should be pleaded by him and proved; and in the absence of such plea or proof, he will be liable under the bond. (1903) 5 Bom. L R 478=7 C.W.N. 681=30 I.A. 165=25 A. 407 (P.C.).

——Suit for maintenance—Plea of incontinence —Absence of issue.

In a suit for maintenance the plea of incontinence should be specifically pleaded and put in issue; such an averment and issue cannot be said to be included in the general issue "whether the plaintiff's are entitled to maintenance in any event." A new averment, as that the plaintiff is not entitled to maintenance by reason of her incontinence, should not be allowed to be made after the closing of the plaintiff's case necessitating as it does the opening up of the whole case, in the absence of any suggestion that the facts relied on had newly come to the knowledge of the defendant and had before been excusably unknown to them. (1903) 5 Bom. L.R. 475=27 B. 485. 7 C.W.N. 665=301 A. 127 (P.C.).

——Usufructuary mortgage—Purchase of equity redemption—Suit by purchaser for redemption —Plea of right to pre-emption — Sale to plaintiff.

The plaintiffs sued as purchasers of part of the equity of redemption of a usufructuary mortgage to redeem the mortgage and recover possession of a proportionate part of the mortgaged property. One of the mortgagees defendants pleaded that he had a right of pre-emption in respect of the sale which formed the basis of the plaintiff's title and was ready and was willing to exercise such right. Held, that the plea could not be admitted as an answer to the plaintiff's suit for redemption. 27 A. 78=1 A.L.J. 426.

——Suit for damage done to property while under attachment — Defendant's plea that he attached it under decree of Court — How far that plea raises the question of jurisdiction of the Small Cause Court.

Where in a suit for damage done to property while under attachment, the defendant merely stated that he attached it under a decree of court, that statement alone cannot be construed as raising the question that therefore the Small Cause Court had no jurisdiction. (1902) 25 A. 135=1902 A.W.N. 219.

——Plea of contract — Right to specific performance barred—Cannot be set up by way of defence.

Where the right to sue for specific performance of a contract is barred, it cannot be set up by way of defence to a suit for possession. (1901) 24 M. 449=11 M.L.J. 132.

——Plea of misjoinder—Second Appeal.

See: 2 Bom. L.R. 185.

51. Practice—Pleader's fees.

——Suit for declaration of his rights by purchaser of insolvents' rights from Official Receiver—Advocate's fee—Governed by plaint valuation of the property and not the mortgage amount.

Where a suit is one for a declaration of the right of the purchaser from the Official Receiver valued at Rs. 1,00,000, and the title of the plaintiff is disputed unsuccessfully the plaintiff will be entitled to the advocate's fee on the value of the property. I. L. R. (1949) Mad. 904= 62 L. W. 212=A. I. R 1949 Mad. 886=(1949) 1 M. L. J. 249.

——Pleader's fee—Suit dismissed as having abated.

In calculating, defendant's costs in a case where the suit is dismissed as having abated on the death of the plaintiff the pleader's fee to be allowed is the same as in the case of suit dismissed for default of prosecution after framing of issues, i. e., only one-half of the full fee should be awarded. 37 M. L. J. 596=10 L. W. 656=54 Ind. Cas. 118.

——Pleader's fees — Rules of the commissioner's Court—Sindh.

Where the intricacy and length of the trial is due to the defendants having made the plaintiff's suit a test case to decide important questions bearing upon their right of disposal of waste lands the plaintiff's were entitled to have the pleader's fee assessed under Cl. G of Appendix VI of the Rules of the Sindh Court. 4 S. L. R. 37, Dist. 9 S. L. R. 10=30 Ind. Cas. 19.

——Pleader's fee—Counsel instructed by Vakil.

Where counsel appears instructed by the party in person the latter can claim as part of the costs decreed to him the reasonable fee paid to his counsel Where counsel is instructed by a Vakil the Taxing Officer of the Court may certify for his fee which is recoverable in addition to the ad volorem fee allowed for the Vakil 26 M. L. J. 567=15 M. L. T. 411=24 Ind. Cas. 895. (Overruled on appeal by 33 Ind. Cas. 906).

——Pleader's fee—Declaratory suit.

In a suit for declaration the fee to be fixed is in the discretion of the court, as R. 31 of the rules under the Legal Practitioners' Act (18 of 1879) did not apply. (1913) M. W. N. 867=21 Ind. Cas. 541.

——Pleader's fee—Land acquisition case.

Pleader's costs can be allowed in Land Acquisition cases on the differnce between the amount claimed and the amount awarded. 174 P. W. R. 1913=309 P. L. R. 1913=21 Ind. Cas. 270.

——Pleader's fee—Allahabad High Court Rules, Rr. 457 and 461—Land Acquisition Case.

Proceedings under the Land Acquisition Act in the District Court are not suits for money or land within rule 457 of the High Court and so a pleader's fee in such proceedings should be calculated according to rule 461 of the Rules. 14 Ind. Cas. 214 (All).

——Pleader's fee—Redemption suit.

In a suit for redemption of immoveable property its value both for the purposes of Court fees and jurisdiction is the amount for which redemption is sought and pleader's fees are to be calculated thereon. 61 P. W. R. 1917.

——Pleader's fee—Advocate or Attorney—Personal appearance.

An Advocate or Attorney who personally appears and acts in a suit as a duly constituted agent of a party, cannot by the mere fact that he is a member of the legal profession entitled to practise in court charge the other side with an advocate fee. 6 Bur. L. T. 160=7 L. B. R. 56 =20 Ind. Cas. 971.

——Pleader's fee—Certificate of fees received after arguments—Costs.

Where a pleader's certificate of fees received by him was lodged in court after the arguments had commenced the amount of fee was not allowed as costs. 13 Ind. Cas. 500 (Oudh).

——Pleader's fee—High Court of Bombay—Probate proceedings.

According to the long standing practice of High Court of Bombay the pleader's fee is Rs. 30 in appeals from probate proceedings. 33 Bom. 256=10 Bom. L. R. 1197=2 Ind. Cas. 283.

52. Practice—Pleadings.

See Pleadings.

53. Practice—Powers of Court.

See also: Notes 22 and 36.

——Power of Court—Determination of question not in issue.

A Court is not competent in spite of an objection taken by the defendant to consider and determine a question which is not only not in issue but which the plaintiff is by his own express admission precluded from arguing. 54 C. W. N. 435=A. I. R. 1950 P. C. 73 (P. C.).

——Plaintiff coming to Court with extremely exaggerated and substantially false case based on a substratum of truth—Proper course for courts to adopt when defence also is exaggerated or false.

The only way in which plaintiff's can be stopped from coming to Court with extremely exaggerated and substantially false cases based on a substratum of truth is by dismissing such suits in toto if the Court has good reason to believe that they have not disclosed the truth in their plaints and evidence. It is impossible to expect a Court to ferret out the exact truth between two extreme positions in all cases.

A plaintiff filed a small cause suit in the Subordinate Judge's Court against a goldsmith claiming the return of gold given for making jewels and the goldsmith filed a seperate suit in the Village Panchayat Court claiming making charges alleging that the jewels had been made and delivered. On the evidence the Subordinate Judge decreed the suit and the Panchayat Court also subsequently decreed the suit filed by the goldsmith. The Panchayat Court decree was set aside by the Munsif on the ground that it was vitiated by bias and the case was withdrawn by the Munsif to his own file. On revision petitions in both cases, both the suits were directed to be dismissed without costs as it was found that both the versions were exaggerated. A.I.R. 1949 Mad. 756= (1949) 1 M.L.J. 612.

——Inherent powers — Witness giving false evidence — Prop under of will unintentionally denying same—Procedure.

Where under stress of a long and trying cross-examination a female who sought to propound a will said that the will was false and it appeared that she had not intentionally said so, held, that there was no occasion for the Court exercising its inherent powers against the deponent. A.I.R. 1930 Pat. 488=11 Pat. L.T. 353.

——Powers of Court.

Court cannot assume non-dispute of facts or draw inferences from those facts not before it without party's consent. 117 Ind. Cas. 22=51 All. 367=56 I.A. 192=1929 A L J. 566=33 C.W.N. 761 =31 Bom.L R 854=30 M L W 76=50 C.L.J. 74= 1929 M.W.N. 676=A.I.R. 1929 P.C. 158 (P.C.).

——Criminal Court.

A Competent Criminal Court is just as much entitled to decide the question of fact as a Civil Court. 119 Ind. Cas. 465=1929 M.W.N. 172=A.I.R. 1929 Mad. 345.

——Inference inconsistent with the case of either party.

A Judge is perfectly entitled as a judge of fact to give due weight to the evidence adduced by the parties and to draw his own inference which may be inconsistent with the case of either party, for it is the duty of the Judge to sift the truth and not to be pinned to the evidence of a party to the case in order not to defeat the ends of justice. 98 Ind. Cas. 849=44 C.L.J 265=A.I.R 1927 Cal. 49.

——Interlocutory judgments —Validity.

The Court has ample authority to direct successive trials of different issues and even to record interlocutory judgments thereon, to be made the basis of the final judgment at the conclusion of the trial of the whole case. 82 Ind. Cas. 934=28 C.W.N. 131=39 C.L.J. 140=A.I.R. 1924 Cal 467.

—Custom—Custom alleged by defendant not proved but plaintiff's evidence showed narrower custom—Court can find it 73 Ind. Cas 629=1 Pat. L.R Civ. 289=A.I.R. 1924 Pat. 147.

Courts are not to deal with questions of abstract justice but are tied down by the wording of the Statute Law. 66 Ind. Cas. 324=23 Cr. L.J. 260=24 O.C. 352=A.I.R. 1922 Oudh 144.

——The fact that the petition in a case is headed as under S. 151 does not debar the Court from proceeding with it under any other provision, which

it may find actually applicable. 70 Ind. Cas. 425 =16 M.L.W. 440=1922 M.W.N. 495=31 M.L.T. 132=A.I.R. 1922 Mad. 446=43 M.L.J. 290.

——Judge is entitled to act on materials placed before him by consent of the parties.

It is open to parties to agree as to materials to be placed before the Judge for his decision and if the Judge acts on such agreement, he does not thereby delegate his functions as a Judge. So if the parties consent, the Judge can act on the evidence taken by a Commissioner unauthorisedly. 66 Ind. Cas. 49=25 C.W.N. 369=A.I.R. 1921 Cal. 363.

—Although question of res judicata is not raised specifically by the parties, Court can go into the question. 62 Ind. Cas. 647=25 C.W.N. 881=A.I.R. 1921 Cal. 71.

——Powers of Appellate Court—C.P.C. (1882), S. 564—Object and effect of repeal.

S. 564 of the C.P. Code, 1882 has been omitted with the object of removing the restrictions e g., where the appellate Court allows an amendment of pleadings or adds a party, as such restrictions embarrass the procedure. 37 Bom. 289=14 Bom. L.R. 1154=17 Ind. Cas. 891.

54. Practice—Precedents.

See Precedents.

55. Practice—Privy Council.

See Privy Council.

——Prerogative writs—Delay in the application for issue of—Extraordinary powers—If will be exercised.

Though there is no specific period of limitation, it has generally been the accepted practice of this Court not to exercise the extraordinary power by way of the issue of prerogative writs when there has been a long delay since the passing of the order sought to be quashed. 63 L.W. 867 (1)=(1950) 2 M.L.J. 448=A.I.R. 1951 Mad. 250.

56. Practice—Probate.

——Probate—Application for grant of—Entering of caveat—Objection that caveator had no interest and that caveat should be struck of —If can be disposed of on a Judge's summons or if to be decided in the testamentary suit itself—Hindu reversioner—If person interested in the estate to enter caveat—Succession Act (XXXIX of 1925), S. 295 and O.S.Rules, O. XXXIV, Rr. 50 and 62

A question whether a caveator has an interest in the estate to lodge the caveat and contest the grant of probate of a will can be disposed of on a Judge's summons and need not be decided only in the testamentary suit. A summons for discontinuance of proceedings may be taken out where a caveator shows insufficient interest.

A Hindu reversioner of the estate disposed of by a will who disputes the validity of the will has an interest in the estate of the testator and is entitled to lodge the caveat. 60 L.W. 313=1947 M.W.N. 377=A.I.R. 1948 Mad. 83=(1947) 1 M.L J. 324.

——Probate —Copy of will accompanying probate—Photographic facsimile.

A photographic facsimile of the will may be attached to a probate of a will. (1902) 6 C.W.N. 477=29 C. 311.

——Probate—Grant of—Will—Alterations.

A court may grant a probate of a will with the alterations, and in doing so direct that the copy attached shall show the alterations. (1902) 6 C.W.N. 477=29 C. 311.

——Probate—Will altered in pencil—Copy to be attached to probate—Photograph facsimile.

Where a probate is granted in respect of a will which contains alterations, the practice of the Calcutta High Court is to append to it a copy of the will with alterations in the text. (1902) 6 C.W.N. 477=29 C. 311.

57. Practice—Procedure.

(a) General
(b) Object of Rules.

57 (a). Practice—Procedure—General.

———Suit filed in the Subordinate Judge's Court with proper vakalat—Finding of overvaluation —Return of plaint and re-presentation to Munsif's Court—Vakalat not returned and not re-presented—Suit dismissed as no vakalat was filed—Legality of dismissal—Proper procedure.

A plaint was presented in the Court of the Subordinate Judge with a proper vakalat and it was numbered. The defendant contested that it had been overvalued for the purpose of pecuniary jurisdiction and the Court found that the value of the suit properties was below Rs. 3000. The plaint was, thereupon, directed to be returned and it was taken back and re-presented in the Munsif's Court. But as there was no direction to return the vakalat it was not taken back and when the plaint was filed before the District Munsiff no vakalat was filed. The District Munsiff dismissed the suit as no vakalat had been filed by the plaintiff, when the plaint was re-presented to his Court. On appeal, the Subordinate Judge admitted the original vakalat lying in his Court as additional evidence, but holding that the proceedings before the Munsiff were new proceedings, came to the conclusion that in the absence of a proper vakalat the suit was properly dismissed. On second appeal:

Held, that the retention of the vakalat in the Subordinate Judge's Court would not in any way detract from the fact that when the plaint was subsequently presented in the Munsiff's Court it was a continuation of the suit that had been originally instituted. Even though the vakalat was not produced before the District Munsiff still its existence being now proved to be correc

the District Munsif and the Subordinate Judge should not have dismissed the suit on this technical point. There is no provision in the C.P. Code, or in the rules of practice making it obligatory that along with the presentation of the plaint, eo instanti a vakalat also should be filed. If the Court is convinced that at the time the plaint was presented, the pleader had in his possession or power a properly executed and attested vakalat, then the Court is entitled to come to the conclusion that though there was some irregularity in the procedure adopted, it is a matter which can be cured under S. 151, C.P. Code. What is necessary and essential is the existence of the power in the possession or power of the person who acts. In the circumstances, the dismissal of the suit was not justified in law. I.L.R. (1950) Mad. 555=A.I.R 1950 Mad. 119=63 L.W. 1074=1949 M.W.N. 693=(1949) 2 M.L. J. 258.

——Procedure—Duty of Court to follow procedure prescribed by law—Agreement of parties —Effect of.

The ordinary rule is that when the Court is seized of a case, it has jurisdiction to decide it in the manner prescribed by law and the parties have no right to interfere with its authority to do so. There are, no doubt, well understood exceptions to this rule but where the exceptions do not apply, the rule must prevail. An agreement by a party that the suit may be decided against him in case he fails to take a certain oath is not one of the exceptions engrafted by the law on the general rule as to a Court having to decide the suit in accordance with law and on the merits. A. I. R. 1946 Lah. 78=47 P. L. R. 411=223 Ind. Cas. 623.

——Procedure — Several remedies provided — Option of litigant.

When the law gives a person two remedies, he is entitled to avail himself of either of them unless they are inconsistent. A.I.R. 1940 Pat. 668=6 B.R. 569=188 Ind. Cas. 45.

——Procedure — Suit for compensation for breach of contract—Distinction.

A suit for accounts is essentially different from a suit for compensation for breach of contract. In the former, if the accounts should ultimately show something due to the defendant, a decree can at once be given to him; this is not possible in the latter class of suits. 1930 M.W.N. 1199=54 Mad. 654=33 M.L.W. 1=131 Ind. Cas. 165=A.I.R. 1931 Mad. 185 (2)=62 M L.J. 45.

——Procedure—Charging order.

Where a judgment-creditor seeks to obtain a charging order on the assets in the hands of a receiver appointed in a partnership suit the proper procedure for him is first to take out the execution proceedings contemplated by O. 21, R. 11, and then by obtaining the notice contemplated by O, 21, R. 52. Then if necessary he can apply in the partnership suit either for payment or for leave to levy execution against the partnership assets under O. 21, R. 50. or alternatively for a charging order. The application for such charging order is to be made to the judge having seisin of the partnership suit and control over the partnership assets. 34 Bom. 884, Diss. from. 54 Bom. 667=32 Bom.L.R. 850=127 Ind. Cas. 481= A.I.R. 193o Bom. 451.

——Procedure—Summoning record.

The mere summoning by the Court of a record containing a document relied on by a party will not absolve the party from the duty of placing that document by formal admission or proof upon the record of the trial for which it is required as evidence the correct procedure for the party relying on a document not in his possession but of which a copy can be got by him is to produce the copy. If the copy is admitted by the opposite party the original need not be produced. If it is not admitted or if it is still necessary to produce the original for technical proof then the party must make an application in strict accordance with Rs. 10 of O. 13 specifying the documents required. Application for summoning records of a case or the file of a suit should be rejected unless the affidavit satisfied the Court that copies of the specified documents cannot be produced without unreasonable delay or expense or that the production of the original is necessary. 31 P.L.R. 926=131 Ind. Cas. 374=A.I.R. 1931 Lah. 119.

——Error in procedure—Prejudice—Presumption.

Where an officer whose duty it is to apply the provisions of an Act, such as the Land Acquisition Act, commits an error of procedure every presumption should be made in favour of the party likely to have been prejudiced by the error. 53 Mad. 921 =32 M.L.W. 363=1930 M.W.N. 613=128 Ind. Cas. 147=A.I.R. 1930 Mad. 836.

——A formality which is directed by legislature is imperative but if it is prescribed by ordinary individuals and corporations it is directory merely. 127 Ind. Cas. 337=A.I.R. 1930 Nag. 157.

——Minor defendant—Notice of motion.

Notice of motion cannot be taken out where the plaintiffs know that there is a dispute whether the defendant is or is not a minor. The proper course in such case is to have the issue of minority determined. Notice of motion should be discharged being a vexatious proceeding. 31 Bom. L.R. 1007 =A.I.R. 1929 Bom. 431.

——If a person has disappeared, the Court cannot appoint another to represent him in proceedings in Court, until his return or till his death can properly be presumed. 117 Ind. Cas. 144=A. I. R. 1929 Mad. 704.

——Procedure of putting both parties in the witness-box.

The procedure of putting both parties in the witness-box after the case has been closed without putting them on oath and let each talk to the other is not warranted by law and vitiates the whole trial. 107 Ind. Cas. 469=A.I.R. 1928 Cal. 227.

——Violation of rules of procedure.

A Court is not justified in depriving a party of the benefits of his decree, on the bare ground that he has failed to comply with some rule of procedure. 109 Ind. Cas. 528=1928 M.W.N. 222=28 M.L.W. 132=A.I.R. 1928 Mad. 522=54 M.L.J. 665.

——Further application regarding subject-matter in suit, after disposal of appeal should be made to first Court—If new matters are involved, fresh proceedings should then be taken. 98 Ind. Cas. 452 =28 Bom.L.R. 1180=A.I.R. 1926 Bom. 579.

——Specific procedure prescribed not followed —Effect.

When a statute lays down a specific rule as to the manner in which an enquiry is to be held and jurisdiction to be exercised, the enquiry held by a superior authority cannot be held to be a proper substitute for the procedure laid down by law if the specific rules have not been followed. 98 Ind. Cas. 334=53 Cal. 561=A.I.R. 1926 Cal. 1061.

——In suits for damages for failure to take delivery of goods ordered, no preliminary decree should be passed. 93 Ind. Cas. 1012=A.I.R. 1926 Lah. 337.

——In matters of procedure it is more important that the law should be certain than that it should be logical. 95 Ind. Cas. 12=49 Mad. 746=A.I.R. 1926 Mad. 421=50 M.L.J. 161.

——In matters of procedure uniformity is of great practical importance and when a practice has been established it should not be departed from even if there may be some doubt as to its strict soundness. 87 Ind Cas. 783=29 C.W.N. 575=A.I.R. 1925 Cal. 966.

——Court should examine witnesses itself.

Where a matter has to be decided on trial the Court should hold the trial itself and retain the advantage of seeing the witnesses give evidence following the course of the proceedings. It should not delegate its duty to a person whose interest and duty may conflict in the conduct of the proceedings. But the consent of the parties is sufficient to validate the procedure if adopted.

In proceedings which began with a report from the Official Receiver in which he applied for setting aside an alienation by an insolvent, the parties agreed that in the enquiry into this application, the statements of the witnesses should be recorded by the Official Receiver, and the statements here so recorded:

Held, that the course adopted was extremely undesirable but as the parties had agreed to it, it was validated. 75 Ind. Cas. 445=A.I.R. 1925 Mad. 381.

——Unexplained disappearance of party—Death my be presumed upon affidavit if circumstances justify —Or, some one should be appointed to look after thd vanished party's affairs till his return or till death can be legally presumed. 86 Ind. Cas. 358=4 Pat. 378=6 P.L.T. 547 =3 Pat. L.R. 43=1925 P.H.C.C. 57=A.I.R. 1925 Pat. 369.

——Hearing of a case prior to fixed date is illegal. 80 Ind. Cas. 324=6 L.L.J. 155=A.I.R. 1924 Lah. 459.

——Decree a nullity—Application to vacate it need not be under any particular section.

When the order or decree of a Court is a nullity, a party interested in showing it to be a nullity may apply to the Court to vacate it and if the Court is satisfied about the facts, it ought to do so. Such an application need not be filed under any particular section of the Code and the absence of a section does not render the application incompetent. 70 Ind. Cas. 168=16 M.L.W. 330=1922 M.W.N. 674=32 M.L.T. 124=A.I.R. 1923 Mad. 58.

——Defects—Duty of court is to remedy them.

Procedure is the machinery of the law after all, the channel and means whereby law is administered and justice reached; it strangely departs from its proper office, when in place of facilitating, it is permitted to obstruct and even extinguish legal rights and is thus made to govern where it ought to subserve. Section 151 of the Civil P. C. speaks of the inherent and already existing power of a Court to prevent injustice and abuse of its own process. But to do that is much more than a matter within the power of the Court; it is its first duty, and indeed the chief if not the only object of its existence. 71 Ind. Cas. 436 =19 N.L.R. 36=6 N.L.J. 100=A.I.R. 1923 Nag. 182.

——Ex-parte order for delivery of possession.

An important order such as order for delivery of possession should not be passed **ex parte** and the signature of pleader should invariably be taken in column 4 provided for in the order-sheet for the purpose. The special column provided for in the order-sheet is particularly meant to guard against any injustice being done by an **ex-parte** order behind the back of a party. 79 Ind. Cas. 188=76 Ind. Cas. 49=4 P.L.T. 508=1 Pat. L.R. 393=A.I.R. 1923 Pat. 597.

——Application for refund of money paid by Court to wrong party—Order taking security from person paid and directing applicant to a fresh suit is unauthorised. 66 Ind. Cas. 744=20 A.L.J. 353=A.I.R. 1922 All. 190.

——Suit on contract—No pleading of unlawful consideration — Unlawfulness appearing in plaintiff's evidence—Procedure.

See **Contract Act, S. 24.** 1904 A.W.N. 238=1 A. L. J. 632=27 A. 266.

——Procedure.

Where a particular section of the Code is appropriately applicable to a certain state of things, proceeding should be held under that section and not under any other. 1903 A.W.N. 102=25 A. 537.

57 (b). Practice — Procedure—Object of Rules.

——Rules of procedure—Object of.

The rules of procedure have been made for furthering the ends of justice and the rules should be enforced accordingly. 1950 A.W.R. 158.

——No forms or procedure should ever be permitted to exclude the presentation of a litigant's defence. 110 Ind. Cas. 299=29 M.L.W. 72=A.I.R. 1928 P. C. 261 (P.C.).

——Rules of.

Procedure is not the machinery of the law and as such too much importance cannot be given to form if it tends to defeat justice: 33 Bom. 644 and Nag. C. R. 141-B of 1926, Foll. 98 Ind. Cas. 658=A.I.R. 1927 Nag. 95.

——Courts and rules of procedure regulating their conduct are intended for facilitating justice and not for its impediment. 104 Ind. Cas. 527=1 L. C. 574= A.I.R. 1927 Oudh 507.

——Rules of procedure are not made for the purpose of hindering justice. 78 Ind. Cas. 157=27 O. C. 103 =11 O.L. J. 412=A.I.R. 1924 Oudh 389.

58. Practice—Professional Etiquette.

See also: (1) Legal Practitioner.
(2) Legal Practitoners' Act.

——Professional etiquette—Counsel—Direct instructions.

By long practice of the Calcutta High Court only in appeals from mofussil, counsel can be instructed directly by the client In general Counsel and Attorney and not counsel and lay client should directly communicate. 31 C.L. J. 313=57 Ind. Cas. 22.

——Professional etiquette—Accepting engagements.

In modern times the tendency is to expect from the legal profession a greater amount of care and conscience in accepting engagements than was done in the case of Lord Erskine and Lord Brougham. 32 M L J 392= 5 L. W. 598=21 M.L.T. 324=40 Ind. Cas. 126.

——Professional etiquette—Pleader as witness—Professional obligations of pleader.

It is an error of judgment and against the professional obligations of a pleader that he should accept the brief of a case where he has to appear as a witness on behalf of his client. 12 A. L. J. 285=15 Cr. L. J. 429=24 Ind. Cas. 165.

——Professional etiquette—Pleader witness in the case—Propriety.

It is a rule of professional ethics that having taken up the position of an Advocate he should refrain from testifying on a trial which was being conducted by him. 16 C.W.N. 145=13 Cr.L. J. 65=13 Ind. Cas. 721.

59. Practice—Record.

See: C. P. C., O. 13.

——Record—Appellant—Duty to print records.

There is no rule which says that the appellant is to print papers on which he relies in the sense that he need only print papers in his favour. The appellant must print all the papers which he desires to use either by way of building up his case or by criticism destroying the case of the other side, that is, every document on which he can base any argument to show that his appeal should succeed. 98 Ind. Cas. 682=48 All. 815 =24 A.L. J. 918=A.I.R. 1927 All. 62.

——Registration endorsements ought to be translated and printed where they are necessary by way of evidence. 88 Ind Cas. 810=12 O. L. J. 372=A.I.R. 1925 Oudh 462.

——Important Registration endorsements should be printed.

The office in courts and counsel of parties ought to use their discretion in getting important registration endorsements printed, though such endorsements do not require to be printed as a general rule. 85 Ind. Cas. 509=12 O. L. J. 1=28 O. C. 8=A.I.R. 1925 Oudh 337.

——Paper book — Appeal from order refusing to execute decree—Decree forms part of record and must be printed. 75 Ind. Cas. 681=4 P.L.T. 512= A.I.R. 1924 Pat. 184.

——Printing of.

A party, in an appeal to the High Court cannot refer to a document which has not been printed in the paper book of its case. 71 Ind. Cas. 833=A.I.R 1923 Lah. 17.

——Party relying on documents must pay for printing.

When a person has obtained a decree in his favour the onus is on the appellant in a Court of Appeal to show that the decision is wrong. This proposition no doubt is generally correct. But it is not the duty of the defendant-appellant to get those documents printed upon which the plaintiffs respondents relied in the Court below and on which he wants to rely in the High Court. 74 Ind. Cas. 685=5 L.L.J. 190=A.I.R. 1923 Lah. 355.

——Record—Preparation of record—Paper—Book—Document not printed—Contents of documents—Parties agreed as to.

Where parties in both the lower courts proceed upon the view that there was a certain stipulation in a lease the High Court can go into the question even though the lease is not printed in the paper book. 17 C. W. N. 1068=20 Ind. Cas. 294.

——Judge's statement cannot be challenged.

Per **C. C Ghose, J.**—Court has no more power of contradicting the statements of a learned Judge as to what happened in his Court than it has the power of contradicting any allegation which may appear upon the record.

Per **Page, J.**—A statement by a learned Judge as to what took place during the course of a trial before him is final and decisive; it is not to be criticised or circumvented; much less is it to be exposed to animadversion. 81 Ind. Cas. 353=28 C.W.N. 170=38 C. L. J. 411=25 Cr. L. J. 817=A.I.R. 1924 Cal. 257 (F B).

——Judgment stating that certain admission was made—Effect.

A statement in a judgment as to an admission made before the Court of first instance should not be doubted lightly by the Appellate Court, specially in the absence of an affidavit by the Vakil who appeared in the Court of first instance. In cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment. 66 Ind. Cas. 433=34 C. L. J. 302=A. I. R. 1921 Cal. 584.

——Reconstruction of.

There is inherent power in every Court to reconstruct its own records where it has been destroyed or lost and it follows that there is inherent power in the Appellate Court to reconstruct the records of the Court from which an appeal lies to it. It may be that in reconstructing the record, the Court will have to go very near to re-hearing, but the Court will always have to apply its mind to ascertain not what the rights of the parties were, but what the destroyed record of the suit was and on that record, when reconstructed, it will have to act on the ordinary principles on which it would have acted if the original record had been before it. It will be for the Judge, to whom the application is made, to decide how the reconstruction of the record is to be attempted. In the event of the Appellate Judge being unable to reconstruct the record to his satisfaction, it must be borne in mind that the **onus** is on the appellant to establish his grounds of appeal and on the respondent his cross-objections, if any. If the judgment has been preserved, it will be very good evidence of what took place and of the facts necessary for reconstruction. 73 Ind. Cas. 1050=18 M.L.W. 21=32 M.L.T. 382=1923 M.W.N. 471=46 Mad. 679=A.I.R. 1923 Mad. 647=44 M.L. J. 673. (F.B.).

——Record—Loss of—Effect on conviction.

The mere facts that the records of a case are lost at the time of conviction does not make the trial and conviction void or without jurisdiction, and hence no retrial is necessary especially as in this case, no appeal has been preferred by the accused. 38 Mad. 498=14 M.L.T. 317=25 M.L. J. 445=(1913) M.W.N. 862=14 Cr.L. J. 595=21 Ind. Cas. 467.

——Record—Copy of records—Right of accused.

A convicted person has a right to ask for a copy of the proceeding in the Magistrate's summary register. 9 P.R.Cr. 1909=30 P.W.R.Cr. 1909=11 Cr.L. J. 17=37 P.I. R. 1910=4 Ind. Cas. 611.

60. Practice—Relief.

See: C. P. C., O. 2, R. 2 and O. 7.

Synopsis.

(a) Admissions
(b) Alternative claims
(c) Cause of action accruing after suit
(d) Facts found
(e) Inconsistent claims
(f) Infructuous relief
(g) Power and duty of Court
(h) Right to relief on plea not raised
(i) Several reliefs
(j) Miscellaneous.

60 (a). Practice—Relief—Admissions.

——Relief—Admissions—Suit on mortgage—Admission of different mortgage—Decree.

When in the case of usufructuary mortgage a plaintiff sues on the allegation that the property was mortgaged under two mortgages of which he gives the terms from hearsay and the defendant-mortgagee admits that he holds the property as mortgagee but under 12 mortgages, the Court is entitled to allow the plaintiff to succeed upon the admission of the defendant even though his plaint set forth mortgages different in number and in other respects. 119 Ind. Cas. 568=10 L.R.A. Rev. 289=A.I.R. 1929 All. 305.

60 (b). Practice—Relief—Alternative claims.

See: C. P. C., O. 2, R. 3.

——Relief—Claim to ownership and to easement—Ownership not proved—Decree on basis of claim of easement—Right to.

A suit is not liable to be dismissed because the plaintiff prays in the alternative over the same plot of land rights of ownership and rights of easement. The fact that the plaintiff fails to prove the claim of ownership set up by him would not stand in the way of his right to get a decree in respect of the claim of easement, if that is established. 224 Ind. Cas. 286=A.I.R. 1947 Lah. 79.

——A suit is not liable to be dismissed because the plaintiff claims in the alternative over the same plot of land both, rights of ownership and of easement. 74 Ind. Cas. 922=21 A.L. J. 569=5 L.R.A. Civ. 24=A.I.R. 1924 All. 97.

——Relief in the alternative can be claimed.

It is open to a plaintiff to ask relief in the alternative dependent upon what might be found by the Court to be true facts of the case.

Where in a mortgage suit there was prayer for relief against a certain defendant, who was not a mortgagee, in case it was not decreed against the mortgagee;

Held, that such relief can be decreed. 78 Ind. Cas. 127=A.I.R. 1924 Nag. 401.

——Relief — Alternate, suit on mortgage—Mortgage found invalid—Decree on personal covenant—Amendment—Necessity for.

A claim on the footing of a mortgage includes the lesser claim, that on the personal covenant to pay contained therein and where in such a case, all the materials necessary to decide the point are before the Court and no question of prejudice to the defendant arises, the Court can, on the failure of the instrument as deed of mortgage for want of proper attestation straightaway passed a decree against the general assets of the mortgagor without even the formality of an amendment to the plaint. 60 M.L. J. 56=54 Mad. 163=33 M.L.W. 95=135 Ind. Cas. 17=A.I.R. 1931 Mad. 140.

60 (c). Practice—Relief—Cause of action accruing after suit.

——Relief—Cause of action accruing during trial—Discretion of Court.

Normally where a plaintiff brings his suit before the cause of action has arisen, it should be dismissed, but it cannot be laid down that the Court has no option but to dismiss the suit. Where a suit was premature on the date of the institution of the suit and the cause of action accrued during the pendency of the trial, the defect could be cured by permitting amendment of the plaint. Where the accrual of the cause of action during the pendency of the suit is apparent, the Court may take notice of it without insisting on a formal amendment of the plaint. The matter is really in the discretion of the Court and the discretion may be exercised in order to shorten litigation to do comptete justice between the parties, or where by reason of the subsequent change of circumstances the relief originally claimed becomes inappropriate. A.I.R. 1947 Pesh. 33.

——Cause of action arising after suit.

Where a cause of action arises only after the suit has been instituted, still the suit may be decreed in certain circumstances. 116 Ind. Cas. 317=30 P.L.R. 306=11 L.L.J. 251=A.I.R. 1929 Lah. 409.

——Where the cause of action in the suit has been negatived the Appellate Court should dismiss the suit and not decree the plaintiffs' suit on a cause of action which arises after the filing of the suit being based on defendant's written statement in the suit. 108 Ind. Cas. 589 (Cal.).

——Trial — Pleadings cannot furnish cause of action in the same suit.

In exceptional cases Courts can take cognizance of events since the institution of the suit where the adoption of such a course tends to shorten litigation. But where plaintiff sued on a breach of agreement, the pleadings of defendant cannot be taken advantage of to furnish a cause of action on failure of plaintiff to prove the alleged breach prior to suit. 66 Ind. Cas. 616=A I.R. 1922 Lah. 437.

——Relief—Cause of action arising after determination of suit.

Plaintiff cannot get a decree upon a cause of action which arises only after the suit had been determined by the trial court and is totally different from that pleaded. 98 Ind. Cas. 845=44 C.L.J. 263=A.I.R. 1927 Cal. 56.

——Right to sue accruing subsequent to suit.

A person whose right to sue had not accrued at the date of institution, cannot claim a decree on the ground that his right became complete during its pendency. 137 P.W.R. 1910=8 Ind. Cas. 576.

60 (d). Practice—Relief—Facts found.

——Relief — Facts found — Riparian rights—Easement.

Plaintiffs claimed to erect permanent structure across a stream. It was found on evidence that they had no such right but from time to time there was an interruption of the water of the river through the erection of temporary structures. That right had been exercised for 20 years before the beginning of the litigation:

Held, that the right was a right to such interference with the water of the stream as has been effected by the continual use of what are described as temporary structures and plaintiffs should be given a declaration to that effect:

Held, further: that it is possible that the use of these temporary structures has given a larger right than the natural right to the plaintiffs. 122 Ind. Cas. 305 =31 M.L.W. 326=34 C.W.N. 512=52 Bom. L.R. 492=A.I.R. 1930 P.C. 42=58 M.L.J. 285 (P.C.).

——Relief—Facts found.

Where an unsuccessful applicant to set aside sale under O. 21, R. 90, C. P. C., brings a suit praying (1) that the sale should be declared void and (2) that, if the sale be found valid, he alone should be declared to be entitled to the surplus sale proceeds, even if the suit is held to be entertainable, the Court must give a decision on the second prayer. 119 Ind. Cas. 431= A.I.R. 1929 Lah. 618.

——Relief — Facts found — Plaintiff failing to prove all his allegations may yet obtain relief if facts pleaded by defendant and found by Court show him entitled thereto.

A plaintiff who fails to prove all the facts alleged by him may yet obtain the whole or any part of the relief claimed by him, if the facts pleaded by the defendant, and found by the Court, show him to be entitled thereto. 4 N. L. R. 86, Foll. 124 Ind. Cas. 453=A.I.R. 1930 Nag. 273.

——The Court is not precluded from awarding such relief as the parties are found entitled to on the facts ascertained in the case. 122 Ind. Cas. 699=A.I.R. 1930 Nag. 173.

——A plaintiff, who fa ls to prove all the facts alleged by him may yet obtain the whole or any part of the relief claimed by him, if the fact is pleaded by the defendant and found by these Courts, show him to be entitled to it: 4 N. L. R. 86, Foll. 121 Ind. Cas. 39= 26 N.L.R. 130=A.I.R. 1930 Nag. 8.

——The relief to be awarded to the plaintiff, depends on the facts established by him and not upon the unfounded assertion of a claim by him which is negatived by the Court. 62 Ind. Cas. 633 (Cal.)

60 (e). Practice—Relief—Inconsistent claims.

——Relief—Inconsistent claims.

A party basing his claim on custom but failing can fall back on personal law. 95 Ind. Cas. 123=A.I.R. 1926 Lah. 551.

——Relief inconsistent with case—Claim inconsistent with sale—Prayer to set aside sale.

A party seeking relief inconsistent with a previous sale must expressly pray to set it aside, (1900) 5 C.W.N. 10=25 B. 337=27 I.A. 216=2 Bom. L.R. 927=10 M.L.J. 368 (P.C.).

60 (f). Practice—Relief—Infructuous relief.

——**Relief—Infructuous.**

Jailal, J.—It is a well-recognised rule of law that no Court shall pass an infructuous and ineffective decree —a decree which it cannot enforce. 114 Ind. Cas. 417 =10 Lah. 7=11 L.L.J. 317=30 P.L.R. 453=A.I.R. 1928 Lah. 572 (F.B.).

——**Declaration.**

A Court will not make a declaration of an abstract right exclusive of practical utility especially when that declaration may not be productive of any benefit to the party obtaining the declaration. 103 Ind. Cas. 313=8 P.L.T. 477=A.I.R. 1927 Pat. 286.

——It is meaningless to have a power and to pass an order without having the power to enforce it. 96 Ind. Cas. 791=5 Pat. 595=7 P.L.T. 695=A.I.R. 1926 Pat. 305 (F.B.).

——A Court cannot be required to do what is useless and unprofitable. 86 Ind. Cas. 380=A.I.R. 1925 Oudh 598.

——Where the relief asked for by plaintiff would have been of no avail to him if granted, the Court declined to grant the same. 73 Ind. Cas. 1021=6 N L.J. 205=A.I.R. 1923 Nag. 306.

60 (g). Practice—Relief—Power and duty of Court.

——**Relief—Suit for declaration of title to and possession of lands—Burden of proof and relief—Decree for demarcation—When to be given.**

In a suit for declaration of title and possession of immovable property two things have to be found, namely title and possession. If the plaintiff is found, to have proved a subsisting title, then he would be entitled to a decree for possession to the extent of the area from which he has been dispossessed. He cannot be given a decree for demarcation of his lands when he does not ask for such relief. A.I.R. 1950 Pat. 306.

——**Relief—Suit for possession and arrears of** rent on basis of lease—Plea of agreement of sale in defence—Procedure—Finding of agreement and decree for specific performance—Legality—Parties not asking relief of specific profermance or amendment—Effect.

In a suit for recovery of possession and arrears of rent bassed on a lease, it is not open to the Court to convert it into one for specific performance of a contract of sale and to pass a decree for that relief, without amendment of the pleadings and without a request therefor from any of the parties. If the defendants raise a plea of a contract for sale, and if the Courts find in favour of such a plea, the only proper course is to dismiss the suit, on such finding. But to decree specific performance is irregular and unwarranted. A.I.R. 1950 T.C. 110.

——**Relief—Declaration alone claimed in respect of land in possession of defendant—Duty of Court—Grant of bare declaration—Propriety.**

Where in a suit concerning land in the possession of the defendant or his tenants, the plaintiff can gain nothing by a bare declaration which he claims, it will be wholly inappropriate for the Court to grant a declaratory relief only. A.I.R. 1949 P.C. 53 (P.C.).

——**Relief—Suit for declaration of title and** possession after ejectment of tenant—Failure to prove tenancy—Decree on basis of title and ejectment of defendant as trespasser—Permissibility.

In a suit for declaration of title, recovery of possession after eviction of the defendant therefrom and for consequential reliefs such as recovery of arrears of rent etc., alleging that the defendant is a monthly tenant even though fails to prove that the defendant is a monthly tenant or to establish the relationship of landlord and tenant, the Court would be perfectly justified in passing a decree for ejectment of the tenant as a trespasser, when both parties had led evidence to prove their respective titles and no prejudice is caused to the defendant, nor is he taken by surprise. 9 C.L.J. 322, dist.; 25 All. 499, foll. 16 Cut. L.T. 80.

——Relief—Suit for eviction—Proof of title—Decree for possession—Duty of Court—Rule as to—Exceptions to rule—Hindu Law—Widow in possession—Right to insist on provision for maintenance being made before eviction. See **Hindu Law—Widow.** 53 Mys. H.C.R. 11.

——**Relief—Doubt as to particular section under** which relief is claimed—Intention—Inference from application as a whole.

As it is the relief claimed which is the more material part of an application, if there is some doubt as to section or rule under which it falls, the intention is to be inferred from the application as a whole. 1948 A.W.R. (Rev.) 175=1948 R.D. 203 (2).

——**Relief—Duty of Court to grant when all** material facts are before it—Failure to plead the law applicable to the facts—Effect.

It is not the duty of a party to plead law in the pleadings. All that is required of him is to state all the material facts which constitute his cause of action. When the facts have been so stated, the duty of giving approprite relief according to the facts established on the record devolves on the Court which has to apply the correct rule of law to such facts. 222 Ind. Cas. 469=A.I.R. 1946 Lah. 10.

——**Wrong section is no bar.**

A Court in the administration of justice should not refuse an application, which, on the merits it ought to grant and in law can grant, simply because the applicant asks the Court to exercise its admitted powers under a wrong section. Regard should be had to the substance rather than to the form of proceedings. 75 Ind. Cas. 664=7 N.L.J. 4=20 N.L.R. 158=A.I.R. 1924 Nag. 77.

——**Relief—Suit for cancellation of sale—Relief** as to payment of consideration—If can be granted.

The plaintiff filed a suit for the cancellation of the sale-deed on the ground that due to failure of consideration there had been, in fact, no sale. **Held,** that it was not open to the Court to pass a decree against the defendant for the payment of the consideration. 1946 M.L.R. 43 (Civ.).

——Relief—Charge.

Suit for possession—Plaintiff entitled not to possession but only to charge—Charge can be declared though not definitely claimed. A.I.R. 1927 Cal. 359 Affirmed. 121 Ind. Cas. 296=51 C.L.J. 131=34 C.W.N. 313=31 M.L.W. 317=A.I.R. 1930 P.C. 38=58 M.L.J. 252. (P.C.)

——Relief—Court's duty.

In decrees founded on contracts the Court can give relief in a separte suit or in execution proceedings where the terms of the consent decree are against the provisions of any statute. 53 Mad. 805=123 Ind. Cas. 584=31 M.L.W. 44=A.I.R. 1930 Mad. 305.

——Where a plaintiff claims exclusive possession, but the Court finds that he is only entitled to joint possession, the Court can pass a decree for joint possession, It is not correct to say that the whole suit should be dismissed. 114 Ind. Cas. 871 (All.).

——Relief—Propriety of.

Where the adequate and proper remedy would be to have the sale set aside on the ground of fraud or failure of consideration, the Court ought not, even if it has got power, to give a simple declaration that consideration did not pass or no debt was due. 114 Ind. Cas. 840=A.I.R. 1929 Mad. 141.

——Relief—Technicality.

Sulaiman, J.—A court is not bound to confine its attention strictly to the language of the relief actually claimed in the plaint, if the allegations do entitle the plaintiffs to a wider relief. 114 Ind. Cas. 177=50 All. 559=9 L.R.A. Rev. 49=26 A.L.J. 217=A.I.R. 1928 All. 172 (F.B.)

——Relief—Injunction—Religious endowment.

Where in a suit to establish hereditary right to an office the right is not proved but only possession is proved and no prayer for injunction to restrain defendant from interference is made, no injunction can be granted as in cases of suits for possession of immovable property. 110 Ind. Cas. 411=A.I.R. 1928 Mad. 1139.

——Relief—Equitable.

Where the circumstances are such that it would lead to unnecessary litigation by granting the relief asked for by the plaintiff, the Court is not debarred from considering the equities in the case, and in order to avoid multiplicity of suits and unnecessary litigation, from granting only such relief as the equities of the case would justify without, in any way, prejudicing the rights of the parties. 106 Ind. Cas. 196=27 M.L.W. 206=A.I.R. 1927 Mad. 1039 (2).

——The apprehension that the Court may be flooded by applications is no ground for refusing an obvious remedy conferred upon the parties by the legislature. 105=Ind. Cas. 782=50 Mad. 936=26 M.L.W. 493=1927 M.W.N. 754=39 M.L.T 537=A.I.R. 1927 Mad. 994=53 M.L.J. 644.

——Where the defendant's position was that the **ota** is his exclusive property, while the plaintiffs' position is that it was the property of the occupants of the surrounding houses, the Court could hold that neither of them had established their claim thereto and that the **ota** was public property: 5 N.L.R. 67, Foll. 92 Ind. Cas. 818=A.I.R. 1926 Nag. 383.

——Plaintiff should not be given a relief by which a provision of law would be nugatory.

To hold that the plaintiffs are entitled to have a declaration that a certain decree is not binding against them though they were parties to such proceedings, would be to make nugatory such provisions of the law which make it obligatory on a party to set aside the decree and the sale in order to remove an impediment which stands in the way of his obtaining the relief he seeks. 90 Ind. Cas. 866=30 C.W.N. 59=A.I.R. 1926 Cal. 167.

——Right to sue.

Per **Fawcett, J**:—In considering the question whether a person has a right to sue, the Court should lean in favour of that right, unless it is plainly shown that the suit is barred. 89 Ind. Cas. 35=49 Bom. 291=27 Bom. L.R. 48=A I.R. 1925 Bom. 188.

——It would not be fitting, in the case of a personal claim to make an order in the decree, for the sale of property in default of payment of the same. 85 Ind. Cas. 331=A.I.R. 1925 Oudh 550.

——Suit on lease—Lease not proved—Court cannot enquire into plaintiff's title and award possesssion on basis thereof. 82 Ind. Cas. 350=5 L.R.A. Civ. 670=A.I.R. 1925 All. 59.

——In a case where the dispute is as between transferees from co-parceners even a partial partition could be decreed; much more could a decree for joint possession be given. (9 N.L.R. 145; 34 Mad. 269, Foll.) 78 Ind. Cas. 650=A.I.R. 1924 Nag. 337.

——Court can order redemption in a suit for ejectment. 75 Ind. Cas. 740=A.I.R. 1923 Lah. 675.

——Relief—Maintenance—Quantum of.

In all cases where a right to maintenance has been allowed the **quantum** of maintenance should be decided in the suit itself even though the parties may not have in the first instance provided the Court with the materials. The parties entitled to maintenance who are generally females should not be left to separate proceedings. 79 Ind. Cas. 208=A.I.R. 1923 Bom. 419.

——Court can grant the relief though not prayed for.

Where the plaintiff land-lord in a suit for royalty and arrears of rent against tenant claimed a decree for ejectment and immediate possession and also for money due and set out in the plaint facts which showed that he was entitled to another relief also, namely, sale of the leasehold property:

Held, that a decree for sale of the leasehold property though not specifically asked for, was within the scope of the suit as framed. The facts which sustain the relief granted are pleaded and not traversed and though there was no prayer for general relief, the Court can always give general or other relief as it may think just. 76 Ind. Cas. 940=1923 P.H.C.C. 153=5 P.L.T. 330=A.I.R. 1923 Pat. 386.

——Decree—Relief by way of possession not claimed—Decree for possession cannot be given. 68 Ind. Cas. 307 =A.I.R. 1923 All. 235.

——Suit by a sharer under Mahomedan Law for his share—He cannot be given the share of another co-sharer who has not joined in the suit. 67 Ind. Cas. 154=3 Lah. 80=A.I.R. 1922 Lah. 298.

60 (h). Practice—Relief—Right to relief on plea not raised.

——Relief—Right to on plea not raised—Relief claimed on basis of easement—Right to fall back on customary right and to claim relief on basis thereof.

It is a well-established principle of pleading that a plaintiff cannot be permitted to succeed on facts which he has not both alleged and proved and that he is not entitled to give evidence which is not in conformity with the pleadings. It is equally well established that in India, where pleadings are not artistically drawn up, they have to be construed very liberally. Where the relief is claimed in the plaint on the basis of an easement it is not open to the plaintiff to succeed on the basis of a customary right which has not been pleaded or made out. A.I.R. 1948 Pat. 425=29 P.L.T. 415.

——Relief—Relief not founded on case set up in plaint —Discretion and power of Court—Suit to eject tenant —Relationship of land-lord and tenant not established —Decree on basis of title—Power to grant—Principles. **See** C.P.C., O. 7, R. 7. 27 Pat. 554.

——Relief—Claim based on original loan with acknowledgments—Relief on basis of account stated—New plea taken in second appeal.

Where a suit is based on an original loan with acknowledgments used to extend limitation, it cannot be decided on the basis of an account stated on a plea raised for the first time in second appeal. I.L.R. (1947) Nag. 710=A.I.R. 1948 Nag. 293=1947 N. L. J. 405.

——Relief—Grant of—Relief based on case not pleaded.

The Court should not grant a relief based upon a case not pleaded by the plaintiff. It is absolutely necessary that determinations in a cause should be founded upon a case either to be founded in the pleadings or involved in or consistent with the case thereby made. I.L.R. (1946) Kar. 207=223 Ind. Cas. 307= A.I.R. 1946 Sind 117.

——Suit based upon customary right—Plaintiff cannot be given relief on common law right. 94 Ind. Cas. 226 =A.I.R. 1926 Mad. 830.

——Suit on title—No relief on the basis of adverse possession.

A declaration cannot be given on a title not stated either on the plaint or the issues. Where plaintiff alleged title only without more, no relief can be given him on the basis of long possession. (1908) 31 M. 531=4 M.L.T. 344. Also (1908) A.W.N. 277.

60 (i). Practice—Relief—Several reliefs.

——Relief—Several.

There is no authority for the proposition that where several reliefs are claimed as arising from one cause of action, the fact that one is time barred will disentitle the plaintiff to the grant of any others which may not be time barred. 99 Ind. Cas. 1055=38 M.L.T. 44 =1927 M.W.N. 201=A.I.R. 1927 Mad. 350=52 M. L. J. 132.

——Plaintiff can give up some relief and press for others. 76 Ind. Cas. 76=18 M.L.W. 649=1923 M.W.N. 779=A.I.R. 1924 Mad. 224.

60 (j). Practice—Relief—Miscellaneous.

——Relief.

Where a person who is entitled to sue only for accounts sues for dissolution of partnership and for accounts, and the lower Court decrees the suit, where accounts have been taken and where defendants have not been prejudiced, the lower Court's decree need not be vacated but it is enough if it is suitably varied. 86 Ind. Cas. 944 =18 S.L.R. 96=A.I.R. 1925 Sind 272.

——Relief—Interpretation of.

Where the application was for an inventory of the property of the deceased, for the appointment of a curator and for any other relief that might be deemed fit and proper to be granted:

Held, the last mentioned prayer could only be read in connection with the main one, viz., that for inventory and appointment of curator. 80 Ind. Cas. 269=26 Bom. L.R. 145=A.I.R. 1924 Bom. 507.

——Relief—Plaintiff having no right to sue—Effect—Weakness of defence case—Relevancy.

When the plaintiff has no right to sue, his suit must fail, however weak the defendant's case may be. 54 P.L.R. 1911=195 P.W.R. 1911=9 Ind. Cas. 339.

——Relief—Lease—Admissibility of evidence— Dismissal of suit on account of in-admissibility of document relied on by plaintiff.

The plaintiff sued to eject the defendant from a certain shop, basing his case upon a document put forward as 'kriyannamali' or lease. This document was ruled inadmissible for want of registration and the plaintiff's suit thereupon dismissed. **Held**, that even if the document were inadmissible in evidence its rejection did not involve the dismissal of the plaintiff's suit. 1904 A.W.N. 212=27 A 190.

61. Practice—Remand.

See: C.P.C., S. 107 and O. 41, Rr. 23 and 25.

——Remand—Erroneous view as to onus prejudicing Judge is sufficient for remand.

The fact that the wrong party was called upon to begin, taken alone, might not be sufficient ground for a new trial, but it is so if the trial Judge takes an erroneous view as to the law in regard to **onus** and his mind is coloured by that view, thereby disabling him from weighing the evidence evenly. 32 M. L. W 574=128 Ind. Cas. 662=A I.R. 1930 P. C. 265 (P. C.)

——Point of limitation not raised before Appellate Court—On remand it cannot be so raised if reference is limited. 51 C. L. J. 283=A I.R. 1930 Cal. 547.

——It is competent to the High Court to remit a case for re-hearing on an issue not raised in the pleadings or even suggested in the Courts below, but this ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away. 98 Ind. Cas. 297=28 Bom. L.R. 1090=A.I.R. 1926 Bom. 577.

——Remand—Reconsideration of order.

An order under O. 41, R. 23 cannot be reconsidered in a subsequent appeal from the decision on remand. 46 Ind. Cas. 922 (Nag.).

——Remand—New issue.

A remand by a Court of second appeal for trial of the case on new issues not raised in the pleadings or in evidence in the Courts below is improper. 43 Cal. 1104 =20 M.L.T. 235=20 C.W.N. 1245=(1916) 2 M.W.N. 175=4 L.W. 251=14 A. L. J. 1009=18 Bom. L.R. 838 =24 C. L. J. 296=31 M. L. J. 745=43 I.A. 172=37 Ind. Cas. 223 (P.C.).

——Remand—Decision on jurisdiction.

Where the District Munsif gave his findings on issues but held that the suit ought to be brought in a Revenue Court but the appellate Court held that the munsiff had jurisdiction **held,** that the proper course was to leave the munsit free to decide whether to return the case or record findings or give judgment. (1915) M.W.N. 784=32 Ind. Cas. 759.

——Remand—Contradictory decrees.

There cannot be two contradictory decrees existing side by side, and when there exists a decree of a subordinate judge and also a decree of the District Judge one directly at variance with the other the whole proceedings should be remanded to the District Judge for disposal after setting aside both. 19 C. L. J. 9=22 Ind. Cas. 801.

——Remand—Order set aside—Effect of.

When an order of remand by an appellate Court is set aside by the High Court, the successor of the Judge in the Lower Appellate Court can go into the whole case and come to a different conclusion. 136 P.L.R. 1912=116 P.W.R. 1912=14 Ind. Cas. 16.

——Remand—Trial of suit—Incomplete evidence.

Where in a suit for possession the first Court after recording only plaintiff's evidence dismissed the case on ground of want of jurisdiction the appellate court cannot decide it on merits. 10 Ind. Cas. 441 All.

——Remand—Fresh evidence.

Where, the taking of fresh evidence in a point, on which proof ought to have been given in the lower court is in the opinion of the appellate Court dangerous it ought not to be allowed as it would result in the production of false evidence. 165 P.L.R. 1911=52 P.R. 1911=162 P.W.R. 1911=10 Ind. Cas. 315.

——Remand—Reference of issue to lower court—Subsequent dismissal of claim.

An appellate court referring an issue to lower court, is right in subsequently dismissing the claim if the claim is found to be weak. 31 All. 325=6 A.L.J. 247=2 Ind. Cas. 221.

——Omission of plaintiff to press the essential issue in the case—Right to ask appellate court to refer the issue for trial.

The omission of plaintiff to press the essential issue in the case in the court of first instance is not a ground for refusal by the appellate court to refer that issue for trial if the lower court has omitted to frame or try it. (1902) 4 Bom. L.R. 818.

62 Practice—Restoration of proceedings.

See: C P. C., O. 9, R. 13.

——Restoration of proceedings.

If a decree in second appeal passed by the High Court is set aside on the ground that a minor respondent was not duly represented by a guardian **ad litem** the second appeal is to be re-heard. 94 Ind. Cas. 686= A.I.R. 1926 Lah. 441.

——Mortgage decree against minors—Suit for declaration by minors after attaining majority that decree was not binding—Declaration granted—Application by decree-holder to restore mortgage suit—Suit should be restored. 88 Ind. Cas. 175=A.I.R. 1926 Oudh 32.

——Subordinate Courts—Taking up new case after 5 p. m. in contravention of directions of High Court—Dismissal in default of plaintiff—Material irregularity —Suit must be restored. 66 Ind. Cas. 167=44 All. 325 =20 A. L. J. 138=A.I.R. 1922 All. 72.

63. Practice—Retrial,

——Suit by next friend of a minor to set aside compromise decree in an earlier partition suit is not binding—Suit decreed and matters in issue in the prior suit tried and preliminary decree passed—No need to revive the earlier suit.

Where a suit by the next friend of a minor to set aside as not binding on the minor a compromise decree in an earlier partition suit in which the minor was one of the defendants, a declaration in favour of the minor is given and the matters which have been in issue in the previous suit have been tried and a preliminary decree has been passed in the minor's suit, there is no necessity nor any justification for the Court for reviving the earlier suit and allowing it to be tried. 1950 M.W.N. 53=A.I.R. 1950 Mad. 334=(1949) 2 M. L. J. 779.

——Retrial—Decree on compromise by pleader without authority—Application to set it aside.

A court can on application re-open a suit by setting aside a decree on a compromise by pleader without authority from the client. 34 Bom. 408=12 Bom. L.R. 223=5 Ind. Cas. 968.

——Retrial—Jurisdiction.

A Court has no power to direct that a suit disposed of, by a Court equally competent as itself, be restored for re-hearing. 14 C.W.N. 558=6 Ind. Cas. 13.

——Retrial—Criminal case.

Retrial under a new Act should not be ordered in a case where a person is convicted under a

repealed law though such conviction is illegal if it has not done substantial injury to the accused. (1911) 2 M.W.N. 588=12 Cr. L. J. 616=12 Ind. Cas. 992.

——New Trial—When granted—Surprise—Fraud.

A new trial should not be lightly granted, especially where there is no fraud or surprise, and the ground alleged is the discovery of a new document which, but for neglect of the party claiming the new trial could have been found before. (1902) 6 C.W.N. 809 (P.C.).

64. Practice—Revenue Courts.

——Revenue Courts — Appeals or revisions—Desirability.

Interference in revision should be the exception rather than the rule in proceedings before Revenue Courts, particularly in proceedings under Acts like the Public Demands Recovery Act and the Land Registration Act. The parties in their anxiety to obtain a favourable decision from the Revenue Courts and to compel the opponent to appear, if they think it worth while, in the Civil Courts as plaintiffs, put in every possible appeal or revision petition in the Revenue Courts. Ultimately most of the disputes do go to the Civil Courts and if that is inevitable the sooner proceedings in Revenue Courts are brought to conclusion the better in the interests of all parties and also of general administration. 12 B.R. 606.

——Revenue Court—Mutation cases in U. P.

Where in mutation cases possession is with a Receiver the Revenue courts have simply to decide and that by summary inquiry who is the person best entitled to possessions. 3 O.L.J. 178=34 Ind. Cas. 496.

65. Practice—Review.

See: C. P. C., S. 151 and O. 47.

——Review—Power of Court.

The Court hearing a review petition cannot sit in judgment as an appellate Court over the matter in question. A.I.R. 1950 Ajmer 36 (2).

——Statement in judgment challenged—Review.

Statement in judgment that pleader made certain admission — Admission challenged — Remedy is to apply for review immediately. 90 Ind. Cas. 775=22 M.L.W. 234=A.I.R. 1925 Mad. 1031=49 M.L.J. 671.

——Discovery of fresh evidence.

When a second appeal court finds that, by reason of discovery of fresh evidence, the appellant would have had a better chance of winning his case, the practice is to allow him to withdraw the second appeal in order that a review petition may be presented to the lower appellate court. But such a course will be practically useless when a review had already been presented to that court and been refused. (1903) 5 Bom.L.R. 615=28 B. 4.

66. Practice—Revision.

See: (1) C.P.C., S. 115.
(2) Punjab Courts Act, S. 70.

——Revision—Interlocutory orders — Question as to legal representative of deceased plaintiff—If can be allowed to be agitated in revision—Hyderabad High Court—Practice.

The High Court will not ordinarily in revision go into the question as to who is the legal representative of a deceased plaintiff in a suit, but refer the parties to a regular suit. Where, however, the proceedings relating to the decision about the legal representative of the deceased plaintiff in the suit have dragged a weary length and have taken about four years, the High Court would go into the question and decide the matter. A.I.R. 1950 Hyd. 41.

——Revision—Argument that lower Court did not consider document relied on—Affidavit, if necessary.

An appellate Court has only to deal with the objections raised to the judgment of the lower Court and it is no part of its duty to search through the files for material which the parties do not choose to bring to its notice. Therefore, in a revision, it would be necessary for counsel to file an affidavit to the effect that certain documents were expressly referred to and relied on, before an argument can be entertained that the lower Court omitted them from consideration. It does not follow that a Court has omitted a document from consideration simply because it has not referred to it in its judgment. I.L.R. (1946) Nag. 26=223 Ind. Cas. 491=1946 N.L.J. 14—A.I.R. 1946 Nag. 165.

——Interlocutory order is revisable only when no appeal allowed and irreparable damage caused by refusal. 76 Ind. Cas. 482=1 Rang. 231=A.I.R. 1924 Rang. 2.

—When a party applies for revision and obtains an order issuing notice to show cause, he should confine himself to the grounds on which the order was based. 60 Ind. Cas. 420=42 All. 646=22 Cr. L. J. 228=18 A.L.J. 673=L.R. 1 A. (Cr.) 182.

——Revision—Conversion into memo. of appeal.

Where no question of limitation or Court fees arises, a revision petition may be treated as a memorandum of appeal, if necessary. 18 C.W.N. 1266 =20 C L.J. 341=27 Ind. Cas. 294.

——Revision—High Court.

A High Court having admitted a revision petition must decide it on its merits, after hearing the applicant for revision. 1 O.L.J. 541=15 Cr. L. J. 721=26 Ind. Cas. 169.

——Revision—Appeal.

A suit for profits was dismissed by the Assistant Collector directing, "As the plaintiff has failed to prove his claim and to prosecute the case, ordered that his claim be dismissed for default." **Held**, the Assistant Collector acted under R. 3 and not under R. 2 of O. 17, C P.C. and as the order was appealable no revision would lie. 10 A.L.J. 478=17 Ind. Cas. 839

——Revision — Preliminary and interlocutory orders —If High Court will interfere.

Where an appeal will lie from a decree that may be passed in a suit, the High Court will not interfere in revision with merely preliminary and interlocutory orders. 82 P.R. 1911=13 Ind. Cas. 800.

——Revision—Conversion into appeal.

A revision was converted into an appeal. 10 Ind. Cas. 51 (Cal.)

——Revision—Interference—Criminal case.

Even in appeal, the appellate Court, will not lightly substitute its own view for the view of the Lower Court, because the latter has the chance of hearing witness. Revision stands on a lower plane than appeal. 10 Cr. L. J. 160=2 Ind, Cas. 825 (Bom).

67. Practice—Sanction.

See also: (1) C. P. Code, O. 32, R. 7.
(2) Cr. P. Code, S. 195.
(3) C. P. Code, S. 115.
(4) Cr. P. Code, S. 439.

——Sanction—Cr. P. C., Ss. 195 and 476—Duty of Court.

Per Piggot, J.—Where one of two Judges constituting a bench is clearly of opinion that the case under consideration is a proper one for the institution of further proceedings it would be improper for his colleague to refuse to concur. 18 Cr. L. J. 680=40 Ind. Cas. 328. (All).

——Sanction—Affidavit—Cross-examination.

On principle no cross-examination is allowed on affidavits in support of a petition for sanction under S. 195, Cr. P. C. and sanction is to be given, when the affidavit discloses materials for a prima facie case. 11 Bom. L. R. 1164=10 Cr. L. J. 539=4 Ind. Cas. 273.

68. Practice—Second Appeal.

See: C.P.C., S. 100.

——Practice—Second appeal—Change of case.

Second appeal—Suit for ejectment cannot be changed into one for redemption. 97 Ind. Cas. 483=A .I. R. 1927 All. 63.

——The suit for arrears of maintenance cannot be changed into one for contribution in second appeal. 67 Ind. Cas. 919=2 L. L. J. 255.

——Special custom—No plea—Amendment in second appeal.

When a special usage is not pleaded or proved in the Court of first instance, the parties cannot expect to be allowed by the High Court in second appeal to be given an opportunity to amend their pleading and to let in evidence in support of the usage. 84 Ind. Cas. 973=20 M. L. W. 876=35 M. L. T. 127=1924 M. W. N. 792=A. I. R. 1925 Mad. 260=47 M. L. J. 686.

——Second Appeal — No new issue can be framed.

Plaintiff must raise the question that he was not given the opportunity of meeting the case in the first appeal and get the case remanded for that issue but he cannot raise that point in second appeal. 58 Ind. Cas. 189 (Cal.).

——Second appeal—Evidence not brought to notice of lower court.

The High Court will not entertain second appeal on the ground that the lower courts have over looked evidence if it is found that it was not brought to their notice by the parties. 2 Pat. L. J. 231=1 Pat. L. W. 658=39 Ind. Cas. 398.

——Second Appeal—Findings of lower Court.

Where the defendant who was unsuccessful in the original court rests his case in the first appellate court on a question of law only, and does not challenge the findings of the lower court on other points held that he could not when the question of law is decided against him in the High Court on the plaintiff's appeal be allowed to meet the case on other points. 32 Mad. 76=19 M. L. J. 10 =4 M. L. T. 456=1 Ind. Cas. 384.

——Second Appeal—Findings of fact.

A judgment upon a pure question of fact is binding upon the High Court in second appeal. 11 Bom. L. R. 26=9 M. L. T. 228=33 Bom. 311=1 Ind. Cas. 106.

——Second appeal—Evidence—Consideration of—C.P. Code, S. 103.

Where the point was taken in the grounds of appeal but the lower appellate court made no reference to it the High Court can under S. 103 in second appeal consider the evidence on the point. 5 M. L. T. 288=4 Ind. Cas. 1143.

——Second appeal—Right to file cross objections filed in first appeal—Right of parties.

Where some of the respondents in first appeal did not file cross objections but the court reduced the appellant's share in property on the objection of one of the Respondents and when in second appeal the other Respondents filed cross objection, it was held that they were incompetent in as much as they must be deemed to have accepted the decree of the first court in the first appellate court. 36 P.R. 1909=1 Ind. Cas. 697.

——Want of certificate.

If there is no cerificate that the finding of the Lower Appellate Court is based on no evidence, the finding cannot be reconsidered in second appeal. 62 Ind. Cas. 103=2 U.P.L.R. (All.) 417= L. R. 2. A. 3.

——Second Appeal—Error of law—Judgment on document not admitted or proved.

To base judgment on document not tendered in evidence or on record is an error of law. 91 P.L.R. 1919=58 Ind. Cas. 67.

——Second appeal—Findings of fact—Error.

A High Court can and will interfere in second appeal with a wrong finding of facts by the Appellate court. 24 C.W.N. 800=58 Ind. Cas. 879.

——Second appeal—Finding of fact.

A finding on a consideration of evidence should not be disturbed in second appeal. 6. O.L.J. 86=50 Ind. Cas. 195.

——Second appeal—Finding of fact.

If the appellant did not challenge in the Lower appellate Court a finding by the first Court that certain alienations by the guardian of a Hindu minor were not for legal necessity, he cannot challenge it in second appeal. 10 S.L.R. 38=35 Ind. Cas. 551.

——Second appeal—Question of fact—Reasonable compensation.

What is reasonable compensation is a question of fact and the High Court will not interfere with it in second appeal. 17 Ind.Cas. 517 (All.).

——Second appeal—Question of law and fact—Reasonable cause.

Whether there was reasonable and probable cause is a mixed question of fact and law and the High Court in second appeal must accept the facts as found by the Court of appeal below, but would examine whether the inference drawn therefrom is legitimate. 16 C.W.N. 540=14 C. L. J. 515=11 Ind. Cas. 729.

——Second appeal—Question of law—Inference from facts—Implied contract.

Where a particular conclusion is the only inference that can be drawn by a Court and the Lower Appellate Court fails to draw that inference, the matter is one of law into which the High Court cannot enter. But where more than one inference is possible the fact that the Lower Appellate Court made one instead of another, is not a ground for interference in second appeal. The question of implied contract is one of fact. 21 M.L.J. 156=9 M.L.T. 329=9 Ind. Cas. 169.

——Second appeal—Finding of fact—Interference on ground of mis-appreciation of evidence.

Ordinarily a High Court will not interfere lightly with the considered judgment of the court below but where it finds out that the lower appellate Court has not considered the evidence dealt with by the court of first instance, it will interfere in second appeal. 1. Ind. Cas. 205. (Cal.)

69. Practice—Small Cause Court.

——Small Cause Court.

Small Cause Court, though it need not have elaborate record, must try a case as carefully as a regular suit. 93 Ind. Cas. 108=1 Luck. 297=13 O.L.J. 335=3 O.W.N. 191=A.I.R. 1926 Oudh 261.

——When the Court is a Small Cause Court, it is open to the Judge to assess the damages for bailee's negligence and the amount of wear deposed to, etc., even in the absence of more definite evidence as to the extent of the negligence which he has found to be proved. A Court of Small Causes is not bound to discuss such points at so great a length as ordinary Courts. 84 Ind. Cas. 274=3 Bur. L. J. 203=A.I.R. 1924 Rang. 356.

——In a Small Cause suit the Judge, after the completion of the taking of evidence and the hearing of arguments, and having reserved Judgment, sent for the parties and asked them to argue the case in his presence and decided the case on the basis of the statements made by them (which he did not record) and on the evidence already taken:

Held, that he had acted very irregularly and that a retrial should be ordered. 25 C. W. N. 599=A.I.R. 1921 Cal. 558.

70. Practice—Subordinate Courts.

——Subordinate Court of one Province—If can order stay of suit pending between the parties in a Court subordinate to another High Court of a different Province. See Madras Marumakkattayam Act. Ss. 6 and. 7 (1). (1949) 2 M.L.J. 823=A.I.R. 1950 Mad. 373.

——Decision of High Court—Binding nature—Subordinate Courts.

When there are decisions of the Madras High Court bearing on the point involved in a case it is the duty of a Subordinate Court to be guided by them rather than by the decisions of other High Courts. 1930 M.W.N. 689=32 M.L.W. 273=A.I.R. 1930 Mad. 869=129 Ind. Cas. 72=59 M.L. J. 229.

——Subordinate Courts—Duty to follow rulings of High Court.

It is not in good taste or proper for a subordinate Court to question the soundness of a decision of the High Court to which it is subordinate. Their duty is only to follow the rulings if they are applicable to the case before them. 1930 M. W. N. 955=130 Ind. Cas. 190=A.I.R. 1931 Mad. 71.

——Subordinate Courts.

Subordinate Courts are bound to follow the published rulings of their High Court and cannot set up their own opinion in the matter or follow the rulings of other High Courts which express a contrary view. 25 N.L.R. 85=A.I.R. 1929 Nag. 156.

——Subordinate Courts — Rulings of Chief Courts.

Subordinate Courts in the Madras Presidency should confine themselves to the ruling of the High Courts and not act on the strength of the rulings of the Lower Burma Chief Court. 12 L.W. 227=59 Ind. Cas. 414=22 Cr. L. J. 110.

——Subordinate Courts—Duty of, to follow decisions of High Court.

A Court subordinate to Patna High Court is bound to follow the decisions of that Court no

matter whether they are right or wrong or are in conflict with the decisions of the other High Courts in India. 4 Pat.L.J. 565=(1919) P.H.C.C. 365=51 Ind. Cas. 496.

——Subordinate Courts—Duty to follow High Court.

Subordinate courts must follow the decision published or unpublished of the High Court to which they are subordinate and cannot prefer the decision of some other court to that court. 46 Ind Cas. 902. (Nag.)

——Subordinate Courts—Duty of, to follow majority of Full Bench of High Court.

A Subordinate Court should follow the opinion of the majority of the Judges of the Full Bench and not the dissentient judgment of a single judge of that Bench. (1915) M.W.N. 810=2 L.W. 1025=30 Ind. Cas. 927.

——Subordinate Courts—Duty to follow decisions of its own High Court.

A subordinate Court is bound to follow the decision of a Bench of the High Court to which it is subordinate unless the decision of the Bench has been overruled by a subsequent decision of the Full Bench of the High Court or expressly or impliedly overruled by the Privy Council or the law has been altered by subsequent legislation. 37 All. 359=19 C.W N. 841=13 A. L.J. 121=17 Bom. L.R. 549=18 M.L T. 61=29 M.L.J. 63=22 C. L. J. 190=2 L.W. 881=42 I. A. 155=(1915) M.W.N. 514=29 Ind. Cas. 617 (P.C.).

——Subordinate Courts—Duty to follow decisions of superior tribunal.

It is the duty of Subordinate Courts to follow the decision of the superior courts, leaving it to the superior court to deal with conflicts of opinion. 29 Ind. Cas. 709. (L.B.).

——District Magistrate must give explanation when ordered by High Court to do so.

Where the High Court issued a rule calling upon the District Magistrate to show cause why an appeal summarily dismissed should not be re-heard.

Held, the Magistrate is bound to give reasons and should not merely say "I should not be justified in taking up their Lordship's time over this trumpery case." 69 Ind. Cas. 461=A.I.R. 1924 Cal. 642.

——Subordinate Courts are not expected to anticipate pleas not raised—Evidence.

High Court does not expect Subordinate Courts to do more than try out a litigation on the pleadings of the parties and on the facts raised and put in issue before them. They are not expected to anticipate and meet beforehand any objection to a plaintiff's suit which the ingenuity of abler and better instructed counsel may find it possible to raise in High Court at the stage of second appeal when evidence has been led on both sides and a finding has been arrived at on a review of the entire evidence, it is immaterial that the onus of proof has been wrongly laid on a party. 74 Ind. Cas. 1004=45 All. 53=A.I.R. 1923 All. 358.

——Subordinate Courts—Duty to accept decision of Superior Court.

The subordinate courts must accept the decision of court to which it is subordinate. They act illegally, if they rely upon documents pronounced to be not binding on the parties by the superior Court. 28 Ind. Cas. 982. (Mad).

——Subordinate Court—Bound by order of higher Courts.

A subordinate court has no right to question the order of an appellate court when the parties are willing to abide by it. 21 M. 288 Foll. 16 M. L. T. 244=(1914) M.W.N. 713 and 870=26 Ind. Cas. 475.

——Subordinate Courts — Duty of, to follow High Court's—Judgment—Procedure.

It is the duty of Magisterial Court to faithfully and loyally follow the strict letter of the directions given by the High Court. If it does not understand the order of the Court it must refer the matter back to the court for further directions. It cannot on that account ignore the order of the High Court and go about its own sweet will as though the High Court has given no decision in the matter. 8 Cr.L.R. 264.

——Subordinate Courts—Revenue Courts.

The Revenue Courts must follow the rulings of the Financial Commissioner until overruled by that officer himself. 3 P.R. Rev. 1911=258 P.L.R. 1911=5 P.W.R. Rev. 1911=12 Ind. Cas. 442.

——Subordinate Courts — Order of Sessions Judge—Duty of District Magistrate.

A District Magistrate should forward orders of the Sessions Judge to the Magistrate to whom they are addressed and he cannot with-hold them on the ground of their being illegal. A revision of such order can be obtained by moving the High Court through the law officers of the Crown. 8 M.L.T. 88=11 Cr.L.J. 327=6 Ind. Cas. 358.

71. Practice—Subsequent Events.

See also: Note 60 (c).

(a) Cognizance by court.
(b) Cognizance in appeal.
(c) Cognizance in execution.
(d) Cognizance in revesion.
(e) Premature action.

71 (a). Practice—Subsequent events—Cognizance by Court.

——Subsequent events—Courts, if can take note of and give relief.

Though it is no doubt settled as a general rule of law that the Court cannot take into consideration any facts which come into existence subsequent to the institution of the suit, yet it is equally well settled that in certain cases where the Court

feels that in order to shorten litigation and to subserve the ends of justice between the parties it is necessary to consider such facts it can certainly do so. A mere technical difficulty should not prevent a Court from doing substantial justice between the parties. I.L.R. 1945 A. 165=A.I.R. 1945 A. 311=1946 A.W.R. (H.C.) 315.

——Subsequent events—Decree on basis of — Power of Court.

It is a well-known principle that the Court can always modify the decree according to subsequent events, i. e., events which happen subsequent to the filing of the plaint rendering the relief claimed in the plaint inadequate. 86 C.L.J. 186.

——Subsequent events—Duty of Court to take notice of.

Courts should take notice of events which happen subsequent to the suit in order both to avoid unnecessary litigation and to do complete justice between the parties. 52 P.L.R. 211.

——Subsequent events—Power of Court to take into consideration.

For the purpose of shortening litigation and doing complete justice to the parties the Court is not precluded from taking into consideration facts which happened after the suit was filed. 53 C.W.N. 329.

——Subsequent events.

The Court is entitled to take cognizance of events which have happened since the filing of the suit or appeal. 54 Bom. 902=32 Bom. L.R. 1252 =A.I.R. 1930 Bom. 554.

——Subsequent events—Taking notice of.

The Court is bound to take notice of events that happens since the institution of the suit, and to mould its decree according to circumstances as they stand at the time of passing the decree. 122 Ind. Cas. 66=31 Bom. L.R. 476=A.I.R. 1929 Bom. 337.

——Subsequent events can be considered only in exceptional cases.

The ordinary rule is that a suit must be tried in all its stages on the cause of action as it existed at the date of its commencement; the doctrine that events happen after the date of the commencement of the cause of action can be taken into consideration is of an exceptional character and is applied in cases where the original relief has become inappropriate. 1929 A.L.J. 267=10 L.R.A. Rev. 166=A.I.R. 1929 All. 341.

——Courts can take cognizance of events which happen during the pendency of the litigation. 113 Ind. Cas. 27=52 Bom. 883=30 Bom. L.R. 1149 =A.I.R. 1928 Bom. 427.

——Taking notice of.

Ordinarily relief must be given according to the facts found to exist at the time of the institution of the suit. There are, however, exceptions to this general rule and if litigation can be shortened by taking notice of facts which have come into existence after the institution of the suit, Courts are entitled to give relief on the basis of the new facts. 113 Ind. Cas. 585 =A.I.R. 1928 Pat. 396.

——Courts can take cognizance of events which happen during the pendency of litigation, and mould the relief to be granted with reference to such events, so as to shorten the litigation. 103 Ind. Cas. 720=23 N.L.R. 57=A.I.R. 1927 Nag. 230.

——When taken notice of.

A Court may take notice of events which have happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions, where it is shown that the original relief claimed has by reason of subsequent change of circumstances become inappropriate or that it is necessary to base the decision of the Courts on the altered circumstances in order to shorten litigation or to do complete justice between the parties. 101 Ind. Cas. 220=8 P.L.T. 456=A.I.R. 1927 Pat. 422.

If the circumstances have changed pendente lite there is no reason why the Court should not in the interest of justice and to avoid a multiplicity of suits notice them and adjudicate accordingly. 78 Ind. Cas. 95=A.I.R. 1924 Nag. 344.

——Events after suit were taken into consideration, injunction which would have been useless was refused. 75 Ind. Cas. 786=5 L.L.J. 210= A.I.R. 1923 Lah. 24.

——Where after the appointment of a Receiver in a suit for recovery of crops and other things the defendant removed the crops, held that the Court could pass a decree against the defendant for the value of the crops so removed. 71 Ind. Cas. 413=A.I.R. 1923 Nag. 70.

——Subsequent events—Cognisance.

In exceptional cases, courts are justified in taking cognisance of events subsequent to the institution of suit when litigation is thereby shortened and justice rendered. On a declaration of title, possession may be granted when the lease of the defendant expires before the date of decree. 37 Ind. Cas. 962 (Cal.).

——Subsequent events—Relief.

Where it is shown that the original relief claimed at the date of the institution of the suit has by reason of subsequent change of circumstances become inappropriate or that it is necessary to base the decision of the court on the altered circumstances in order to shorten litigation or to do complete justice between the parties it is incumbent upon a court of justice to take notice of events which have happened since the institution of the suit and the court should mould its decree according to the circumstances as they stand at the time the decree is made. 44 Cal. 47 =20 C. W. N. 1099=24 C. L. J. 140=34 Ind. Cas. 869.

——Subsequent events—If can pe considered.

Events pendente lite may be taken into consideration by the Court for the sake of justice,

6 C.L.J. 74; 6 C. L. J. 102, Foll. 15 C.L. J. 241 =13 Ind. Cas. 377.

The rights of parties must be ascertained as they are at the date of the action brought and they cannot be allowed to claim relief on the basis of a right which accrues to them after the institution of the action brought. 6 N. L. R. 17, Foll; 6 Bom. 139; A. I. R. 1925 Mad. 63; A. I. R. 1926 Mad. 6, not Foll. 122 Ind. Cas. 699=A.I.R. 1930 Nag. 173.

——If a controversy relating to proprietary right exists at the time when the appeal is filed subsequent abandonment of the plea by the respondent before the Distric Judge, which makes it unnecessary for the question of proprietary right being decided, does not deprive the District Judge of jurisdiction to hear the appeal. 113 Ind. Cas. 748=10 L. R. A. Rev 134=A. I. R. 1929 All. 67.

——Suit for ejectment with a claim for rent does not cease to be so, because of subsequent delivery of possession.

Marten, C. J.—The date, to test a suit is the date when it is brought, and not some subsequent date in its history.

Blackwell, J.—A suit begun as a suit in ejectment, combined with a claim for rent and for compensation does not, because possession of the premises is given after suit cease to be a suit in ejectment but remains such up to the termination of the suit. 105 Ind. Cas. 395=51 Bom. 885=29 Bom.L.R 1220=A.I.R.1927 Bom.556.

——Judgment of the Court must depend upon the rights of the parties at the date when the suit was instituted. 82 Ind. Cas.510=3 Pat. 224 =A. I. R. 1924 Pat. 438.

——Events which had happened altering the relationship of the parties after the decision of the first Court has nothing to do with the rights of the plaintiff which subsisted when the suit was brought. 69 Ind. Cas. 685=20 A. L. J. 888 =A.I. R. 1922 All. 526.

——Subsequent events—Consideration of.

The rights of the parties must pe adjudicated upon as they existed at the date of the suit. 46 Ind. Cas. 794 (Nag.).

——Subsequent events—Suit to be tried on the original cause of action.

A suit must be tried on the cause of action as it existed at the commencement. A devolution of a plaintiff's interest in the subject matter of the suit is not an exception to the general rule that a suit must be tried on the cause of action as it existed on the date of its commencement, and does not make the plaintiff incompetent to maintain the suit, there being no change in the cause of action. 20 C. L. J. 107=26 Ind. Cas. 410.

71 (b). Practice—Subsequent events—Cognizance in appeal.

——Subsequent events—Power of Court to take notice of—Lease of land—Suit by lessor for ejectment—Finding that lessor had no present right to possession—Subsequent vesting of interests of lessee in lessor pending appeal—Power of Appellate Court to decree suit on basis of such vesting.

The ordinary rule is that the Court should give a decision in the suit on the fact and circumstances as they existed on the date of the suit and should not take notice of events which have happened after such date. But the Court has got the power in proper cases to take notice of events subsequent to suit in order to shorten the litigation.

Where in a suit by a lessor to eject a trespasser from land held by a lesse, it is found that the lessor had no presnt right to possession on the date of suit, but pending appeal, the lessor becomes entitled to possession owing to the vesting of the rights and interests of the lessee also in the lessor, the Court can take notice of the fact of such vesting and decree the suit for ejectment, on the ground that the lessor has become entitled to maintain the suit for ejectment under S. 111 (d), T. P. Act especially, when the defendant trespasser has no possible defence to a fresh suit by the lessor. 227 Ind. Cas. 376=13 B. R. 34=A. I. R. 1947 Pat. 263.

——Whether can be considered.

Though it is a general rule that a Court of Appeal should not take into consideration anything that may have happened subsequent to the institution of the suit or at any rate after the termination of the proceedings of the trial Court, there are cases where the rule may be departed from. One justifiable reason is where it will shortern litigation and best attain the ends of justice by preserving the rights of both parties. 34 C.W.N. 634=57 Cal. 1358=A.I.R. 1931 Cal. 45.

——Decree validly passed—If can be set aside.

When a decree is validly passed, the Appellate Court will not set it aside merely on the ground that an event happens subsequent to such decree which, happening before its passing, would have led to the dismissal of the suit. 100 Ind. Cas. 84= 8 Lah. 215=28 P.L.R. 341=A.I.R. 1927 Lah. 198.

Pre-emption decree—Appellate Court can take notice of subsequent developments and reverse decree. 86 Ind.Cas. 589=47 All. 324=23 A.L.J 138 =6 L.R.A.Civ. 19=A.I.R. 1925 All. 361.

——Taking notice of.

—Though the general rule is that a suit must be tried in all its stages on the cause of action as it existed at the date of its commencement yet a Court both in the primary stages as well as in the appellate stages of the suit may take notice of events which happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions. 80 Ind. Cas. 607=A.I.R. 1925 Nag. 104.

——Subsequent events—Notice of.

An appellate Court is justified in taking cognizance of a fact which has happened subsequent to the order appealed from if the fact materially

affects the rights of the parties to an appeal. 78 Ind. Cas. 881=A.I.R. 1925 Cal. 561.

——When taken notice of.

It is not only in the power but it sometimes is the duty of even a Court of appeal to take notice of events which have happened during the pendency of appeal, where by so doing it can shorten a litigation and best attain the ends of justice by preserving the rights of both parties. 78 Ind. Cas. 194=A.I.R. 1924 Nag. 204.

——Proper procedure.

Point urged in the grounds of appeal which could not have been taken before the Subordinate Judge as it was not then possible to make that objection, the fact giving rise to the same being subsequent to the order appealed against, is not proper to be decided by the Appellate Court. But the fact having been brought to the notice of the Appellate Court the matter should be brought to the notice of the lower Court for amendment of order. A.I.R. 1929 All. 699.

71 (c). Practice—Subsequent events—Cognizance in execution.

——Subsequent events—Relief on basis of—Power and duty of Court — Rule—Foreign Court ceasing to be such as a result of merger of State in Indian Union—Decree passed by Indian Court prior to merger—Execution in Court of State—Refusal—Propriety—Duty of Court to take note of change of status.

A decree was passed by the Court of Civil Judge, Belgaum, in British India on 11th March, 1938, against several defendants, all but the fifth defendants being resident within that Court's jurisdiction. The fifth defendant was not so resident but was a permanent resident of the Indian State, Jamkhandi. The cause of action, however, arose within the Belgaum Court's jurisdiction and as against the fifth defendant leave to sue was obtained under S. 20 (c), Civil Procedure Code. He remained ex parte and a decree was passed against him personally for money.

In 1940 execution was taken out in the Belgaum Court and the decree was transferred to the Court of the Subordinate Judge at Jamkhandi, as against the fifth defendant who resided and had property within that Court's jurisdiction. An execution application filed in the Jamkhandi Court was opposed by the fifth defendant on the ground that the Belgaum Court was not a Court of competent jurisdiction under S. 13 (a), Civil Procedure Code, and the Court dismissed the execution application, holding that as the judgment-debtor was rather a permanent resident within the territorial limits of the Belgaum Court and had not submitted to the jurisdiction of that Court, the principle of international law would apply and that the ex-parte decree could not be executed by the Jamkhandi Court on the grounds mentioned in S. 13 (a), Civil Procedure Code. The darkhast was dismissed on 10th March, 1948.

Prior to this, however, in February, 1948, the Rulers of Deccan States, including the Ruler of Jamkhandi State, decided in favour of integration with the Bombay Province and signed merger agreements. On 25th February, 1948, the Government of India delegated to the Bombay Government the powers under S. 4 of the Extra Provincial Jurisdiction Act in respect of the Deccan States. There was a modified notification later on. On 2nd March, 1948, under the Administration of Deccan States Order, the Deccan States, including, Jamkhandi were administratively integrated with the Province of Bombay. Under S 5 of that Order, which came into force on 8th March, 1948 the High Court of Bombay was to have all original appellate and other jurisdiction and superintendence in those States as under the law in force immediately before 8th March, 1948, or exercisable by any other High Court. The Courts till then functioning as the Courts of the State became Courts of the Dominion of India, the sovereignty of the States itself being extinguished, as they merged into the Dominion of India.

An appeal having been preferred to the High Court of Bombay against the order dismissing the execution case:

Held, (1) that the Belgaum Court was no longer a foreign Court qua the Jamkhandi Court, and the decree of the former Court was executable in any part of the Indian Dominion, including the territory formerly known as the State of Jamkhandi; that both the Belgaum Court and the Jamkhandi Court were Courts of the same State and the Jamkhandi Court, when execution of the decree was sought, was bound to execute the decree and the judgment debtor was no longer entitled to resist the execution of a decree of the Belgaum Court; (2) that in any event the Court was entitled, in order to avoid multiplicity of proceedings, to grant relief which is proper and effectual after taking into consideration events which have happened subsequent to the date of the trial Court's order; a Court cannot ignore the subsequent events which have taken place since the institution of proceedings, whether in the trial Court or after the Judgment of that Court. 52 Bom. L.R. 660=A.I.R. 1951 Bom. 190.

71 (d). Practice—Subsequent events—Cognizance in revision.

——Subsequent events—Revision.

Where the petitioners were convicted of rioting arising out of a dispute as to possession of certain lands the High Court in revision took into consideration the decision of the settlement officer after these riots, who held that the petitioners were in possession, and reduced the sentences as the petitioners could not have been the aggressors. 18 C.W.N. 646=15 Cr.L.J. 473 =24 Ind. Cas. 561.

71 (e). Practice—Subsequent events—Premature action.

——Suit filed prematurely—Subsequent events whether can be taken into account.

Courts have jurisdiction to take notice of subsequent events in a proper case when it will tend to shorten the litigation provided the parties are not prejudiced

thereby. Where a suit to recover possession was filed a month before the lease term expired, **held,** that the suit need not be dismissed as being premature. 1929 M.W.N. 165.

——Suit premature on date of filing—Dismissal with liberty to file fresh suit is the right course. 94 Ind.Cas. 639=23 M.L.W. 367=A.I.R. 1926 Mad. 594.

——Premature action.

If the action is found to be premature, amendment cannot cure a defect of that character. 101 Ind Cas. 643=25 A. L. J. 385=49 All. 599=A. I. R. 1927 All. 451.

72. Practice—Trial.

See: (1) C. P. C., O. 15-20.
(2) Notes 22, 36 and 53.

——Trial of case—Ruling as to admissibility of evidence—Proper form and procedure.

A ruling as regards admissibility of evidence should be as brief as possible and once the ruling has been given, there should be no interruption in the trial and the trial court should proceed with the trial to judgment without interruption. In its judgment the court should incorporate fuller reasons, if need be, for holding particular evidence to be inadmissible. It is not proper to give a lengthy judgment as to admissibility of evidence and then post the suit for further hearing. A.I.R. 1950 Mad 62=(1949) 2 M.L.J. 142.

——Inspection—Election petition to set aside election filed before the Chief Judge of the Court of Small Causes—Ordering inspection of marked rolls, counterfoils of ballot papers, etc.—Duty of Court.

In an election petition, the powers of ordering inspection must be exercised with some circumspection. It is necessary that before an order for inspection is made, the Judge should be satisfied that the inspection of the documents was required **bona fide** for the purpose of the enquiry. Since great sanctity is attached to the secrecy of the ballot it is not advisable to give a roving inspection of the ballot papers and other ducuments and thus violate the principle of secrecy of ballot Where an order for inspection is made on the consent of both sides it cannot be said that the Court had applied its mind and considered whether in fact the inspection was required for the **bona fide** purpose of proving the petitioner's case. 62 L W 714=A.I.R. 1950 Mad. 258=1949 M.W N. 652=(1949) 2 M.L. J. 446.

——Trial of suit—Plaintiffs calling defendant as witness—Court, if can dismiss suit on his denial alone.

The plaintiff will no doubt be bound by the evidence of the defendant if he chooses to produce the latter as his witness in the case. But it does not mean that the Court in deciding the case, should exclude the other reliable evidence produced by the plaintiff and dismiss his claim on the defendant's bare denial alone. 1946 M L.R. 70 (Civ.).

——Preliminary point raised in trial—Mode of disposal.

A preliminary point must be decided as a preliminary point and at the earliest stage of the suit. It is not proper that a preliminary point should be decided along with the points involved in the merits of the case. 128 Ind. Cas. 827=A.I.R. 1930 All. 863.

——Trial—Propriety.

To decide a new issue or evidence let in for some other purpose collaterally is not a satisfactory mode of disposing of the case. 120 Ind. Cas. 573 (Mad.),

——Absence of formal amendment of pleadings—Trial if vitiated.

Where, in pursuance of a statement made by the plaintiff when he was examined under O. 10 of the C. P. Code, an issue was framed by the Trial Court and evidence was also let in, but there was no formal application for amendment of the plaint or a formal order allowing amendment. **Held,** that the trial was not vitiated. 116 Ind. Cas. 884 (Lah.).

——Claim.

A Court has to see whether there is proof of claim before it need inquire as to the truth or otherwise of the defence. 110 Ind. Cas. 818=A.I.R. 1928 All. 688.

——Piecemeal trial of a case.

The practice of trying an important case piecemeal should be deprecated as tending to lead to protracted litigation and serious inconvenience and to involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal. 92 Ind. Cas. 712 =7 Lah. 42=7 L.L. J 611=27 P. L. R. 287=A.I.R. 1926 Lah. 125.

——Trial—Piecemeal trial to be avoided.

As a piecemeal trial leads to protracted litigation and good deal of inconvenience and heavy costs if the case is taken repeatedly on appeal it is advisable that in appealable cases the courts below should pronounce the opinion on all the points involved. 20 C.L.J. 426=26 Ind. Cas 954.

——Trial of issues.

The Court has ample authority to direct successive trials of different issues and even to record interlocutary judgments thereon, to be made the basis of the final judgment at the conclusion of the trial of the whole case. 82 Ind. Cas. 934=28 C.W.N. 131=39 C.L.J. 140=A.I.R. 1924 Cal. 467.

——Trial—Decision on some issues—Not binding on successor of Judge.

A succeeding judge is not bound by and may reconsider the judgment of his predecessor on certain issues of the case even though arrived at by the consent of parties. 11 Bur. L.T. 97=47 Ind. Cas. 555.

——Trial—Court's duty of—Raising of issues and adjudication.

The duty of raising points arising upon the pleadings and the evidence and the proper adjudication of which is essential for the ends of justice rests on the Court as much as on the parties or their pleaders. (1914) M.W.N. 883=26 Ind. Cas. 337.

——Hasty disposal.

A reasonable expedition in the performance of one's work is no doubt commendable, but an attempt to cut

too short the procedure prescribed by Law would amount to an inexcusable haste and perfunctoriness. 72 Ind. Cas. 345=4 Pat. L. T. 723=1 Pat. L. R. Cr. 130=24 Cr.L.J. 345=A.I.R. 1922 Pat. 77.

——Trial—Hearing of case—Right of junior to continue—Arguments begun by junior pleader.

A junior pleader is not entitled as of right to complete the argument, left unfinished by his senior. 30 C.L.J. 522=53 Ind. Cas. 955.

——Trial—Hearing of Counsel.

Where in the hearing of an appeal, the respondent's counsel was stopped with the remark that he would be called, if the judge was not with him on the points already heard, and the appeal was allowed without hearing the counsel, **held** that the respondent's counsel must be given an opportunity of presenting his case and the order must be set aside. 13 Bom. L R. 27=12 Cr. L.J. 64=9 Ind. Cas. 350.

——Trial—Batch of suits—Suits by landlord against several tenants—Evidence—Admissibility.

Several suits instituted by the landlord for additional rent against several tenants were tried together without objection by the tenants defendants. One of the tenants did not produce the chitta which was in his possession. **Held**, that as the evidence given, so far as it was general in its character, applied to all the suits and all the defendants or sets of defendants were sailing in the same boat, and none of them dissociated himself from the defendant who did not produce the chitta or at any rate displayed any anxiety to forego any advantage that might accrue from his conduct, they were all alike affected by his conduct in the suit. 27 C. L. J. 563=22 C.W.N. 826=45 Ind. Cas. 660.

——Trial—Connected case—Joint trial.

Two applications were made one for setting aside an **ex parte** decree and the other for setting aside the sale held in execution thereof on the ground of fraud. The two applications were heard together as the questions of fraud was closely interwoven in both. 4 Pat. L.W. 296=44 Ind. Cas. 661.

——Trial—Experts—If arbitrator can take the assistance of.

An arbitrator is entitled to receive assistance in technical matters from experts in arriving at an independent judgment in the matter. 22 C. L. J. 237=31 Ind. Cas. 33.

——Trial—Disposal of a suit—Manner not warranted by law—Consent of parties.

No agreement between the parties to a case would enable a Court to dispose of a case in a manner not recognised by law or by authority. 18 M.L.T. 93=2 L W. 605=30 Ind. Cas. 260.

——Trial—New evidence—Original Court.

An original Court cannot entertain a new question requiring introduction of new evidence after it has finished taking evidence. 6 S.L.R. 135=19 Ind. Cas. 368.

——Trial—Duty to adduce all the evidence.

Pleaders and parties must remember that the first court is not the final court, and that there are higher courts of appeal which might take a view different from that taken by the first court. Pleaders and parties take the responsibilities when they dispense with evidence. 13 Bom. L.R. 1021=12 Ind. Cas. 691.

73. Practice—Valuation.

——Valuation.

Under-valuation in Lower Courts—Plaintiff cannot be allowed to show real valuation for purposes of leave to appeal to Privy Council. 69 Ind. Cas. 385 =1922 M.W.N. 683=16 M.L.W. 517=31 M.L.T. 335=A.I.R. 1923 Mad. 125=43 M.L.J. 728.

——Under-valuation of suit—Inquiry.

To determine whether or not a suit has, for the purpose of Court-fees, been under-valued, evidence should be recorded on the point. A document in which the description of the value of the property, did not impose a corresponding obligation, as to the stamp duty, leviable on it, cannot be safely taken as a criterion as to the value of the property. 63 Ind. Cas. 685=14 S.L.R. 137.

——Valuation—Appeal.

An appellant may value the appeal at a smaller value than the valuation of the original suit if he is interested only in a portion of the property in suit. 37 All. 208=13 A.L.J. 283=28 Ind. Cas. 261.

——Valuation—Objection to.

A party cannot object in appeal, to a valuation not questioned by him at the trial of the suit and by virtue of which the suit had to be tried in a Higher Court. 8 N.L.R. 179=17 Ind. Cas. 886.

——An objection as to the valuation of a suit or to the admissibility of a document cannot be raised for the first time in appeal to the Chief Court. 78 P.W R. 1910=6 Ind. Cas. 1006.

74. Practice—Witness.

See also: Note 26.

(a) Citing opponent as
(b) Commission
(c) Costs
(d) Credibility
(e) Cross-examination
(f) Examination
(g) Summons

74 (a). Practice—Witness—Citing opponent as.

——Witness—Parties.

The practice of parties examining each other as witness on his own behalf is highly objectionable and embarrassing. It has been repeatedly condemned by their Lordships of the Privy Council and should be discontinued by the legal profession. A.I.R. 1929 Lah. 868.

——Where plaintiff insisted on examination of defendant, to which defendant objected:

Held, that in the case the proper order would be that the examination of defendant will be postponed

till the evidence of the side of the plaintiff is closed. Then if the defendant does not offer himself for examination on the side of the defendants, the plaintiff will be at liberty to examine him as his witness. 112 Ind. Cas. 456=48 C. L. J. 131.

——There is no objection whatever to an advocate seeking to prove his case out of the mouth of the opposite party; but if he puts the opposite party into the box he takes the risk of making statements made by that witness part of his own evidence. 92 Ind. Cas. 844=23 M.L.W. 29=A.I.R. 1926 Mad. 384.

——Witness—Citing opponent as.

A party calling his opposite side as a witness is not bound by his statement. The practice though condemnable is not illegal and cannot be made a ground of revision. (1913) M.W.N. 998=21 Ind. Cas. 781.

——Witness—Citing opponent as.

The practice of citing an opponent as a witness condemned. (1913) M W.N. 828=21 Ind. Cas. 787.

——Witness—Opponent cited.

There is nothing to prevent a party from examining his opponent as his witness. 16 O.C. 145=20 Ind. Cas. 450.

——Witness—Citing opponent as.

The unworthy effort of the advocate on each side in India is to force his opponent to produce his own cilent in order that he himself may have the opportunity of cross-examining that client. If the opponent should refuse to be led into this trap, then the court is not put in possession of the best evidence available. It is a vicious practice, unworthy of a high toned or reputable system of advocacy. It must embarrass and perplex judicial investigation, and, it is to be feared, too often enables fraud, falsehood or chicane to baffle justice. 32 All. 104=37 I.A. 1=14 C.W.N. 285=11 C. L. J. 172=7 M.L.T. 57=(1910) M.W.N. 8=12 Bom. L R. 244=20 M.L. J. 182=5 Ind. Cas. 549 (P.C.).

——Witness—Citing opponent as.

The practice of summoning the opposite party as a witness by either side is very objectionable and ought to be discountenanced. 3 Ind. Cas. 45 (Bom.).

——Witness—Citing opponent as.

It is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness, with the design that each party shall be forced to produce the opponent summoned as a witness, and thus give the counsel for each litigant the opportunity of cross examining his own client. It is a practice which their Lordships cannot help thinking all judicial tribunals ought to set themselves to render as abhortive as it is objectionable. It ought never to be permitted in the result to embarrass judicial investigation as it has done in this instance. 31 All. 116=36 I.A. 9=5 M.L.T. 58=9 C.L J. 172=13 C.W.N. 370=11 Bom. L.R. 196=19 M L.J. 186=1 Ind. Cas. 128 (P.C.).

74 (b). Practice—Witness—Commission.

——Witness—Commission.

Where a commission for the examination of the defendant who was charged with fraud was issued and the trial commenced on the 28th February, 1917, and the Commissioner only sent in his report on the 15th February, the evidence having been taken on the 21st and 27th January, and 4th and 5th February 1917, previous:

Held, nothing could be more unsatisfactory than this mode of procedure. The principal defendant gives his evidence before the plaintiff's case has been opened or the evidence of their witnesses given. The Court which has to decide has no opportunity of judging the veracity of the witness from his conduct and demeanour. All the advantage of confronting a witness accused of a fraud, with his accusers is lost.

Evidence taken on commission should only be permitted to be used where the witness is proved to too ill to give his evidence in Court or is absent or for other sufficient reason. 73 Ind. Cas. 391=28 C.W.N. 327=39 C.L. J. 165=33 M.L.T. 325=A.I.R. 1923 P.C. 73=45 M.L.J. 363 (P.C.).

74 (c). Practice—Witness—Costs.

——Witness—Costs—Expenses of.

A witness who resides abroad is entitled to the expenses of being brought to give evidence and also to subsistence money due during the period of detention, and the same principle applies to the case of a party where evidence is reasonably necessary and material for the purpose of his case and on his behalf. 122 Ind. Cas. 121=31 Bom. L. R. 1020=54 Bom. 62=A.I.R. 1930 Bom. 24.

——Witness—Recoupment to witness' employer.

——Recoupment to the witness' employer should be made on the basis of his salary. 108 Ind. Cas. 672=21 S.L.R. 91=A.I.R. 1928 Sind 15.

——The successful party is entitled to travelling expenses of the witness summoned by him as against the unsuccessful party. 67 Ind. Cas. 277=A.I.R. 1923 Cal. 315.

74 (d). Practice—Witness—Credibility.

——Witness—Credibility.

It is not a sound ground for disbelieving a witness that he is of the same caste or community as the person in whose favour he deposes. 90 Ind. Cas. 439=7 P.L.T. 272=26 Cr.L. J. 1559=A.I.R. 1926 Pat. 36.

——Low status of witness.

The mere fact, that the attesting witnesses to a will did not appear to be men of any status, in this case they were cultivators, is not sufficient to discredit their evidence, when nothing is suggested which would be sufficient to discredit them. 80 Ind. Cas. 641=1924 M.W.N. 445=19 M.L.W. 699=7 N.L.J. 126=A.I.R. 1924 P.C. 166 (P.C.).

——Disbelief on ground of impracticability.

Where a witness states that he could see and did see, in apparently very short time, that a certain quantity of land had not been cleared, the statement can be disbelieved as being improbable only if cross-examination is directed to the impracticability of forming a judgment by mere inspection even with the aid of

glasses, as to the proportion cleared. 77 Ind. Cas. 141 =1923 M.W.N. 622=28 C.W.N. 589=33 M.L.T. 309=5 L.R.P.C. 25=A.I.R. 1923 P.C. 95=45 M.L.J. 438 (P.C.)

——**Relationship.**

Relationship to the agent of a party or even to the party who has called him is not a sufficient reason by itself for disbelieving a witness. 76 Ind. Cas. 772= A.I.R. 1923 Nag. 322.

——**Witness—Impartiality—Interested witness.**

Where a fight takes place in a shop it is scarcely likely that the shop-keeper and his family members would give evidence against their own customers. Their inclination would be to say that nothing disorderly had taken place at their shop, which they hold under a licence from Government. 74 Ind. Cas. 705= 2 Pat. 309=1 Pat. L.R. Cr. 236=24 Cr.L.J. 801= A.I.R. 1923 Pat. 413.

——**Witness—Credibility.**

A trial Judge in India has not the same opportunity of observing the demeanour of witnesses as a trial Judge in England. 39 All. 426=15 A.L.J. 349=39 Ind. Cas. 666.

——**Witness—Partial credibility.**

It is dangerous to lay down as a general rule of law that in this country it is not proper to believe the evidence of a certain witness in part. 90 Ind. Cas. 537= 53 Cal. 181=42 C.L.J. 205=26 Cr.L.J. 1577=A.I.R. 1926 Cal. 235.

——It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. 78 Ind. Cas. 542=20 N.L.R. 63=A.I.R. 1924 Nag. 129.

74 (e). Practice—Witness—Cross-examination.

——One of the defendants who was contesting for the other defendant was put in the witnets-box as his own witness. After the examination-in-chief, by himself the other defendant proceeded to cross-examine him and in the course of such cross-examination elicited a number of details favourable to himself.

Held, that this was a gross irregularity which the Judge ought not to have allowed. 109 Ind. Cas. 170= A.I.R. 1928 Mad. 919.

——When a document is produced by opponent after his witness's cross-exmination is over the witness can be recalled for further cross-exmination on the document. 83 Ind. Cas. 205=3 Pat. 85=A.I.R. 1924 Pat. 402.

——**Witness—Cross-examination—Admission in.**

A party's counsel cross-examining a witness as to whether an event happened cannot there by be held to commit himself to an assertion that such an event took place. 1 O.L.J. 591=26 Ind. Cas. 547.

——**Witness—Cross-examination of a witness—** Serious imputation not substantiated—Whether should be withdrawn.

Where in the course of cross-examination, a very serious imputation of dishonourable, if not dishonest conduct was made to the witness which however was not substantiated. **Held,** that imputation ought to have been withdrawn. 20 M.L.J. 549=26 Ind. Cas. 610.

——**Witness—Document put into his hands— Right of Cross-exsmination.**

Where a Cross-exmining counsel puts a document into the hands of the witness and asks him some question about its general nature and identity the adversary will have no right to see the document but he will have such a right if any questions are put respecting its contents or handwriting. 39 Cal. 245= 16 C.W.N. 265=13 Ind. Cas. 577.

74 (f). Practice—Witness—Examination.

——**Witness—Examination.**

Party entitled to conduct examination is entitled to do so with help of counsel. 130 Ind. Cas. 407= A.I.R. 1931 Lah. 8.

——**Party personally knowing circumstances of the case not going into witness-box.**

It is the bounden duty of a party personally knowing the whole circumstances of the case to give evidence on his own behalf and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case. A.I.R. 1927 P.C. 230, Foll. 113 Ind. Cas. 370=A.I.R. 1929 Sind 7.

——**Party not examining himself as witness— Adverse presumption.**

If the defendant does not choose to go into the witness-box on his own behalf, that is a matter for himself to decide, but in an ordinary case, the Court is entitled to consider that as a point against the defendant. One party is not bound to issue a summons to the other, and unless the latter gives evidence on his own behalf so as to give the former an opportunity of cross-examining him, the court is entitled to infer everything against him. 66 Ind. Cas. 943=24 Bom. L.R. 115= A.I.R. 1922 Bom. 81.

——**Party should be offered as witness.**

The practice of not calling the party as witness with a view to force the other party to call him, and so suffer the discomfiture of having him treated as his (the other party's) own witness is a bad and degrading practice. The true object to be achieved by the Court of Justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination. 105 Ind. Cas. 220 =46 C.L.J. 272=1927 M.W N. 778=4 O.W.N. 995= 29 Bom. L.R. 1392=32 C.W.N. 119=28 P.L.R. 567= A.I.R. 1927 P.C. 230=53 M.L.J. 392 (P.C.).

——**Witness—Examination.**

The name, parentage, age, residence and profession of a witness form part of the deposition on solemn affirmation and not part of the heading. 111 Ind. Cas. 308=7 Pat. 361=10 P.L.T. 26=29 Cr.L.J. 804= 11 A.I.Cr.R. 91=A.I.R. 1928 Pat. 420.

——Where no adjournment for the purpose of examining the plaintiffs is asked for and the plaintiffs are present in Court, the trial Court is not entitled to

prevent them from entering the witness-box. 94 Ind. Cas. 21=A.I.R. 1926 Lah. 450.

——Duty of Court.

It is not the duty of the Court to direct the party as to the order in which he is to lead his witnesses. 92 Ind. Cas. 1006=8 L.L.J. 67=27 P.L.R. 136.

——Witness—Pleaders or Advocates—Examination—Chambers.

There is nothing wrong in the Pleader or Advocate examining the witnesses in Chambers before they appear in Court as it is intended to find out what they have to say and conduct the case properly. 5 Bur. L.T. 38 =13 Cr.L.J. 299=14 Ind. Cas. 763.

——Witness—Examination of witness—Caution.

While it is unobjectionable for a judge to caution a witness to speak the truth it is wholly wrong to tell him thas no matter what evidence he gives no action would be taken against him. 46 P.W.R. 1911 Cr.=12 Cr.L.J. 73=63 P.L.R. 1911=9 Ind. Cas. 436.

——Witness—Place of giving evidence.

All witnesses, without distinction, must give their evidence from the witness-box and it is not desirable that any one should give his evidence on the dais, by the side of the Judge. 63 Ind. Cas. 461=22 Cr.L.J. 669=3 U.P.L.R. (Lah.) 78.

74 (g). Practice—Witness—Summons.

——Witness—Summons—Right of parties.

A person is always entitled to take out summons from the Court and endeavour to have his witnesses served. If he is late in the application, non-service of the witnesses will not be a ground for adjourning the case but it is not a ground for refusing the summons. 116 Ind. Cas. 896=A.I.R. 1929 Lah. 849.

——Witness—Summoning—Refusal to summon additional witnesses—If a ground for interference.

Where a party's application for summoning two witnesses on the ground that they were not named in first instance, **Held**, that the Court should not refuse to summon the witnesses, the witnesses summoned for the day and served not having appeared, although the witnesses are not served, it may refuse to summon them. 114 Ind. Cas. 439 Lah.

——Practical difficulties of parties must be looked to.

Allowance must be made for the practical difficulties felt by litigants in India when they are driven to choose between dispensing with the evidence of an important witness and dragging him into Court against his will. These difficulties are likely to be accentuated by the fact that the recalcitrant witness happens to be a gentleman of position, who wound keenly resent the issue of a warrant for his attendance. 89 Ind. Cas. 849=A.I.R. 1926 All. 103.

——Court's duty is to enforce attendance.

When once the Court issues the summons it is the duty of the Court, unless the judgment debtor is guilty of gross laches to assist the judgment-debtor and to enforce the attendance of the proper person who can give evidence relevant to the case. The refusal to grant the prayer of the judgment-debtor to summon the proper witness is a grave irregularity and contravenes the recognised principles embodied in the Code of Civil Procedure regarding the enforcement of the attendance of witnesses. 68 Ind. Cas. 645=1 Pat. 644=3 Pat. L.T. 487=1922 P.H.C.C. 200=A.I.R. 1922 Pat. 276.

75. Practice—Miscellaneous.

——Quia timet action—Basis of relief—Completed act—If necessary—Protection from threatened act—Sufficiency.

Quaere.—Whether in a suit in the nature of a bill **quia timet** a completed act is necessary in order to given the plaintiff a right of relief or whether the plaintiff is entitled to protection from a threatened act, which if completed, would give him a right of action? 31 P.L.T. 93=A.I.R. 1950 Pat. 366.

——Quia timet—Competency of Court—Rule.

It is quite true that in a **quia timet** action, the Court in a proper case is competent to and will determine whether the defendant's threat of disciplinary action against the plaintiff is proper or justified. But there must be before the Court, before it will entertain a **quia timet** action satisfactory evidence that the defendant is threatening or intending to do that which it is said he is not entitled to do or that which, it is said, will lead to serious damage to the plaintiff. 49 Bom. L.R. 439=A.I.R. 1947 Bom. 424.

——Presentation of plaint by person who had no power of attorney—Irregularity.

The mere fact that a plaint is presented by a person who had no power of attorney in his favour, is a mere irregularity. I.L.R. (1950) A 136=1949 A.L.J. 157= A.I.R. 1949 A 499=1949 A.W.N. R. 275.

——Interlocutory applications — Affidavits — Swearing by subordinate clerks of parties —Desirability.

It is absolutely essential in interlocutory proceedings where the Court is asked to make an order on affidavits only that such affidavits on which Courts are asked to act must be from persons who could be relied upon and on whose affidavit it will be safe for the Courts to proceed. The practice of having affidavits affirmed by subordinate clerks of parties is objectionable. The persons in most cases who should make the affidavits are naturally the parties themselves and this is particularly so when personal allegations are made against a particular party. It may be that in some cases a party to the suit may not be a proper person to swear an affidavit in which case the Court will certainly rely on the affidavit of an employee or an agent of his, who could show his competence and acquaintance with the facts of the case. That is not only desirable but also convenient. But it is the exception rather than the Rule. 85 C.L.J. 22=54 C.W.N. 189.

——Interlocutory order—Effect of—If without prejudice to contentions of parties in suit—Arrears of rent paid by tenant in fulfilment of undertaking contained in interlocutory order—Such payment and receipt—If amounts to renewal of lease. **See** T.P. Act, S. 116, 83 C.L.J. 321.

——Transfer of appeal—Notice to parties essential.

Notice should be given to the parties or pleaders if an appeal is transferred from one court to another and some record should be maintained to show service of such notice. Absence of such record is a good ground for restoring the appeal when it had been disposed of in the absence of parties. 3 Pat L. J. 218=1918 P.H C.C. 17=4 Pat. L.W. 75=43 Ind. Cas. 925 (F.B.).

Per Curiam.—It is idle to speculate as to whether a Judge who obviously approached an issue of fact with his mind invaded by an erroneous view of the law can be treated as having really applied his mind to the real question which he had to try. 1930 M.W.N. 371.

——Deposit money due under bond in Court.

There is no law under which a sum of money due on a simple bond, which is not the subject of litigation, can be deposited in Court and the bond holder is not bound in law to accept such deposit even if it is sufficient to satisfy his bond. 7 O.W.N. 1055=A.I.R. 1931 Oudh 9.

——Mofussil client to be acquainted with High Court's decision—Two months is not a long time. 100 Ind. Cas. 727=A.I.R. 1927 All. 386.

——Ex-parte orders.

It is a general principle that a party against whom an order **ex-parte** is made is entitled to have the matter decided after argument on both sides have been heard. Such an order is not an order passed in revision. 95 Ind. Cas. 1008=28 Bom. L.R. 651=A.I.R. 1926 Bom. 417.

——A defendant who is not a necessary party and who has no interest in the subject-matter of the suit cannot contest it. 82 Ind. Cas. 603=6 L. L. J. 351=A.I.R. 1925 Lah. 65.

——Educated people making enquiry ought to adopt calmer and more judicial attitude than casual narrators. 85 Ind. Cas. 900=22 M.L.W. 26=A.I.R. 1925 Mad. 950.

——Receiver appointed—Third person's rights affected—Remedy is to apply to the Court for redress or bring separate suit impleading the Receiver and parties. 70 Ind. Cas. 673=17 M. L. W. 64=A.I R. 1923 Mad. 304.

Resitution.

See also: C.P.C., S. 144.

——Restitution—Removal of crops by respondent pending appeal—Nature of order.

Where during the pendency of an appeal the respondent removes the corps sued for, he should properly be directed to pay to the appellant only its **net** value. 10 M.L.T. 190=12 Ind. Cas. 105.

——Right of suit—Inconvenience of appeal—If ground for bringing suit.

That the course of appeal is inconvenient or difficult is no ground to bring a suit. 118 P.L.R. 1911=38 P.R. 1911=97 P.W.R. 1911=9 Ind. Cas. 1000.

——Insolvency—Commission—Unlawful.

A practice to allow commission on the full value on the sale if an insolvent's estate cannot be followed being contrary to law. 36 Cal. 990=4 Ind. Cas. 697.

——Third party directions—General principles—Practice—Procedure.

The general principles on which a Court will issue third party directions are: (1) that there must be a clear case of contribution or indemnity from the third party; (2) that all the disputes arising out of a transaction, as between the plaintiff and the defendant and between the defendant and a third party, can be tried and settled in one action and, (3) that in cases of contract and sub-contract it must appear that the contract between the plaintiff and the defendant has been imported into the contract between the defendant and the third party. (1909) 34 B. 423=11 Bom. L.R. 1056=4 Ind. Cas. 131.

——Landlord and Tenant—Custom question of—C. P. C., S. 30.

A court cannot hold that the whole body of tenants had acquired an easement or right by custom at the instance of a single tenant defendant. [It is competent to a single defendant to raise a defence of general custom without joining the other persons interested in the custom with himself or getting himself made their representative under S. 30 Civil Procedure Code.] If the plaintiff wishes to have the question of common right tried out after the defendant filed his written statement it is his duty to amend his plaint and allege that the suit was brought against defendant personally and as representing others claiming the same right. 5 M. 4, foll. (1907) 6 C. L. J. 218.

——Suing for less remedy when entitled to a greater one:

See: 31 C. 174=9 C.W.N. 87.

——Title to possession pleaded in first suit withdrawn with leave—Second suit for easement.

See: 2 A.L. J. 59=1905 A.W.N. 18.

——Practice—Plaint—Loss of—Pending appeal.

Where during the progress of a suit or appeal the plaint is stolen or destroyed, the case may proceed upon a copy thereof or, failing a copy, upon oral evidence of the contents thereof. (1904) 1 A.L. J. 695.

Pradhan and Pradhani Tenure.

See: (1) **Chota Nagpur Tenancy Act, 1908. Ss. 64, 74-A, 77 and 208.**

(2) **Land Tenures.**

Prajapatya Marriage.

See: **Hindu Law—Marriage.**

Preamble.

See: **Interpretation of Statutes.**

Precedents.

Synopsis.

1. Absence of
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1. Absence of.

——Absence of—Inference.

Per **Hamilton, J.**—The fact that there is no previously reported case on a certain question leads to no inference either one way or the other. A.I.R. 1942 All. 201=1942 A.L.J. 289=1942 A.W.R. 133=I.L.R. (1942) All. 759=202 Ind. Cas. 350 (F.B.)

——Precedents—Absence of ruling of High Court—Reference to decisions of other High Courts—Desirability.

If there is a conflict of judicial opinions on a particular point, the Courts are bound to follow the decisions, if any, of the local High Court. In absence of any pronouncement by the said High Court, it is the duty of the Courts to study the law as laid down by other High Courts for the purpose of coming to a proper decision. It is very undesirable to reject a plea simply because there is no ruling on it by the local High Court. 32 P.L.R. 92=129 Ind. Cas. 276=1930 Cr. C. 1227=A.I.R. 1930 Lah. 1051.

2. Analogy.

See: **Precedents—Extent of authority.**

——It is always more or less dangerous, when discussing authorities on a particular provision of law to cite cases upon entirely different provisions of law by way of mere analogy. A.I.R. 1936 Lah. 301=37 P.L.R. 387=161 Ind. Cas. 765.

——Attempt to apply analogy to cases with different facts, deprecated.

The attempt to apply judicial decisions by analogy to cases, the facts of which are different, results in confusion and must be deprecated. A.I.R. 1935 All. 323=1935 A.L.J. 201=4 A.W.R. 1352=153 Ind. Cas. 1058.

3. Binding effect on suboridinate courts.

——Duty of Court—Duty of magistracy to follow authority of High Court.

A Magistrate is bound to follow the authority of the High Court to which he is subordinate. Whenever, therefore, he is called upon to decide a question of law it becomes his duty to ascertain whether any pronouncement of the High Court exists on the point. Omission to do so is as much dereliction of duty as omission to refer to sections of the statute. The disregard of authority is, however, something still more objectionable. (1949) A.L.J. 413=I.L.R. (1950) A. 935=A.I.R. 1950 A. 134=51 Cr. L. J. 436.

——Board's rulings and rulings of Chief Court—Preference.

The Board's rulings in matters which come to the Board for final decision must have preference over the contrary rulings of the Chief Court, if any. (1948) A.W.R. (Rev.) 41 (2).

——Duty of subordinate Courts to follow implicitly decisions of High Court to which they are subordinate.

It is the bounden duty of the Judges of Court subordinate to the High Court to implicitly follow the decisions pronounced by the High Court and any attempt on their part to criticise them or to refuse to follow them is to be deprecated.

A Judicial precedent of a higher Court does not cease to be binding upon subordinate Courts merely because all the relevant reasons in support of or against the view taken by the higher Court are not mentioned in the judgment or the actual decision is based upon a reason which does not appeal to the subordinate Judge. A.I.R. 1946 All. 509=1946 A.L.J. 204=1946 A.W.R. H.C. 385=I.L.R. (1946) All. 605=225 Ind. Cas. 91.

——Duty of subordinate court—Division Bench decision and opinion of single Judge of High Court—Duty to follow former in preference to latter.

A subordinate court is in duty bound to follow the decision of a division Bench of the High Court which is binding upon it, whether it considers the same right or wrong, and the subordinate Court is not at liberty to ignore such decision and to follow the opinion of a single Judge of the High Court in preference to a Bench decision. 226 Ind. Cas. 604=A.I.R. 1947 Cal. 248.

——Duty of Subordinate Courts.

It is the bounden duty of Judges of Courts subordinate to the High Court to implicitly follow the decisions pronounced by the High Court and they should not attempt to criticise them or to refuse to follow them. A judicial precedent of a higher Court does not cease to be binding upon subordinate Courts merely because all the relevant reasons in support of or against the view taken by the higher Court are not discussed or mentioned in the judgment or the actual decision is based upon a reason which does not appeal to the subordinate Courts. I.L.R. (1946) All. 605=225 Ind. Cas. 91=1946 A.L.W. 248=1946 R.D. 164=1946 A.W.R. (H.C.) 385=1946 A.L.J. 204=A.I.R. 1946 All. 509.

——It is a flagrant abuse of discretion on the part of Subordinate Courts to disregard the strongly voiced views as to proper and desirable procedure of the High Court to which they are subordinate. A.I.R. 1945 Nag. 72=1944 N.L.J. 515=I.L.R. (1945) Nag. 515=46 Cr. L. J. 731=220 Ind. Cas. 319.

——Subordinate Courts.

The lower Courts are bound by the decision of their own High Court in preference to the decision of another High Court. A.I.R. 1945 Pat. 132=10 C. L. T. 84=26 P. L. T. 42=11 B R. 343=219 Ind. Cas. 30.

Every Judge or Magistrate in the Province is bound to follow the decisions of the High Court of that Province and accept the law as laid down by that Court no matter what his personal views may be. He

has no option in the matter. If he considers himself impelled to present his point of view and does not find it to have been considered and rejected, he may submit it respectfully but nevertheless he has no option but to follow the authority of the High Court and decide the case accordingly. A.I.R. 1944 Lah. 54=I.L.R. (1943) Lah. 760=45 Cr.L. J. 371=211 Ind. Cas. 299.

——It is not open to the lower Court not to follow a direct decision of their High Court and to rely upon what appears to it some grounds of equity and follow a decision of another High Court. A.I.R. 1944 Mad. 124=56 L.W. 494=(1943) 2 M.L.J. 515=1943 M.W.N. 820=212 Ind. Cas. 414.

——Binding effect—Duty of Court.

A Judge has always the right of expressing his own opinion and indicating that he is not in agreement with an authority binding on him, but he is nevertheless, in duty, bound to follow it. The fact that he thinks that some argument has been overlooked in a judgment binding on him is no reason for refusing to follow it. A.I.R. 1943 Mad. 471=56 L.W. 242=(1943) 1 M.L.J. 353=1943 M.W.N. 325=I.L.R. (1944) Mad. 95=210 Ind. Cas. 580.

——High Court decision.

Munsif is not entitled to prefer the decisions of other High Courts even by Full Benches to a decision of a Division Bench of his High Court. A.I.R. 1938 Pat. 120=19 P.L.T. 8=4 B.R. 483=17 Pat. 281=174 Ind. Cas. 769.

——A lower Court, whatever its own opinion, is bound to follow a decision of the High Court so long as it has not been overruled. A.I.R. 1936 Bom. 59=38 Bom. L.R. 6=60 B. 311=160 Ind. Cas. 1046 (F.B.).

——It is desirable that the case-law of the Punjab, especially if it has the merit of uniformity and is otherwise based upon sound legal principle, should, as far as possible, be followed so that the Courts below as well as the litigants might know exactly what is the settled law on a particular subject in the Province. A.I.R. 1936 Lah. 612=165 Ind. Cas. 66.

——Tendency of Courts to follow decisions of other High Courts in matters provided for by local enactments deprecated.

The tendency ou the part of the Subordinate Court of the Central Provinces to take recourse to the decisions of the Allahabad High Court in matters specifically provided for by any local enactments of the Central Provinces, deprecated. A I.R. 1936 Nag. 278=I.L.R. (1937) Nag. 108=167 Ind. Cas. 592.

——It is highly improper for a Subordinate Judge to criticise rulings by which he is bound and especially to criticise them in disrespectual language. A.I.R. 1935 Lah. 433=37 P.L.R. 83=36 Cr. L. J. 1195=157 Ind. Cas. 735.

When there is a ruling of the highest Court of the province published, a Subordinate Court is bound to follow it. A.I.R. 1935 Rang. 525=14 R. 16=160 Ind. Cas. 490.

——Assistant Collector.

In cases in which appeals lie to the District Judge and ultimately to the High Court, it is the duty of the Assistant Collector to follow the rulings of the High Court. A.I.R. 1934 All. 333=1934 A.L.J. 228=18 R. D. 79=3 A.W.R. 352=149 Ind. Cas. 96.

——Contrary decisions of other High Courts.

When there is a direct decision of one High Court on any particular point, Courts subordinate to that High Court ought to follow that decision in preference to a contrary decision of the other High Courts on the same point. A.I.R. 1934 Pat. 173=15 P.L.T. 255=13 Pat. 303=150 Ind. Cas. 34.

——Duty of Subordinate Courts—Duty to follow Division Bench rulings.

It is not open to a Subordinate Court to compare the soundness of the views taken by the High Court to which it is subordinate on a question of law with the views of other High Courts and doubt or decline to follow the same on the ground that the former do not seem to be so sound as the latter.

If there are two decisions of a High Court, one of a single Judge and another of a Bench composed of two Judges, then, unless the Subordinate Court finds some grounds for distinguishing the one decision from the other, it would be bound to follow the decision given by the Bench. A.I.R. 1931 Mad. 71=1930 M.W.N. 955=130 Ind. Cas. 190.

——Conflicting rulings—Subordinate Courts have to follow their High Court.

It is not proper for a Judge subordinate to the High Court to disregard its rulings which he cannot distinguish from the circumstances of the cases before him and to follow contrary opinions expressed byother High Courts. 1930 A.L.J. 1153=124 Ind. Cas. 180=A.I.R. 1930 All. 573.

——Where there are decisions of a High Court, it is the duty of Courts subordinate to that High Court to be guided by them rather than by the decisions of other High Courts. 1930 M.W.N. 689=A.I.R. 1930 Mad. 869=32 M.L.W. 273=129 Ind. Cas. 72=59 M.L.J. 229.

——Binding effect on Subordinate Courts.

Unreported decision of High Court is entitled to respect by lower Courts and should not ordinarily be differed from. 123 Ind. Cas. 901=26 N.L.R. 178=13 N.L.J. 97=A.I.R. 1930 Nag. 270.

——Subordinate Courts must implicitly follow High Court's decision until overruled.

The interpretation of statute is not merely to be law in the particular case, but it is intended to dispel all doubts and difficulties attending the construction of the statute concerned and to serve as a guide to the subordinate judiciary. All Courts of law subordinate to the High Court must, therefore, implicitly and without question follow the decisions of the High Court so long they are not overruled. 112 Ind. Cas. 791=1929 A.L.J. 262=A.I.R. 1929 All. 134.

——Remarks in a remanding judgment not being a definite decision on a point are not binding on the Court hearing the case subsequently. 32 Bom. 432, Expl. 111 Ind. Cas. 278=30 Bom. L.R. 570=A.I.R. 1928 Bom. 201.

——Where there is a ruling of the High Court of the province which covers the case, it is entirely improper for a Subordinate Court to follow a contrary ruling of the High Court of another province. 110 Ind. Cas. 620=6 Rang. 261 =A.I.R. 1928 Rang. 176.

——The judgments of a superior Court, although they do not re-open decided cases, yet decide similar cases pending when the judgments are given. 101 Ind. Cas. 155=51 Bom. 231=29 Bom. L.R. 269 =A.I.R. 1927 Bom. 157.

——Decisions of Chief Court of Lower Burma are binding on Court subordinate to High Courts unless dissented from or overruled by High Court. 98 Ind. Cas. 526=4 Rang. 313=A.I.R. 1927 Rang. 4 (F.B.).

——A Subordinate Court is bound by the ruling of a superior Court however unsound it may appear to it unless it is expressly contrary to any statutory provision of law which was not brought to the notice of the superior Court, or unless it has been overruled. 92 Ind. Cas. 694=7 L.R.A.Cr. 22=27 Cr.L.J. 310=A.I.R. 1926 All. 237.

——One's own High Court should be followed (Walsh, J.).

Where on the subject-matter there is a current of authorities one way in other High Courts and a current of authorities the other way in the High Court to which the Court is subordinate, the Court cannot be said to go outside its jurisdiction or to exercise it irregularly, in following the decision of its own High Court by which it is undoubtedly bound when they are in pari materia. 98 Ind. Cas. 376=48 All. 432=24 A.L.J. 430=A.I.R.1926 All. 346.

——Dalal, J.—A Subordinate Court is bound to follow a decision of a Bench of its High Court, and in doing so it would be exercising jurisdiction rightly and not irregularly. 98 Ind. Cas. 376 =48 All. 432=24 A.L.J. 430=A.I.R. 1926 All. 346.

——Even on a question of fact, inferior Courts are bound to follow, on the same issues, findings of fact pronounced by a superior Court, but there must be a decision by a Court having jurisdiction to review facts and not an expression of opinion on admittedly imperfect material as to a future issue by a Judge determining a point of law with no authority to determine a question of fact. 95 Ind. Cas. 917=48 All. 548=A.I.R. 1926 All. 638.

——Subordinate Courts must follow their own High Court in preference to others. 85 Ind. Cas. 297=48 Mad. 693=A. I. R. 1925 Mad. 261=47 M.L.J. 840.

——An inferior Court ought to follow a ruling of its High Court in preference to the decisions of other High Courts. 65 Ind. Cas. 511=A.I.R. 1923 All. 231.

——Decision of—How far binding on lower courts.

A lower court is legally bound to follow the decision of the High Court. (1904) 8 C.W.N. 578= 31 C. 628.

4. Conflicting decisions.

——Conflicting Rulings of Board of Revenue and High Court—Which to be followed by the Rev. Courts.

Where the rulings of the Board of Revenue and the High Court are conflicting, the revenue Court must follow the rulings of the Board. 1947 A.W.R. (Rev.) 68 (2).

——Conflict between Privy Council decision and Full Bench decision—Latter explaining and limiting the former—Which should be followed.

Where there is a conflict between a Privy Council case and a Full Bench case of a High Court which, in terms, purports to explain and limit the Privy Council decision, the Court is bound to follow the Full Bench case of its own High Court. A.I.R. 1938 All. 540=1938 A.L.J. 894=I.L.R. (1938) All. 823 =1938 A.W.R. 545=178 Ind. Cas. 79.

——Question decided in different ways by same Judge—His later decision is preferable. 30 M.L.W. 960=A.I.R. 1930 Mad. 430=58 M.L.J. 89.

——Each High Court should follow its own decisions unless clearly wrong.

In a matter which is open to divergence of view among various High Courts the Court should follow its own cursus curiae unless it is of opinion that the former decisions of the Court are clearly wrong. 100 Ind. Cas. 385=49 Mad. 302=23 M.L.W. 277=A.I.R. 1926 Mad. 530=50 M.L.J. 674.

——Those in conformity with equity, justice and good conscience should be accepted.

It is the duty of Courts, in cases of divergent opinions, when it seems impossible to ascertain the comparative merits of the authorities, to accept the view which is more in accordance with equity, justice and good conscience. 89 Ind. Cas. 690=47 All. 823=23 A.L.J. 768=A.I.R. 1925 All. 720.

——Conflicting rulings.

In matters of procedure it is advisable that the preponderance of authority in the particular Court should be followed, even supposing that if the matter were res integra different conclusion might be come to. 68 Ind. Cas. 730=14 M.L.W. 85=1921 M.W.N. 487=A.I.R. 1921 Mad. 612=41 M.L.J. 54.

——Conflict.

The authority which is at once more recent and consistent with general principles ought to prevail. But as far as possible the authority of all former decisions ought to be supported and latter decisions must whenever possible, be treated as interpreting and limiting the application of the earlier cases. 9 M.L.T. 251=21 M.L.J. 263=(1911) 1 M.W.N. 151 =9 Ind. Cas. 173 (F.B).

5. Construction.

——Construction of document by one Court is not necessarily guide for construction of similar document by another Court.

Each decision which is arrived at on the construction of a particular document before the Court has got to be dealt with on its own merits and no construction of a particular document before the Court is necessarily a guide for another Court when a similar document comes to be considered by the other Court. A.I.R. 1946 Bom. 499=48 Bom. L.R. 327=227 Ind. Cas. 135.

——The Court must interpret the ruling consistently with the provisions of the statute and not so as to make it nugatory. A.I.R. 1936 Oudh 270 =1936 O.W.N. 354=12 Luck. 109=161 Ind.Cas.605.

——Judgments must be construed with strict regard to its facts.

Remarks made in the judgments must be construed with strict regard to the facts involved in the case in which they were made and that ordinarily they should not be deemed to apply to a different set of facts. 112 Ind. Cas. 689=A.I.R. 1929 Lah. 161.

——Per Sulaiman, Ag. C. J.—When authorities have laid down a rule, it is not always necessary to try to discover the original basis of it. 115 Ind. Cas. 775=51 All. 136=26 A.L. J. 1289=A.I.R. 1928 All. 596 (F.B.)

——Will.

The true way to construe a will is to form an opinion apart from the decided cases and to see whether these decisions require any modification of that opinion, not to beginby considering how far the will in question resembles other wills upon which decisions have been given. A.I.R. 1932 Mad. 489=35 L.W. 756=63 M.L.J. 107=1932 M.W.N. 798 =138 Ind. Cas. 276.

——Will.

In construing a will, intention of the testator must be gathered from the terms of the will, reading it as a whole and not much assistance is derived from previous decisions on the construction of other wills, where the language was different from that of the will under consideration. A.I.R. 1933 Bom. 445=35 Bom. L.R. 952=147 Ind. Cas. 770.

——Will.

In construing a particular will, it is generally unsafe to rely on the words used in another will unless the whole scheme of the two wills is found to be identical. A.I.R. 1937 Bom. 447=39 Bom.L.R. 495=171 Ind. Cas. 742.

——The question whether a particular document is one falling within the scope of S. 17 (1)(b), Registration Act, is one to be decided on a perusal of that document, and rulings upon other documents not shown to be of exactly similar character are no guide to a proper decision. A.I.R. 1935 Lah. 448=38 P.L.R. 582=17 L. 122=159 Ind. Cas. 274.

6. Co-ordinate High Courts.

——Patna High Court—Decision of Calcutta High Court—Preference of over those of other High Courts.

It is the practice of the Patna High Court to lean in favour of a decision of the Calcutta High Court rather than that of any other Court. This is so even when a contrary view has been taken by any of the other High Courts. 27 Pat. 670= A.I.R. 1949 Pat.58=1949 P.W.N. 34=49 Cr.L.J. 657.

——Patna High Court—Calcutta decisions.

It is the practice of the Patna High Court not to depart from the views of the Calcutta High Court unless it is found to be absolutely wrong. A.I.R. 1945 Pat 450=11 Cut. L.T. 33.

——Patna High Court—Calcutta decisions.

It is a practice of the Patna High Court that when there is a difference of opinion between the Calcutta High Court and any other High Court of India, the Calcutta decision should ordinarily be followed. A.I.R. 1942 Pat. 226=20 Pat. 841= 8 B.R. 616=199 Ind. Cas. 713.

——Sind Courts are not bound in absence of Sind ruling by decision of Bombay High Court.

The Subordinate Courts of the Province of Sind are not, in the absence of a decision of the Sind Court, bound by the judgments of the Bombay High Court. As a rule, it would appear wise and prudent for Subordinate Courts in Sind, in the absence of a ruling of the Chief Court to follow a duly reported ruling of the Bombay High Court if there be such ruling on the same point, or in the absence of such a ruling of the Bombay High Court to follow the duly reported ruling of another High Court, and, where the rulings of other High Courts on the same question differ, to follow that ruiing which, in their own judgment, appears the better ruling, but it does not follow that they are bound to follow a ruling of the Bombay High Court, or of any other High Court, even if there be no ruling of this Court, if, in the exercise of their own reason and judgment, they come to a different conclusion. A.I.R. 1941 Sind 221=I.L.R. (1941) Kar. 431=43 Cr.L.J. 468=199 Ind. Cas. 101.

——Direct authority of Chief Court should be preferred.

A dirct authority, though a ruling of a Chief Court especially when it is a Division Bench ruling which refers to other rulings, should be preferred to even that of a High Court if it is not direct. 118 Ind.Cas. 434=A.I.R. 1929 Lah. 174.

——The Patna High Court will not ordinarily depart from a long course of decisions of the Calcutta High Court. 1 P.L.J. 232 and 3 P.L.J. 385 Ref. A.I.R. 1929 Pat. 433.

——Patna High Court will not ordinarily depart from a long course of decisions in the Calcutta High Court. 1 P.L.J. 232 and 3 P.L.J. 285, Foll. 111 Ind. Cas. 84=7 Pat. 613=9 P.L.T. 573=A.I.R. 1928 Pat. 641.

——Sind Courts.

The rulings of the Bombay High Court are considered as having more authority in Sind Judicial Commissioner's Court than those of the

other High Courts. 112 Ind. Cas. 361=29 Cr.L.J. 1033=11 A.I.Cr.R. 392=A.I.R. 1928 Sind 166.

——Decisions of—Binding—Nature of.

Courts should deem themselvesbound by decisions of Courts of co-ordinate jurisdiction, and it should not be left, in cases precisely on all fours for Judge A to decide points of law in one way and for Judge B in another. 105 Ind. Cas. 383=51 Bom. 855=29 B.L.R. 1196=A I.R. 1927 Bom. 542.

——Rangoon High Court is not absolutely bound to follow the decisons of the Lower Burma Chief Court.

(Per Full Bench, Cunliffe, J., dissenting).—The decisions of the Chief Court ot Lower Burma are not absolute authorities binding the High Court on either the Original or Appellate Side, inasmuch as the Chief Court cannot be held to be a Court of co-ordinate jurisdiction with the High Court. The decisions, however, of the Chief Court are conditional authorities of the highest value to which the greatest weight and respect must be attached. The Judges of the High Court should not consider themselves free to set those decisions at naught except for the best and most urgent of reasons and the principle of stare decisis should be applied to these decisions in no narrow or technical spirit.

Per Cunliffe, J.—The true test to be applied in solving the question whether the decisions of the Chief Court are binding on the High Court is to regard both the present High Court and the old Chief Court from the point of view of their main civil and criminal jurisdiction and also from the point of view of their status in relation to the Court of appeal immediately above them.

The difference between a Court of Record and a Court not of Record should not affect in any way at all the legal value of a tribunal's decision. The territorial jurisdiction does not appear to influence the status of a Court one way or the other and looked at from this point of view the Chief Court is co-ordinate to the High Court, and the High Court generally is bound by the authorized reports of the late Chief Court of Lower Burma. 98 Ind. Cas. 526=4 Rang. 313=A.I.R. 1927 Rang. 4 (F.B.).

——The Patna High Court should not without very good reason depart from a long course of decisions of the Calcutta High Court: 3 P.L.J. 367, foll. 78 Ind. Cas. 200=3 Pat. 371=5 P. L. T. 145=1924 P.H.C.C. 33=A.I.R. 1925 Pat. 1 (F.B.).

——Sind Courts.

The Court of the Judicial Commissioner, Sind, has always paid great deference to the decisions of the Bombay High Court. 83 Ind. Cas. 353=17 S.L.R. 133=A.I.R. 1924 Sind 75 (F.B.).

——The Patna High Court will follow the rulings of the Calcutta High Court, unless they are decidedly wrong, if there is a conflict of judicial opinion prior to the establishment of the Patna High Court in 1916. 67 Ind. Cas. 538=1 Pat. 651 =3 Pat. L. T. 422=1922 P. H. C. C 229=A. I. R. 1922 Pat. 188.

——Earlier decision of a court of co-ordinate jurisdiction must be respected.

When a decision of a single Judge on the Original Side of the High Court is produced before another Judge, he is bound to treat it with respect and ordinarily to follow it, if it is applicable to the circumstances of the case before him. But this does not imply that he cannot examine the matter and that it is not competent to him to take a contrary view, if he is convinced that the decision is erroneous. The answer to the question, what regard is to be had to an earlier decision of a Court of co-ordinate jurisdiction must depend upon a variety of circumstances. One important factor is the length of time during which it has stood unchallenged. Another factor, possibly of greater importance, is whether the decision gives adequate reasons for the conclusion embodied therein. But the position is indefensible on principle, that although a Judge may feel absolutely convinced that the decision produced before him is erroneous in law, he is still bound to decide against his own opinion. To take such a view is to hold that the Judge may be reduced to an automaton by the production of an earlier judgment. 60 Ind. Cas. 406=48 Cal. 69=A.I.R. 1921 Cal. 169.

7. Distinguishing.

——Facts different—Principle deduced from such facts when can be applied.

The fact that the facts of one case differ from the facts of another does not of itself exclude the application of the principle or rule laid down in the other case when the facts are plainly facts to which the principle or rule should apply. A.I.R. 1944 Sind 113=I.L.R. (1943) Kar. 371=45 Cr.L.J. 704=213 Ind. Cas. 317.

——Right acquired not under statute but under deed—Cases of Hindu widow or widows of taluqdars cannot be relied on.

It would not be safe to rely on the cases of Hindu widows or the widows of taluqdars where the right has come into existence under the deed and not under any statute. A.I.R. 1941 Oudh 263 =1941 O.W.N. 245=1941 A.W.R. 156=194 Ind. Cas. 16.

——Privy Council.

It is not open to the Indian Courts to attempt to draw fine distinctions in the pronouncements of the Judicial Committee. A.I.R. 1940 Pat. 707=19 Pat. 688=7 B.R. 250=191 Ind. Cas. 773.

——Distinguishing.

Case is distinguishable only when its principle fails to be applicable for some step in the reasoning in the case. 110 Ind. Cas. 141=51 Mad. 361=27 M. L. W. 688=1928 M.W.N. 346=A. I. R. 1928 Mad. 657=54 M.L.J. 726 (F.B.).

——If a case is distinguished it is unnecessary to express any opinion as to its correctness. It is not serious that cases are sometimes distinguished on very slender grounds to avoid the responsibility of appearing to overrule them. 80 Ind. Cas.

72=22 A.L.J. 812=5 L.R.A. Civ. 599=46 All. 884=A.I.R. 1924 All. 851.

8. English and other Foreign decisions.

——English decisions—Injunctions and Receiver—English and Indian laws—If same—English case law—If may be followed by Indian Courts.

The law relating to injunctions and Receivers in India is practically the same as that which prevails in England and therefore resort may be had to English case-law bearing on these subjects by Courts in India, in the absence of any statutory enactment to the contrary. 27 Pat. 263=A.I.R. 1949 Pat. 496.

——Decisions of Canadian, Australian and United States Courts—Value of.

The decisions of Canadian and Australian Courts are not binding upon Courts in India and still less those of the United States, but where they are relevant, they will always be listened to by the Indian Court with attention and respect, as judgments of eminent men accustomed to expound and illumine the principles of jurisprudence. And if the Indian Court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers. For in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting; and since no two constitutions are in identical terms it is extremely unsafe to assume that the decision of one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases; for a word or a phrase may take a colour from its context and bear different sense accordingly. A.I.R. 1946 All. 161=I.L.R. (1945) All. 782=1945 A.W.R. (H.C.) 281=224 Ind.Cas. 356 =1945 A.L.J. 241=47 Cr.L.J. 601.

——Decisions of Australian Courts—Value of.

The decisions of the Australian Courts are not binding on Courts in India but when relevant they will be listened to by an Indian Court with attention and respect and if it finds itself in agreement with them it will deem its own opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers. A.I.R. 1946 Bom. 216=224 Ind. Cas. 476=47 Cr.L.J. 594=47 Bom. L.R. 1010.

——Decisions of the English Courts are not binding on the Courts in India. A.I.R. 1945 All. 318 =I.L.R. (1944) All. 697=1945 A.W.R. (H.C.) 328.

——Courts in India are not bound by the decisions of the Courts of Scotland and England. They are free to follow whichever they choose. A.I.R. 1945 Nag. 8=I.L.R. (1945) Nag. 6.

——English cases are not binding but serve as valuable guide when Indian statutes are based on English Law. A.I.R. 1944 All. 204=1944 A.L.J. 280 =1944 A.W.R. 201=1944 O.W.N. 176=I.L.R. (1944) All. 302.

——When should be referred to and adopted.

The decisions of the English Courts are not binding upon the Courts in India. The views expressed in the judgments of English Courts are referred to and adopted by the Courts in India only when it appears that those views are fundamentally sound and are based on immutable principles. A.I.R. 1942 All. 302=(1942) A.L.J. 561=1942 A.W.R. 205=202 Ind. Cas. 458.

——Applicability of equitable principles.

A High Court is entitled to apply principles of justice, equity and good conscience and to look for such principle to English authorities. A.I.R. 1941 All. 9=(1940) A.L.J. 762=1940 A.W.R. 539=193 Ind. Cas. 495.

——English rules of common or statutory law.

The Courts in India are not bound by any English rule of the common or statutory law except in so far as it furnishes a standard of justice, equity and good conscience to be applied to the decisions of questions arising for consideration by the Courts of India. A.I.R. 1941 Mad. 129=(1940) 2 M.L.J. 520=52 L.W. 556=(1940) M.W.N. 1083.

——When helpful.

When there are clear English authorities dealing with the question whether a creditor has or has not an interest in the estate, such authorities are helpful when precisely the same question has to be answered in India. A.I.R. 1941 Pat. 151=7 B.R. 9=20 Pat. 75=22 P.L.T. 649=190 Ind. Cas. 362.

——Privy Council appeal.

English decisions are not binding either in fact or in law on a question arising in an appeal from a judgment in the State of Johore. Nevertheless the reasoning of Judges in the English Courts may prove helpul in solving a similar problem arising in that State. A.I.R. 1940 P.C. 60=(1940) 1 M.L.J. 68=51 L.W. 702=(1940) M.W.N. 702=42 P.L.R. 450 =187 Ind. Cas. 445 (P.C.).

——Suits on mortgages.

The English Law regarding mortgages is not always a safe guide for the determination of all questions regarding the respective rights of mortgagors and mortgagees in India and wherever rights have been regulated by the Indian statute law, there can be no scope for a reference to the English law regarding those rights. Although there exists a difference between the English and Indian law on the subject in many respects, nevertheless, where the Indian statute law is silent on the subject and where the point for decision is not affected by principles which are peculiar to the English law alone, the English decisions are a valuable source of elucidation on the problems arising out of a mortgage which is, in a form prevalent in England and which has been borrowed from there. A.I.R. 1940 Cal. 429=I.L.R. (1940) 1 Cal. 197=191 Ind. Cas. 559.

——Indian States not in pari materia.

The citation of English authorities to consider Indian statutes which are not in pari materia is not proper. A.I.R. 1939 Pat. 323=5 B.R. 874=20 P.L.T. 825=183 Ind. Cas. 179 (2).

——Precaution to be taken.

It is often dangerous to cite English cases quoted in Indian commentaries without ascertaining whether the English law applicable is the same as the Indian Law. A.I.R. 1938 Rang. 289= 1938 Rang. L.R. 299=177 Ind.Cas. 626.

——Trade Mark cases.

As registered trade marks are recognised by law in England and not in India where a right over them can be obtained only by user, the English cases have to be used with caution. A.I.R. 1937 Nag. 158=I.L.R. (1939) Nag. 569= 168 Ind. Cas. 573.

——When paramount in British India.

In so far as the law of British India has been codified in Acts of the Legislature (and the greater part of it has been enacted in statutory form) the law of British India is the law contained in these Acts and nowhere else. Decisions of Judges are, of course, of the greatest value in assisting Judges before whom similar points subsequently arise for decision, to construe the meaning of statutory provisions, and are frequently of binding authority; but care must be taken in utilising for this purpose decisions of the English Courts. Before applying an English decision, it must first be ascertained how far the statute law of India coincides with the law of England which the decision explains and expounds. Where the law of British India appears on examination to be the same as the law of England on any subject the decisions of the English Courts on that subject form a most valuable guide to the Courts in India, and a decision of the House of Lords on such a subject must be considered to be of paramount authority in India. A.I.R. 1937 Rang. 83=14 R. 666=38 Cr.L.J. 524=168 Ind. Cas. 193 (F.B.).

——Decision of Court of law as opposed to Court of Equity.

A decision of a Court of Law as opposed to a Court of Equity which the common law lawyers recognize as being inequitable, is not a decision which ought to be followed in India. The principle involved has not been accepted by the Privy Council in appeals from the India. A.I.R. 1936 Rang. 141=162 Ind. Cas. 352.

—It is always dangerous to apply English decisions to the construction of an Indian Act. A.I.R. 1932 P.C. 207=9 O.W.N. 638=36 C.W.N. 1017=36 L.W. 246=55 C.L.J. 237=1932 A.L.J. 913=7 Luck. 442=34 Bom. L.R. 1600=63 M.L.J. 187=1932 M.W.N. 912=59 I.A. 376=138 Ind. Cas. 779 (P.C.).

——The use of English decisions in equity to abrogate the clear provisions of an Indian statute deprecated. A.I.R. 1932 Rang. 185=10 R. 403= 140 Ind. Cas. 487.

—English authorities can only be utilised with caution in the consideration of Indian incom-tax cases owing to the differences in the relevant legislation. A.I.R. 1931 P.C. 165=1931 A.L.J. 481 =35 C.W.N. 895=1931 M.W.N. 701=34 L.W. 234 =61 M.L.J. 251=33 Bom. L.R. 1263=54 M. 691= 54 C.L.J. 381=58 I.A. 239=132 Ind.Cas. 619 (P.C.).

——It is futile to endeavour to discuss a matter relating to specific performance of contracts by a reference to a priori principles and it is of but little use to refer to English authorities, the law in India with regard to specific performance of contracts being in many respects quite different from the law in England. A.I.R. 1931 Cal. 463= 35 C.W.N. 40=131 Ind. Cas. 849.

—Where the provisions and the wordings of the Presidency Towns Insolvency Act, are almost the same as those of the English Bankruptcy Act, the rulings of the English Courts on the latter Act are to be followed in interpreting the Indian Act. 1931 Sind 44=25 S.L.R. 310=131 Ind. Cas. 130.

——Where the provisions and wordings of the Presidency Towns Insolvency Act are the same as those of the English Bankruptcy Act, the rulings of the English Courts are to be followed in interpreting the Indian Act. A.I.R. 1931 Sind 70= 25 S.L.R. 381=131 Ind. Cas. 705.

——English and American decisions.

English cases are not necessarily good guides for the decision of mortgage suits in the Indian Courts. 31 Cal. 57 and 33 Cal. 410, Foll. 115 Ind. Cas. 671=6 Rang. 771=A.I.R. 1929 Rang. 71.

—Indian Act practically reproducing English statute—English decisions thereon should not be neglected. 109 Ind. Cas. 377=A.I.R. 1928 Mad. 434.

——American authorities—Application to India is unsafe.

It is unsafe to rely upon the American decisions and apply them to Indian conditions which are sometimes different. 105 Ind. Cas. 864=50 Mad. 961=26 M.L.W. 513=1927 M. W. N. 854= A.I.R. 1927 Mad. 988=53 M.L.J. 868.

——Judgments of foreign Courts are not binding.

American decisions are not binding on Indian Courts. However useful in the scientific study of comparative jurisprudence, judgments of foreign Courts, based often on considerations and conditions totally differing from those applicable to or prevailing in India, are only likely to confuse the administration of justice. 102 Ind. Cas. 878=5 Rang. 212=A.I.R. 1927 Rang. 183.

It is not always profitable, especially in partnership suits, to take English cases for guidance in India. 100 Ind. Cas. 204=A.I.R. 1927 Sind 130.

—Where the Indian statute is clear and sufficient nothing is to be gained by a reference to English case law. 93 Ind.Cas. 271=23 M.L.W. 145=1926 M.W.N. 159=A.I.R. 1926 Mad. 357=50 M.L.J. 239.

——Highways—English principles should be applied to cases of highways.

It is sometimes dangerous to attempt to ascertain the law in India by the discussion of English cases. But in a matter where, legislation like the Municipalities Act, following closely upon English Local Government legislation, has left the matter at large, without following it up by modifying the general law on a topic such as public ways and highways the courts in India are really enjoined to apply the English principles. 85 Ind. Cas. 304 =46 All. 470=22 A.L.J. 729=6 L.R.A. Civ. 67= A.I.R. 1924 All. 599.

The common law of England except where it has been abrogated, and in so far as it is not inapplicable to Indian conditions, is part of the law of India. 83 Ind.Cas. 757=50 Cal. 667=A.I.R. 1924 Cal. 240.

—The opinions of jurists, however eminent, are entitled to Indian Courts' respectful consideration but the Courts are not bound by those opinions, and judgments of English Courts stand in the same category. 77 Ind.Cas. 654=25 Bom. L. R. 945=47 Bom. 843=A.I.R. 1923 Bom. 321 (F.B.).

English law of Highways—Importation wholesale is not right. 70 Ind. Cas. 74=9 O.L.J. 497= A.I.R. 1923 Oudh 26.

——Applicability.

The decisions of English Courts must, subject to all necessary exceptions, continue to afford guidance in India. In particular, where a new Statute expressed in exacter language and administered in a stricter manner than the former law is in question, the assistance afforded by English authorities on the construction of what are, due allowance being made for different wording and local conditions, in many respects similar statutes cannot safely be rejected. 64 Ind. Cas. 682=44 Mad. 718=14 M.L.W. 108=1921 M.W.N. 502= A.I R. 1921 Mad. 524=41 M.L.J. 177.

——Common Law of England—Applicability to India.

The rules of the common law of England have no application to mofussil towns in India except as rules of justice, equity and good conscience. (1920) P.H.C.C. 245=1 Pat. L.T. 229=2 U.P.L.R. (Pat.) 111=56 Ind. Cas. 344.

——English Law — Applicability of—Justice, equity and good conscience.

Where there is no prescribed law to which the decision of a court must conform and the Court must proceed according to justice, equity, and good conscience, the Court may follow the principles of English law applicable to a similar state of circumstances. 55 Ind.Cas. 152 (Nag.).

——American decisions.

The P.C. deprecated the growing practice in India of referring largely to foriegn decisions based on considerations and conditions totally different from those applicable to or prevailing in India. 45 Cal. 878=35 M.L.J. 422=16 A.L.J. 800 =21 M.L.T. 330=28 C.L.J. 409=23 C.W.N. 50=5 Pat.L.W. 276=20 Bom.L.R. 1022=(1919) M.W.N. 91=9 L.W. 518=45 I.A. 73=47 Ind. Cas. 513 (P.C.).

——English and American.

Per Wallis, C.J.—The prohibition against unnecessary resort to foreign decisions in I.L.R. 45 Cal. 878 P.C. is confined to American dicisions. Per Sadasiva Ayyer, J.—The prohibition would equally apply to decisions of English Court in matters of procedure for both are foreign systems of law. 42 Mad. 821=37 M.L.J. 284=26 M.L.T. 223=11 L.W. 63=(1919) M.W.N. 640=53 Ind. Cas. 213.

——English decisions—Value of—Doctrine of exemplary damages—If applicable to India.

The doctrine of exemplary damages should not be introduced into India. English decisions on the law of libel should not be accepted as precedents for Indian Courts unless they are in consonance with justice, equity and good conscience. 32 M.L.J. 392=5 L.W. 598=21 M.L.T. 324=40 Ind. Cas. 126.

——English Law—Decisions of Court of Appeal.

Decisions of the English Court of Appeal ought to be greatly respected in construing a branch of an Indian Act which is essentially based on English Law. 39 Mad. 250=35 Ind. Cas. 942.

——English Cases.

The principle of stare decisis should be followed in doubtful cases. Great care should be exercised in applying to this country the rules liad down in English law with regard to equitable rights. 12 M.L.T. 315=(1912) M.W.N. 919=23 M.L.J. 430=16 Ind. Cas. 601.

9. Extent of authority.

——Expositions of law in a judgment.

The expositions of law in a judgment must be qualified by the particular facts of the case. 1950 A.L.J. 673=A.I.R. 1950 A. 617.

——Judicial decision—Value of—Extension of principle of decision of one case to facts of another case—Permissibility.

It is not always safe logically to extend a ratio to be deduced from a particular case decided by a particular tribunal. A decision is good with regard to the facts found in the particular case and the principle which emerges on a consideration of those facts. Different facts may lead to a different decision and it is not proper to apply a principle based on the facts of one case to the facts of another case merely because relentless logic may so require. I.L.R. 1950 Bom. 510=52 Bom. L.R. 527=A.I.R. 1950 Bom. 360 (F.B.).

——Value—Decisions—Authority of.

One must always read a decision as deciding what it actually decides. I.L.R. (1951) Bom. 83=A.I.R. 1950 Bom. 391=1950 I.T.R. 712=52 Bom. L.R. 427.

——Judgment in case—Value of.

A case is only an authority for what it actually decides. Every judgment must be read as applicable to the particular facts proved or assumed to be proved. 53 Mys. H.C.R. 17=28 Mys.L.J. 80.

——Judicial decision—Authority of—Extent of.

It is a well-established principle of interpretation of judicial decisions that a case is an authority only for what it decides and nothing beyond that. 50 Bom. L R. 368=1948 I.T.R. 294=A.I.R. 1949 Bom. 17.

——Judicial decisions—Authority of.

A decision is useless as a precedent unless it involves the determination of a principle. The foundation of a precedent is that the legal rule applicable to any particular case is fixed and settled from the beginning and the decision of a case is only a deduction from the general rule to the particular circumstances before the Court. A Judge is not necessarily influenced by the deductions of other tribunals. It is to the stable general principle that he owes his allegiance in all circumstances. No individual suggestion contains any future authority in itself. I.L.R. (1949) Cut. 139.

——Every judgment must be read as applicable to particular facts proved or assumed to be proved.

Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed or qualified by the praticular facts of the case in which such expressions are to be found. A.I.R. 1946 Lah. 280=48 Pun. L.R. 250=226 Ind. Cas. 5=I.L.R. (1947) Lah. 47 (F.B.).

——Authority of — Extent of—General observations—Value of.

A decision is only an authority for what it actually decides; it cannot be quoted for a proposition that may seem to follow from it. Every judgment must be read as applicable to the particular facts proved or assumed to be proved; the generality of expressions that may be found cannot be intended to be expositions of whole law but must be regarded as governed or qualified by the particular facts of the cases in which such expressions occur. 224 Ind. Cas. 312=12 B.R. 513=A.I.R. 1946 Pat. 419=1946 P.W.N. 361=27 P.L.T. 499.

——Method of application — Each judgment must be read as applicable to its particular facts and is no authority for propositions logically following from it.

Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides, and it cannot be quoted for a proposition that may seem to follow logically from it. (1901) A. C. 495, Foll. 1930 M.W.N. 1091=32 M.L.W. 760=A.I.R. 1931 Mad. 55=129 Ind. Cas. 225=54 Mad. 495=60 M.L.J. 456.

——Judgments should be construed with due regard to particular facts.

Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. Quinn v. Leatham, (1901) A.C. 495, Foll. 93 Ind. Cas. 344=7 Lah. 179=27 P.L.R. 50=8 L.L.J. 13=A.I.R. 1926 Lah. 65.

——Application of.

General expressions found in a judgment do not expound general law but refer to facts actually decided. 16 N.L.R. 131=56 Ind. Cas. 44.

——Value of.

A case is an authority for what it actually decided and not for a proposition that may seem to follow logically from it. 16 N.L.R. ,131 =56 Ind. Cas. 44.

——Value of.

Where a general rule of construction as once been laid down by authority, a decision arising from its application to a particular set of facts cannot operate as a precedent, for the very remote chance of any two sets of facts being absolutely similar may be excluded. 21 Bom. L.R. 1047=53 Ind. Cas. 805.

——Value of.

Every judgment is applicable to the particular facts proved in the case and each case is authority only for what it actually decides. 42 Ind. Cas. 965. (Nag.)

——Value of.

The language of a judicial pronouncement must be understood as spoken in reference to the facts under consideration and limited in meaning by those facts. 45 Cal. 294=21 C.W.N. 847=25 C.L.J. 629=41 Ind. Cas. 353.

——Value of.

Every judgment must be read as applicable to the particular set of facts proved and the general expressions used must be considered to be governed and qualified by the particular facts of the case in which such expressions are found. A case is an authority for what it decides and not for what may seem to follow logically from it. 25 C.L.J. 626=21 C.W.N. 1132=41 Ind. Cas. 525.

——Value of.

A judgment is authority only for what it decides, but not for what may seem logically to follow from it. 2 O.L.J. 502=32 Ind. Cas. 291.

——Value of.

Per Richards, C. J.—It is very dangerous to place too much reliance on expressions of learned judges used in giving judgment in other cases where the facts and circumstances were different. The only use of authorities or decided cases is the establishment of some principle which the Judge can follow out in deciding the case before him. 13 Ch. D, 696; (1901) A. C. 495; (1909) A. C. 25, Foll. Per Banerjee, J:—When the Judicial Committee of the Privy Council lays down a principle it is essential that it should be followed in India so as not to unsettle what has hitherto been understood to be the law on the point. 37 All. 496=13 A.L.J. 594=30 Ind. Cas. 657.

[On Appeal 40 All. 593 (P.C.)].

——Value of.

Every judgment is applicable to the particular facts taken as proved as general expressions found therein are not expositions of the whole law but are governed by particular facts of the case. 36 Bom. 146=13 Bom. L.R. 1057=12 Ind. Cas. 737.

——Extent of authority—Every Judgment must be read as applicable to particular facts proved or assumed to be proved—Case is an authority for what it actually decides.

Every judgment must be read as applicable to the particular facts proved or assumed to be proved, in that case, since the generality of expression that may be found are not intended to be expositions of the whole law but governed or qualified by the particular facts of the case in which such expressions are found; that is, a case is only an authority for what it actually decides. It cannot be quoted for a proposition that may seem to follow from it logically. A.I.R. 1946 Pat. 419=12 B.R. 513=224 Ind. Cas. 312.

——It is the decision and not the opinion of the Court nor the report of it that makes the precedent. A.I.R. 1944 Nag. 44=1944 N.L.J. 1=I.L.R. (1944) Nag. 342=213 Ind. Cas. 241 (F.B.).

——A case is an authority for what it actually decides and not for point which may seem logically to follow from it. A.I.R. 1944 Nag. 371=1944 N.L.J. 438.

——Value of.

A case is only an authority for what it decides. A.I.R. 1944 Nag. 109=9 C.L.T. 57=10 B.R. 486=212 Ind. Cas. 273.

——Per Mitter and Sen, JJ.—The decision of a Court cannot repeal or annul a statute. A.I.R. 1943 Cal. 377=47 C.W.N. 802=208 Ind. Cas. 493 (S.B.).

——Ratio decidendi.

The ratio decidendi of a case alone is a binding authority as a precedent. The statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand, have no binding authority on another Court, though they may have some merely persuasive efficacy. A.I.R. 1943 Nag. 340=1943 N.L.J. 596=I.L.R. (1944) Nag. 1=214 Ind. Cas. 130 (F.B.).

——Case is authority for what it actually decides.

A case is only authority for what it actually decides. It cannot be quoted for a proposition that may seem to follow logically from it. A.I.R. 1943 Nag. 340=1943 N.L.J. 596=I.L.R. (1944) Nag. 1=214 Ind. Cas. 130 (F.B.).

——Courts merely declare law as it exists.

The Courts of law merely declare the law and do not make it. The law as laid down shall be deemed to have so existed. A.I.R. 1943 Oudh 78=1942 O.W.N. 465=1942 A.W.R.C.C. 305=205 Ind. Cas. 628.

——A case is an authority for what it actually decides and not for what may logically follow from that decision. Hence, the principles laid down in a case which make an inroad into the general principles of law and rights of ownership should not be further extended. A.I.R. 1943 Pat. 194=24 P.L.T. 175=9 B.R. 401=22 Pat. 382=207 Ind. Cas. 353 (F.B.).

——Particular facts.

Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are to be found. A.I.R. 1941 Cal. 574=198 Ind. Cas. 462.

——Parties consenting not to canvass particular legal question—Decision in suit, value of, as precedent.

Where, by consent, parties to a suit do not canvass a particular legal question, the decision in that suit cannot be an authority binding on an inferior Court as to what the answer to that question is. A.I.R. 1941 Rang. 87=1940 Rang. L.R. 783=193 Ind. Cas. 507.

——Generality of expressions found in judgments, whether intended to be expositions of whole law.

Every judgment must be read as applicable to "the particular facts proved, or assumed to be proved" since, the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed or qualified by the particular facts of the case in which such expressions are to be found. A.I.R. 1940 P.C. 230=52 L.W. 926=1940 M.W.N. 1275=22 P.L.T. 1=(1941) 1 M.L.J. 130=I.L.R. (1940) Lah. 685=45 C.W.N. 232=I.L.R. (1940) Kar. (P.C.) 447 Sup.=43 P.L.R. 168=43 Bom. L.R. 372=67 I.A. 464=73 C.L.J. 302=191 Ind. Cas. 548 (P.C.)

——Revenue Courts, decisions of.

Per Bose, J., in order of reference.—The decisions of Revenue Courts are not binding on High

Courts. A.I.R. 1940 Nag. 113=1939 N.L.J. 216= I.L.R. (1941) Nag. 386=189 Ind. Cas. 111.

——Decisions of Board of Revenue.

Per Bennett and Allso, JJ.—The decisions of the Board of Revenue are entitled to respect in the High Court, and where possible, difference should be avoided, but those rulings are not binding upon the High Court in any way and the High Court cannot be held responsible for any practical difficulties which may arise.

Per Iqbal Ahmad, J.—A view contrary to the view taken by the Board of Revenue would be of mere academical interest and of no practical utility for the simple reason that the Collectors are bound by the decisions of the Board and not by the decisions of the High Court. A.I.R. 1939 All. 291=1939 A L.J. 281=1939 R.D. 189=I.L.R. (1939) All. 518=1939 A.W.R. 278=181 Ind. Cas. 561(F.B.).

——A case is an authority for what it decides and not what may seem logically to follow from it, and expressions of opinion, even of eminent Judges must be limited unless there is a very strong indication to the contrary, to the facts which they had before them. A.I.R. 1937 Bom 214=39 Bom. L.R. 123=I.L.R. (1937) Bom. 310=169 Ind. Cas. 376.

——Point not discussed.

A decision which was expressly directed to one point and one point only cannot be considered a decision for a point which was not discussed. A.I.R. 1937 Pat. 44=15 Pat. 753=3 B. R. 191=18 P.L.T. 176=166 Ind. Cas. 599.

——Decision is authority for what is specifically decided.

A decision is an authority only for that which it specifically decides and the fact that every possible argument was not advanced does not detract in any way from the authority of the decision on the specific point. A.I.R. 1934 Pat. 292=15 P.L.T. 237=13 Pat. 486=1 B.R. 289=154 Ind. Cas. 18.

——Judges declare law and do not legislate.

It is a fiction regarding case law that Judges deciding cases do not legislate; they merely declare the law. A.I.R. 1934 Sind 95=150 Ind. Cas. 839.

Per Mukerji, J.—A case is an authority only for the proposition that it decides and not for every proposition that may appear to follow logically from the decision. Law is not always logical. A.I.R. 1931 All. 162=1931 A.L.J. 122= 53 A. 239=135 Ind. Cas. 119 (F.B.).

——Court should bear in mind that a case is only an authority for what it actually decides and that every judgment must be read as applicable to the particular facts proved or assumed to be proved. A.I.R. 1931 All. 398= 133 Ind. Cas. 155.

——Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since, the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. A.I.R. 1931 Oudh 177=8 O.W.N. 349=136 Ind. Cas. 642.

——Extent of authority—Judicial decision.

A Judicial decision is an authority for the proposition which was actually decided in the case. To find out the actual decision should be fastened to the point or points in issue which emerge from the pleadings and to the findings of the Court upon such point. It is undesirable and unsafe to extend the frontier by having recourse to rules of analogy or to rules of logic. 126 Ind. Cas. 357=A.I.R. 1930 All. 82.

——A case is only an authority for what it actually decides. Quinn v. Leatham, (1901) A.C. 495, Foll. 118 Ind. Cas. 17=1929 A. L. J. 983=A.I.R. 1929 All. 625 (F.B.).

——A case is authority for what it actually decides and not for what would seem to flow logically from it for the law is not always logical at all. (1901) A.C. 495, Foll. 120 Ind. Cas. 157 =49 C.L.J. 298=33 C.W.N. 553=56 Cal. 1135= A.I.R. 1929 Cal. 337.

——Previous judgment not inter partes—Value of.

Dawson-Miller, C. J.—A previous judgment of the same Court not inter partes, though not binding as res judicata and determined on the facts there proved, is still an authority which is entitled to respect, the question raised being the same. 111 Ind. Cas. 57=7 Pat. 520=A.I.R. 1928 Pat. 304.

——Per Mitter, J.—A case is only an authority for what it actually decides and it cannot be quoted for a proposition that would seem to follow logically from it. Quinn v. Leatham, (1901) A.C. 506, Appl. 104 Ind. Cas. 547=31 C.W.N. 750 =A.I.R. 1927 Cal. 565.

——Every judgment must be read as applicable to the particular facts proved or assumed to be proved. A case is only an authority for what it actually decides and cannot be quoted for a proposition that may seem to follow logically from it. 104 Ind. Cas. 188=45 C.L.J. 557=A.I.R. 1927 Cal. 657.

——A judgment is an authority for what it decides but not for what may seem logically to follow from it. Every judgment must be read as applicable to the particular facts proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts found. 99 Ind. Cas. 890=4 O.W.N. 350=A.I.R. 1927 Oudh 138.

——Lower Court's decision reversed on some of the grounds only.

Where several points are raised by the decision of the Court under appeal and their Lordships,

having come to the conclusion that they must advise His Majesty to reverse the decision of the Court below on some of the grounds only, abstain from expressing any opinion on the other grounds, in so doing they are not to be held to have given any authority thereby to that part of the decision which they have not touched. 94 Ind. Cas. 974=53 Cal. 533=53 I.A. 100=30 C.W.N. 745 =24 A. L. J. 761=A I.R. 1926 P.C. 41 (P.C.).

——A case is only an authority for the proposition it decides and not for any proposition that may seem to follow logically from it. 95 Ind. Cas. 644 =43 C.L.J. 394=30 C.W.N. 740=A.I.R. 1926 Cal. 913.

——Every judgment must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides. 94 Ind. Cas. 717=4 Bur. L. J. 213=27 Cr.L. J. 669= A.I.R. 1926 Rang. 53.

——Authorities are useful only so far as they lay down the law, but they are usually not safe guides when questions of fact are involved. 89 Ind. Cas. 438=23 A.L.J. 608=6 L.R.A.Civ. 472=A.I.R. 1925 All. 658.

——A case is an authority only for what it decided and is no authority for what may seem to follow from the reasonings adopted in the case. 82 Ind. Cas. 243=46 All. 754=5 L.R.A.Civ. 509= A.I.R. 1924 All. 897.

——Case is authority not for what logically follows from it.

Per Mookerjee, J.—The language of a judicial pronouncement must be understood as spoken in reference to the facts under consideration and limited in meaning by those facts; the generality of the expression which may be found there is not intended to be an exposition of the whole law, but is governed and qualified by the particular facts of the case in which such expressions are to be found. It follows as corollary that a case is only an authority for what it actually decides and cannot be quoted for proposition that may seem logically to follow from it. 81 Ind Cas. 353=28 C.W.N. 170=38 C.L.J. 411=25 Cr.L.J. 817=A.I.R. 1924 Cal. 257 (F.B.).

——It is an oft-repeated caution that a decision is an authority for what it decides, and that it is not an authority for what may seem to be a logical consequence of that decision. 82 Ind. Cas. 618=24 Bom. L.R. 1162=47 Bom. 110=A.I.R. 1923 Bom. 17.

——Decisions of Courts merely declare law as it has been.

The decision of a Court must not be treated as if it were a statute which imposed law for the first time. Such decision is merely declaratory of the law as it has existed. 57 Ind. Cas. 545= 48 Cal. 30=47 I. A. 213=16 N.L.R. 187=18 A.L.J. 1049=22 Bom. L.R. 1070=28 M.L.T. 157=12 M.L.W. 679=1920 M.W.N. 483=3 N.L.J. 251=25 C.W.N. 243=A.I.R. 1921 P.C. 59=39 M.L.J. 166 (P.C.).

——Construction.

Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. See per Halsbury, L.C., 1901 A.C. 495 (536). (1906) 10 C.W.N. 1044=4 C. L. J. 343=33 Cal. 1290.

10. Federal Court.

——Federal Court—Practice—Criminal jurisdiction—Practice and precedent of Privy Council as to limits within which interference is warrented—Binding nature.

Though the Federal Court is no longer bound by Privy Council practice and precedents, there is no reason for it to depart from the principles which have been laid by the Privy Council defining the limits within which interference with the course Criminal justice dispensed in the Subordinate Court is warranted. 29 Pat. 391 =31 P.L.T. 157=1950 M.W.N. 327=52 Bom. L.R. 512=1950 R.L.W. 62=51 Cr. L. J. 1057=63 L.W. 501=A.I.R. 1950 F.C. 80=4 A.I.Cr.D. 291= (1950) S.C.J. 143 (F.C.).

——Advisory opinion of majority of federal Court Judges.

Even if the opinions expressed in a case by the Federal Court are advisory opinions only, they should not be regarded as any the less binding upon the Federal Court on that account. The opinion of the majority must be accepted. A.I.R. 1942 F.C. 33=23 P.L.T. 463=55 L.W. 337= 46 C.W.N. F.C. 38=I.L.R. (1942) Kar. (F.C.) 72 Sup.=1942 M.W.N. 574=(1942) 2 M.L.J. 327=8 B. R. 735=1942 F.C.R. 90=200 Ind. Cas. 551 (F.C.).

——Decision of Federal Court is binding on High Court.

By reason of S. 212 Government of India Act, the law declared by the Federal Court so far as applicable has to be followed by the High Court. The declaration by the Federal Court in Keshav Talpade v. Emperor [A.I.R. (Vol. 30) 1943 F.C. 1 =207 Ind. Cas. 1(F.C.)] and Emperor v. Shibnath Banerjee, [A. I. R. (Vol. 30) 1943 F. C. 75=211 Ind. Cas. 241(F.C.)] that S. 2 Defence of India Act, is intra vires the Indian Legislature is binding on the High Court and precludes it from considering the validity of S. 2 even on a ground which was not raised before the Federal Court. The Federal Court may have the powet, on the new point being taken before it, to revise its view hut so far as the High Court is concerned, it is bound by these decisions. A.I.R. 1944 Lah. 33=I.L.R. (1944) Lah. 245=45 Cr. L. J. 580=212 Ind. Cas. 321 (F.B.).

——Federal Court.

High Court is bound to follow the Federal Court decision and to give effect to it. A. I. R. 1939 Pat. 592=6 B.R. 109=21 P. L. T. 818=185 Ind. Cas. 129.

11. Finding of fact.

——Finding of fact.

It is not a sound principle to rely upon findings of factin an individual case as a foundation for general principles. 112 Ind. Cas 337=5 O. W. N. 760=29 Cr. L. J. 1009=11 A. I. Cr. R. 27=A.I.R. 1928 Oudh 430.

——A finding of fact based upon the evidence before the judicial Committee in another case is not binding in future cases what ever the evidence. 109 Ind. Cas. 461=7 Pat. 275= 9 P. L. T. 589=A. I. R. 1928 Pat. 316.

——On questions of fact or matters of discretion there can be precedent. Each Judge is entitled to come to the conclusion he thinks right on questions of fact and in matters of discretion. 95 Ind. Cas. 521=4 Rang. 18=5 Bur. L. J. 8=A. I. R. 1926 Rang. 109.

12. Head-notes.

——Head-notes.

If a head-note to a reported case is, in any way, inconsistent or not wholly reconcilable with the body of the judgment, it is the latter that must undoubtedly be looked upon as authoritaive. 117 Ind. Cas. 210=30 Cr. L. J. 724=1929 Cr. C. 456=A. I. R. 1929 Nag. 279.

——Head-notes—Reliance on.

Court should not decide questions of law upon brief statements of principle to be found in the head-notes of reported cases without taking the trouble to ascertain the state of facts upon which the decision relied upon as an authority was pronounced. 71 Ind. Cas. 417=20 A. L. J. 969=4 L. R. A. Civ. 31=A. I. R. 1923 All. 124.

——Relying on head-notes of cases is not safe.

It is never safe to accept the law as laid down in a head-note without examining the facts and the reasons given in the judgment. If the cases are examined carefully it will be found that the decision in each case is justified by the actual facts of that case. 71 Ind. Cas. 605=45 All. 250=24 Cr. L. J. 189=A. I. R. 1923 All. 194.

13. Law Reports.

——Ruling reported in C. P. L. R., N. L. R. and I. L. R.—Difference in—Nagpur High Court Rules, R. 9 (2) (b).

(Per Mangalmurti, J., in order of reference). According to R. 9 (2) (b) of the rules of the High Court of judicature at Nagpur, there is no difference in the decisions reported in C.P.L.R., N. L. R. and I. L. R. (Nagpur series) so far as their authority is concerned. The reporting of a ruling in an official report does not give it greater authority than it had before. I. L. R. (1948) Nag. 565=A. I. R. 1949 Nag. 1 (F. B.).

——Authorized reports to be followed.

Lower Courts should follow authorised reports of the decisions of their High Court rather than the unauthorized reports. A.I.R. 1934 Rang. 39= 35 Cr. L. J. 813=148 Ind. Cas. 908 (2).

——Unauthorized law reports.

A Subordinate Judge is not bound to follow a decision of the Judicial Commissioner's Court which had not been published in the Nagpur Law Reports, though he is bound to give most respectful and careful consideration to the reasons which led to the decision. A.I.R. 1932 Nag. 137=28 N. L. R. 116=141 Ind, Cas. 156.

——Unofficial reports.

Courts should fall back on unofficially reported cases only when they can find no officially reported cases on the point in issue. A. I. R. 1933 Rang. 75=146 Ind. Cas. 124.

——Reporting cases before decision of Letters Patent Appeal, impropriety of.

It is reprehensible of compilers of law reports to omit to report the judgment of the Appellate Court reversing the decision in a case which they have reported. A decision in second appeal should rarely be reported until any appeal preferred against it under the Letters Patent has been determined. A. I.R. 1932 Pat. 5=12 P. L. T. 308=10 Pat. 622=134 Ind. Cas. 954.

——Any report of Privy Council or High Court officially published must be taken as correct—Other Judgments are relevant only for reasoning contained therein. 107 Ind. Cas. 206=24 N. L. R. 87= A. I. R. 1928 Nag. 52.

——Unauthorized reports.

Where there is conflict between two decisions of the same High Court one of which is officially reported and the other is reported in an unofficial report, the Courts subordinate to such High Court can rightly follow the one which is officially reported. A. I. R. 1931 Rang. 279= 9 R. 561=135 Ind. Cas. 326.

——Non-official reports.

Judgments not officially published deserve respect for conclusions and reasoning therein. 97 Ind. Cas. 189=22 N. L. R. 108=9 N. L. J. 100 =A. I. R. 1926 Nag. 396.

——View in a Judgment not officially published should be respected but such reports are not to be followed blindly as official reports. 93 Ind. Cas. 850=8 N. L. J. 153=A. I. R. 1925 Nag. 414.

——Unauthorised reports "Indian Cases."

The practice of subordinate courts neglecting the authorised reports and taking their law from

a private publication styled "Indian Cases" disapproved. 23 O. C. 320=60 Ind. Cas. 544.

——Law Report decision—Purpose for which admissible.

A report of cases may be used as precedent for the decision of a case. But when effect is asked to be given to that very order, a copy of the order duly certified must be produced; a report of the order cannot be looked at for the purpose. (1900) 5 C. W. N. 307=28 C. 171. See also: 5 C. W. N. 326=28 C. 289.

14. Method of application.

——Method of application.

No ruling can assist a Judge in arriving at conclusions on facts of the particular case before him. A. I. R. 1942 Pesh. 89=204 Ind. Cas. 579.

——Text books—Notes in, on a case—Reliability.

It is sometimes dangerous to accept as accurate the notes appearing in text-books. It is always safer to refer to the decision itself on which the note is based. A.I.R. 1941 Cal. 106=I.L.R. (1940) 2 Cal. 258=72 C.L.J. 533=44 C.W.N. 840=42 Cr. L. J. 385=193 Ind. Cas. 302.

——Statute susceptible to more than one interpretation—Authority of precedence.

Where there is authority for the interpretation of some part of a statute which is susceptible of more than one interpretation, authority must be followed, but where there is no ambiguity, dicta which might suggest that a meaning is imputed to a statute which it cannot bear must be read in connection with the facts of the case in which they are expressed. A.I.R. 1938 All. 91=1937 A. L. J. 1253=39 Cr. L. J. 364=1937 A.W R. 1099 =173 Ind. Cas. 838.

——Value of—Law on question quite clear—Advisability of searching case-law.

On a question on which the law is clear and unambiguous, it is unprofitable to wander in quest of principles in the wilderness of decided cases, for when the law is clear, the decided cases only seek to apply the law to the particular circumstances which are presented for consideration. In such cases it has only to be seen whether certain facts which are established attract the application of the undisputed and well-recognised principle. A.I.R. 1938 Nag. 470=I.L.R. (1938) Nag. 535=179 Ind. Cas. 285.

——Method of application.

Every decision must be examined with reference to and is an authority on the facts of that particular case. 33 C.W.N. 769=57 Cal. 349=A.I.R. 1930 Cal. 42.

——Isolated dicta should not be applied.

It will be a manifest abuse of judicial precedents to apply isolated dicta from a judgment to a case where the facts are in essential particulars different. 118 Ind. Cas. 309=8 Pat. 471=10 P.L.T. 565=A.I.R. 1929 Pat. 392.

——It is not proper to rely upon one or two sentences in a judgment without reference to the facts of the case. 99 Ind. Cas. 677=50 Mad. 403=25 M.L.W. 61=1927 M.W.N. 8=38 M.L.T. 156=A.I.R. 1927 Mad. 288=52 M.L.J. 1.

——When decisions are sought to be applied to new facts it must be seen in what connexion and with reference to what facts the decisions or rulings were given. 90 Ind. Cas. 410=A.I.R. 1926 Mad. 101.

——To understand and apply the decision of a Court it is necessary to see what were the facts of the case in which the decision was given and what was the point which had to be decided. 95 Ind. Cas. 849=A.I.R. 1926 Oudh 517.

——Facts must be considered.

A judgment is authority for what it decides but not for what may be seen logically to follow from it. To understand and apply the decision of any Court it is necessary to see what were the facts of the case in which the decision was given and what was the point which had to be decided. Each case must be dealt with on its own merits and governed by its own circumstances. 93 Ind. Cas. 645=13 O.L.J. 1=A.I.R. 1926 Oudh 316.

——Precedents should be read in conjunction with facts.

Per Suhrawardy, J.—To avoid abuse of application of precedents, a decision should be read in conjunction with the facts of the case on which it is founded. The danger of regarding a decision based on a particular set of circumstances which were before the Judge's mind and formed the mould on which the proposition of law, however broadly stated, was shaped cannot be over-rated. 1914 A.C. 25 and 1901 A.C. 495, Rel. 88 Ind. Cas. 637=41 C.L.J. 456=29 C.W.N. 755=52 Cal. 894= A.I.R. 1925 Cal. 845 (F.B.)

——Interpretation—Proper way is to see facts and points.

To understand and apply a decision of the Board, or of any Court, it is necessary to see what were the facts of the case in which the decision was given and what was the point which had to be decided. 86 Ind. Cas. 857=21 M.L.W. 721=A.I.R. 1925 Mad. 1032.

——To understand and apply a decision of the Board or of any Court it is necessary to see what are the facts of the case in which the discussion was given and what was the point which had to be decided. 83 Ind. Cas. 418=22 A.L.J. 254=34 M.L.T. 70=5 Lah. 92=5 L.R.P.C. 113=51 I.A. 163=28 C.W.N. 953=1924 M.W.N. 650=20 M.L.W. 406=26 Bom. L.R. 1108=A.I.R. 1924 P.C. 126= 47 M.L.J. 938 (P.C.)

——Each case must be decided on its own facts.

Each case has to be decided on its own facts and circumstances. There is nothing more dangerous and misleading than to apply the inference to be drawn from one set of facts and circumstances proved elsewhere. 74 Ind. Cas. 304= 26 O.C. 209=10 O.L.J. 46=A.I.R. 1923 Oudh 209,

15. Obiter-dicta.

(a) Privy Council
(b) Federal Court
(c) Full Bench
(d) Miscellaneous.

15 (a). Obiter-dicta—Privy Council.

——Obiter dicta of Privy Council—Value of—Duty of Courts to respect.

It is well-settled that even the obiter dicta of the Privy Council are binding upon the Indian Courts and must be respected. 50 Bom. L.R. 696= A.I.R. 1949 Bom. 115.

——Obiter dicta in Privy Council decision are binding on Indian Courts.

The obiter dicta of their Lordships of the Privy Council are binding on all Courts in India if the said dicta contain a definite expression of their Lordships' opinion. A.I.R. 1946 Bom. 365=48 Bom. L.R. 225=227 Ind. Cas. 276.

——Obiter dicta—Privy Council — Obiters deserve respect.

Even obiters of the Privy Council deserve the highest respect. A.I.R. 1946 Bom. 469=48 Bom. L.R. 313=226 Ind. Cas. 503.

——Privy Council.

Per Teja Singh, J.—Even the obiter dicta of the Judicial Committee are binding on the Courts in India. A.I.R. 1944 Lah. 220=I.L.R. (1945) Lah. 67 (F.B.).

——Privy Council.

The obiter dicta of their Lordships of the Privy Council are binding on the High Court if they are definite opinions expressed by them. A.I.R. 1943 Bom. 95=45 Bom. L.R. 186=206 Ind. Cas. 487.

——Privy Council.

An obiter dictum of the Judicial Committee enunciating a principle is as much binding on the Courts in India as an actual decision. A.I.R. 1943 Cal. 1=46 C.W.N. 982=75 C.L.J. 447=I.L.R. (1942) 2 Cal. 268=206 Ind. Cas. 508.

——Privy Council.

The observation of the Judicial Committee of the Privy Council, though obiter, must be followed by High Courts. A.I.R. 1940 All. 544= 1940 A.W.R. 639=1940 A.L.J 826=I.L.R. (1941) All. 153=192 Ind. Cas. 357 (F.B.)

——Privy Council ruling.

When the Privy Council interprets a section or lays down a principle of law, High Court is bound to follow the interpretation or principle whether it is obiter or not. A.I.R. 1940 Cal. 97=44 C.W.N. 82=41 Cr. L.J. 328=I.L.R. (1940) 1 Cal. 231=186 Ind. Cas. 486.

——Privy Council.

The pronouncement of the Judicial Committee on a point of law, though obiter, is binding on a High Court. A.I.R. 1940 Cal. 317=I.L.R. (1940) 2 Cal. 41=71 C.L.J. 392=44 C.W.N. 555=190 Ind. Cas. 723.

——Privy Council.

Per Abdul Rashid, J., (in order of reference) —Even the obiter dicta of the Privy Council are entitled to the greatest respect. A.I.R. 1940 Lah. 129=41 Cr. L.J. 591=I.L.R. (1940) Lah. 242=188 Ind. Cas. 498 (F.B.).

——Privy Council.

An obiter dictum of the Judicial committee of the Privy Council stands on a different footing from an obiter dictum appearing in a judgment of a High Court and cannot be brushed aside. A.I.R. 1937 Cal. 27=40 C.W.N. 1301=I.L.R. (1937) 1 Cal. 455=169 Ind. Cas. 700.

——Privy Council.

A dictum of the Judicial Committee, even if an obiter, is entitled to the highest respect from all Indian Courts. A.I.R. 1935 Cal. 419=39 C.W.N. 770=36 Cr.L.J. 1053=61 C.L.J. 376=63 Cal. 217= 156 Ind. Cas. 1055 (F.B.).

——Obiter.

Where different views of a point of law are possible, that expressed by the Privy Council, even obiter, must undoubtedly be accepted. 89 Ind. Cas. 178=A.I.R. 1926 Nag. 154.

——Obiter Dictum of.

Where their Lordships of the Privy Council have distinctly summed up propositions as a result of a review of principles and authorities they cannot be treated as obiter dictum though the points did not arise in the case and the subordinate Courts are bound by them because the Privy Council intended them to be binding on all subordinate Courts. 83 Ind. Cas. 1044=27 O.C. 161= A.I.R. 1925 Oudh 94.

——Obiter—Value of.

It is necessary to remember that a case is only an authority for the ratio decidendi. This principle is in constant exercise when dealing with the decisions of Courts wherein each Judge gives or may give his individual opinion. It is, however, particularly difficult to apply the decisions of the Judicial Committee and every lawyer in India knows that the Judicial Committee, in giving its reasons, has always a very scrupulous regard to the inconvenience that may be caused by obiter dicta. 80 Ind. Cas. 294=51 Cal. 124=27 C.W.N. 1013=40 C.L.J. 171=A.I.R. 1924 Cal. 508.

——Obiter—Value of.

Where a point directly arises for decision it is the duty of the Court to consider the point for itself, giving, of course, due weight to any words which fell, although obiter from their Lordships. 72 Ind. Cas. 278=46 Mad. 423=A.I.R. 1923 Mad. 517=44 M.L.J. 349.

15 (b). Obiter-dicta—Federal Court.

——Obiter dicta of Federal Court—If binding on High Court.

Since the Federal Court has become the Supreme Court of this land, even dicta must be followed by the High Court unless there is very good reason for not doing so. 53 C.W.N. 728.

——Federal Court.

Even when obiter, the observations of the Federal Court must be treated with great respect. A.I.R. 1941 Mad. 913=54 L.W. 452=I. L. R. (1941) Mad. 874=1941 M.W.N. 887 (2)=1941-2 M.L.J. 607 199 Ind. Cas. 356.

15 (c). Obiter-dicta—Full Bench.

——Full Bench judgment.

A statement of law made by a Chief Justice delivering the judgment of a Full Bench, though obiter dictum, is entitled to great weight. A.I.R. 1943 Mad. 43=55 L.W. 794=(1942) 2 M. L. J. 678 =1942 M.W.N. 704=I.L.R. (1943) Mad. 309=205 Ind. Cas. 1 (F. B.).

——Decision on a question referred to Full Bench should not be ignored on the ground of its being obiter. 65 Ind. Cas. 980=24 O C. 361=A.I.R. 1921 Oudh 217.

——Obiter dicta.

Obiter dicta of the majority of a Full Bench should not be usually departed from by a Division Bench especially if they are acted upon for a length of time. 45 Cal. 259=21 C.W.N. 959=41 Ind. Cas. 561.

15 (d). Obiter dicta—Miscellaneous.

——Obiter dicta - Decision based upon two separate grounds—Decision based upon one of them sufficient—Decision based upon the other —If obiter.

Per Meredith, J.—When a Court bases its decision, upon a point which it has to decide, upon two separate grounds, it cannot be said that the decision upon one of those grounds is obiter merely because the decision upon the other ground would be itself sufficient. 29 Pat. 71=31 P L.T. 14 =A.I.R. 1950 Pat. 50 (F.B.)

——Decision of two points raised—Decision on first sufficient to dispose of case—Decision on other point, if obiter.

Where, in a case, two points are raised and there is a definite decision by the Court on both the points, the decision on one of them cannot correctly be described as an obiter dictum merely because the decision on the other point decided first was sufficient to dispose of the case. A.I.R. 1939 Mad. 433=1939-1 M L.J. 429=49 L.W. 383=1939 M.W.N. 445=189 Ind. Cas. 386.

——Decision on one point given though decision on other point sufficient to decide case—Former decision, whether obiter.

It frequently happens that the contentions raised by the plaintiff require two or more separate decisions in the same judgment. The legal decision on one point (if decided after argument) does not become obiter dictum merely because the decision on the other two points was sufficient to decide the case. A.I.R. 1938 Pat. 22=18 P. L. T. 977=4 B.R. 178=16 Pat. 766=172 Ind. Cas. 840 (F.B.)

——Obiter dicta.

Decision though on a point not in issue but necessary for points in issue is not obiter. 100 Ind. Cas. 849=A.I.R. 1927 Lah. 259.

——Remarks in case dismissed for want of jurisdiction are obiter. 84 Ind. Cas. 714=47 All. 268= 22 A.L.J. 1106=26 Cr L.J. 362=6 L.R.A.Cr, 25= A.I.R. 1925 All. 230.

——Dicta used merely at large in judgment are not binding.

Dicta by Judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless the dicta really form integral parts of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding. 42 Mad. 711 at page 734, Foll. 65 Ind. Cas. 786=5 N.L.J. 114=19 N.L.R. 81=A. I. R. 1922 Nag. 1.

——Obiter dicta—Value of.

An expression of opinion by the High Court which is not necessary for the decision in a case is not an authoritative ruling. 276 P.L.R. 1913= 20 Ind. Cas. 280.

——Obiter Dicta—Application.

Obiter Dicta are to be applied with reference to the facts of the case in which the Dicta are made and should be interpreted in connection with the body of the judgment. 33 Mad. 265=7 M.L T. 1= 19 M.L.J. 778=5 Ind. Cas. 4.

——Obiter dictum—Definition.

A exposition of the law necessary for the Judgment pronounced is not an obiter. (1909) 37 C. 467=14 C.W.N. 1114=7 Ind. Cas. 359.

——Obiter dicta—Value of—How far authoritative.

A judge ought, with all due respect, to examine into dicta but he must not allow any number of them to affect his judgment. (1902) 4 Bom. L.R. 90=26 Bom. 437.

16. Observations.

——Binding character—Observations in case—Value of.

A decision of a Judge of co-ordinate jurisdiction, which is really a decision on the point at issue has to be followed and would be binding. But general observations which are to be found in the various authorities have got to be construed with reference to the facts and circumstances

of the cases in which they have been made. 52 Bom. L.R. 643=A.I.R. 1951 Bom. 249.

——Binding character—Observations in case—Value of.

When general observations are made in any case, they must always be read as made with regard to the facts of the particular case before the Court and not as laying down an absolute general principle irrespective of the facts of that case. 27 Pat. 1187=A.I.R. 1949 Pat. 307=29 P.L.T. 460.

——Observations must be read along with facts of case.

The observations in a case must be read along with the facts of the case, and should not be, unless expressly so pronounced, read as laying down any general propositions of law. A.I.R. 1946 Bom. 353 =48 Bom.L.R. 100=226 Ind. Cas. 102.

——Observations to be read in light of facts.

Observations in every case have to be read in the light of the facts which the Court has to decide upon, and it will be a wrong principle of interpretation to merely take up a sentence and treat it as a general proposition of law, deprived of its context and the facts of the case in which the observation was made. A.I.R. 1946 Bom. 423=226 Ind. Cas. 138=48 Bom. L.R. 90=I L. R. (1946) Bom. 89.

——Observations of Judges should not be torn from context or read without reference to facts.

It is always dangerous to rely on observations of Judges torn from their context or read without reference to the facts of the case which necessitated the particular observation. A.I.R. 1946 Bom. 482=48 Bom L.R. 393=227 Ind. Cas. 67.

——Observations and facts of a case—Deduction of principle.

The observations in a case must be read as relating to the facts of that case and it is, therefore, first necessary to notice the facts and then to notice the observations. A. I. R. 1945 Bom. 238= 1945-13 I. T. R. 113=47 Bom. L. R. 174=I. L. R. (1945) Bom. 419.

——Full Bench.

An observation of the Full Bench deserves the greatest respect. A.I.R. 1943 Lah. 170=45 P.L.R. 265=I.L.R. (1943) Lah. 646=208 Ind. Cas. 345 (F.B.).

——Opinion expressed by Privy Council.

Even if the actual point before Courts in India was not in issue in the earlier litigation, the opinion expressed by their Lordships of the Privy Council on that point in that litigation would be binding on the Courts. A.I.R. 1943 Pat. 327=22 Pat. 220=210 Ind. Cas. 426.

——View of Judge on section of statute, not necessary for decision.

Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand, have no binding authority on another Court, though they may have some merely persuasive efficacy. Consequently, the view of a Judge on a certain section of the Income-tax Act which was not necessary for the decision, is not binding on the Income-tax Authorities. A.I.R. 1938 Cal. 557=177 Ind. Cas. 255 (S.B.).

——Observations.

Observations in a judgment should not be divorced from the context and they cannot be said to support the view enunciated separately from the context. **Quinn** v. **Leatham,** (1901) A. C. 495, Rel. on. 117 Ind. Cas. 657=10 Lah. 657=30 P.L.R. 489=A.I.R. 1929 Lah. 609 (F.B.).

17. Old Authorities.

——Old authorities—Great importance is to be attached to old authorities.

Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined except where they are plainly wrong, and especially where the subsequent course of judical decisions has disclosed weakness in the reasoning on which they were based. West Ham Union v. Edmonton Union, (1908) A.C. 1. Foll. 98 Ind. Cas. 794=50 Bom. 306=28 Bom. L. R. 750=A.I.R. 1926 Bom. 410.

——Old authorities deserve special importance as many rights may have been founded thereon. (1908) A.C. 1 Foll. 84 Ind. Cas. 397=49 Bom. 99=26 Bom. L. R. 847=A.I.R. 1925 Bom. 12.

18 Practice of Courts.

——Cursus curiae—Scope of doctrine—Applicability to proceedings under S. 145, Cr. P. Code.

Per **Meredith, J.**—The doctrine of **cursus curiae** means merely this that where a certain view has been taken in a long series of decisions over a long period and has become the basis upon which many titles have become settled, then that view should continue to prevail despite the fact that two views may be possible. It has no application to proceedings of a quasi-judicial nature like the proceedings under S. 145, Cr. P. Code, where there is no question of any title being unsettled, and the prevailing view has had highly undesirable consequences. Tne doctrine of **cursus curiae** should never stand in the way of putting an end to an abuse of preventing a remedy where things are manifestly wrong. Where reform is made the slave of authority, the result is stagnation. 27 Pat. 1027=30 P.L.T. 41= A.I.R. 1949 Pat. 146=50 Cr.L. J. 299 (S.B.).

——Court cannot depart from official translation except upon expert evidence.

It is not legitimate for the Court to depart from the official translation except upon expert evidence which the parties should have an opportunity of testing. A.I.R. 1946 P. C. 185 =59 M.L.W. 681=1946-2 M.L. J. 408 =1946 A.L. J. 491=51 C. W .N. 205=73 I. A. 264= 1946 A.W.R. (P.C.) 205=I.L.R. (1947) Mad. 159=227 Ind. Cas. 12 (P.C.).

——Two possible views—View held in previous decisions should be followed.

When there are two possible views about a matter it is better that that view should be followed which has been already held by Judges in previous decisions. A.I.R. 1946 All. 448=1946 A. L. J. 330=1946 A.W.R H.C. 534=226 Ind. Cas. 553 (F. B.).

——Bombay High Court—Interpretation of All India Statute—Considered opinion of another High Court when to be followed.

It is a practice adopted by Bombay High Court to follow the general principle that in the interpretation of an All India Statute, as far as possible, considered opinion of another High Court should be followed unless the Court cannot conscientiously accept that view. A.I.R. 1945 Bom. 258=1945-13 I. T. R. 245=I.L.R. (1945) Bom. 528=47 Bom. L. R. 159.

——Cursus curiae **of Calcutta High Court, whether binding on Patna High Court.**

When there is a **cursus curiae** of the Calcutta High Court upon a certain question, the Patna High Court will ordinarily follow those decisions. A.I.R. 1945 Pat. 153=23 Pat. 862.

——Cursus curiae**—Applicability.**

The principle of **cursus curiae** or the rule of practice in the sense of the practice of the Court to decide the construction in a certain way, can only be applied when first the statute is ambiguous; secondly when the decisions are consistent throughout, thirdly, when titles are dependent upon those decisions. A. I. R. 1935 Pat. 291=16 P.L.T. 451=14 Pat. 672=157 Ind. Cas. 98 (F.B.).

——Although a High Court may have its own rules of practice, these rules of practice are not binding upon **mofussil** Courts which are bound by the Civil P. C., and nothing else. A.I.R. 1934 Rang. 174=149 Ind. Cas. 774.

——Practice.

In absence of ruling by local High Court on a point, rulings of at least two other High Courts should be considered for coming to proper decision—Plea should not be rejected simply because there is no ruling on it by local High Court. 32 P.L.R. 92=129 Ind. Cas. 276=1930 Cr. C. 1227=A.I.R. 1930 Lah. 1051.

——**Practice of Courts.**

Per **Kinkhede, A. J. C.**—The High Court is not necessarily bound to follow a practice which is not warranted by law: A.I.R. 1918 P.C. 188 and 12 All. 129 (F.B), Rel. on. 123 Ind. Cas. 417=12 N.L. J. 185 =A.I.R. 1930 Nag. 73.

——Where practice is founded on erroneous construction of statutes it should be corrected.

Where a course of practice is founded upon an erroneous construction of a statute, there is no principle which precludes the Court from correcting the error, and to hold that the matter is not open to review would be to give effect of legislation to a decision contrary to the intention of the legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time. 127 Ind. Cas. 690=A.I.R. 1930 Sind 217.

——A rule of practice, even if it be statutory, can, when found to be inconvenient, be altered by competent authority. 111 Ind. Cas. 413=52 Bom. 597=55 I.A. 360=30 Bom. L. R. 1242=28 M. L W. 257=26 A.L. J. 1220=48 C. L. J. 451=1928 M. W. N. 893= 32 C. W. N. 953=A.I.R. 1928 P.C. 208=55 M. L. J. 523. (P.C.).

——Courts must abide by the words of a rule of Court having the force of law without attempting to reform it according to the supposed intentions of the Legislature or attempting to exclude cases which fall within the expressed meaning of the rule in order to make the law reasonable. For the office of Courts is **jus dicere** and not **jus dare**. 78 Ind. Cas. 583=18 S. L. R. 19=A.I.R. 1925 Sind 49 (F. B.).

——Where a rule of law is clear, unambiguous and well founded, a decision though old and universally followed should be overruled if based on a misconception. 90 Ind. Cas. 341=3 Rang. 549=4 Bur. L.J. 189=A.I.R. 1925 Rang. 340 (F.B.).

——Questions of practice in India are to be determined in accordance with the principles laid down by the Courts in India. 80 Ind. Cas. 317=51 Cal. 62=28 C.W.N. 6=A.I.R. 1924 Cal. 405.

——Where a practice has existed, it is convenient except in cases of extreme urgency and necessity, to adhere to it, because it is the practice even though no reason can be assigned for it. 77 Ind. Cas. 949=51 Cal. 331=38 C. L. J. 365=A.I.R. 1924 Cal. 473.

——Uniformity in.

Policy requires that there should be uniformity, certainty and continuity in legal decisions so that titles supposed for many years to be sound and marketable might not be unsettled. 41 Bom. 181=17 Bom. L.R. 799=31 Ind. Cas. 106.

——Case law, binding effect of.

The Courts must always hesitate to overrule decisions which are not manifestly erroneous and mischievous, which have stood for many years unchallenged, and which from their nature may reasonably be supposed to have affected the conduct of a large portion of the community in matters relating to rights of property. **Young** v. **Robertson** 4 Macqueen 314 (345) Foll. Acting on this principle the Court in the case refused to dissent from 18 C. 333, 28 C. 90. 5 Ind. Cas. 309=11 C. L. J. 106.

19. Previous Courts' decisions.

——Madhyabharat High Court — Decision of Indore High Court—Binding character of.

Decisions of the Indore High Court are binding on the Madhya Bharat High Court. 3 A.I.Cr.D. 413= A.I.R. 1950 M.B. 17=51 Cr.L. J. 731.

——Ruling of Court of Judical Commissioner of Sind—If binding on Chief Court.

The ruling of the Court of the Judical Commissioner of Sind, though entitled to great weight, is not binding on the Chief Court. I.L.R. (1947) Kar. 216=A.I.R. 1948 Sind 110.

——**Decision of Chief Court is not binding on High Court.**

A decision of a Bench of the Chief Court (Punjab) is not binding upon the (Punjab) High Court. A.I.R. 1944 Lah. 427=46 P.L.R. 301=218 Ind. Cas. 53.

——**Oudh Chief Court.**

A Bench decision of the Oudh Judicial Commissioner's Court, though not binding upon the Chief Court, should be followed unless very strong reasons are shown to the contrary. A I.R. 1943 Oudh 360 =1943 O W.N. 153=1943 A.W.R.C.C. 38 (2)=206 Ind. Cas. 574.

——**Chief Court (Sind) and decision of Judicial Commissioner's Court.**

Though the Sind Chief Court must regard with respect the decisions of the Judicial Commissioners Court the Chief Court is not bound by those decisions. A.I.R. 1943 Sind 242=I.L.R. (1943) Kar. 315=211 Ind. Cas. 321.

——**Previous Court's decisions.**

A decision of the late Oudh Judicial Commissioner's Court is not bindig on the Chief Court. 98 Ind. Cas. 742=3 O.W.N. 869=A.I.R. 1927 Oudh 1.

——Single Judge's judgments of the Sind Sadar Court, though entitled to every respect, are in no way binding on Sind Judicial Commissioner's Court. 103 Ind. Cas. 440=A.I.R. 1927 Sind 225.

——Although the decisions of the late Judicial Commissioner's Court of Oudh are properly deserving of all respect and should never be brushed away or treated lightly, they are in no way authoritative after the Chief Court came into existence. They can be and should be examined in order to gain from them the advantage of the considered opinions and arguments that they contain, but they are not in any way authoritative. 95 Ind. Cas. 283=3 O.W.N. 411=27 Cr. L. J. 763=13 O. L. J. 615=A.I.R. 1926 Oudh 367.

——The decisions of the Judicial Commissioner's Court of Oudh are not authority in the Chief Court, although they should always be treated with respect and the reasoning in them closely examined. 97 Ind. Cas. 581=13 O. L. J. 592=3 O.W.N. 621=A.I.R. 1926 Oudh 544.

20. Privy Council.

——Re-opening of previous decisions of Privy Council.

See **Privy Council—Practice—Precedent.** 1950 A. L. J. 539 (P.C.)

——**Privy Council—Decisions and** obiter dicta **of**—Value of—Enactment of Legislature to contrary effect —If prevails over Privy Council decision.

All decisions and even **obiter dicta** of the Privy Council are entitled to be respected by the Courts in India; but where there is an express provision contained in a statute enacted by the Legislature to the contrary effect, even the weighty pronouncements of the Privy Council have to give way to such enactment of the Legislature. 52 Bom. L.R. 231=A I.R. 1950 Bom. 230.

——**Privy Council—Decision of authority of in Mysore.**

A decision of the Privy Council cannot have the effect of a binding precedent in Mysore; but in cases not covered by any ruling of the Mysore Court, it may be applied as a general principle of law, being entitled to respect. 53 Mys. H.C.R. 17=28 Mys. L. J. 80.

——**Privy Council**—Decision in appeal other than from India—Binding nature.

See **Government of India Act (1935), S. 212.** A.I.R. 1948 Sind 100 (F.B.).

——**Privy Council and House of Lords—Decisions of—Which to be preferred.**

A decision of the House of Lords is the highest authority binding on the Courts and Dominions and may therefore be preferred on a question of common law to an earlier decision of the Privy Council. I.L.R. (1946) Kar. 416=A.I.R. 1947 Sind 154.

——**Privy Council**—If and when bound by its previous decisions.

See **Canada Temperance Act.** (1946) F. L. J. 50= A.I.R. 1946 P.C. 88.

——**Interpretation contrary to express words of their Lordships of Privy Council is not permissible.**

It may be permissible to interpret the dictum of their Lordships of the Privy Council in a particular way in a single case, but where that particular view has been expressed on more than one occasion even though the particular question was not under consideration in the appeal itself, any interpretation contary to their Lordships' express words is not permissible. A.I.R. 1945 Nag. 156=1945 N. L. J. 128=I.L.R. (1945) Nag. 286.

——**Privy Council—Decision in conflict with that of House of Lords—Duty of Courts in India.**

A decision of the Privy Council is binding on the Courts in India, although it is in conflict with a decision of the House of Lords. I.L.R. (1946) Lah. 692= 227 Ind. Cas. 546=48 P.L.R. 116=A.I.R. 1946 Lah. 116 (F.B.)

——It is not open to the Indian Courts to attempt to draw fine distinctions in the pronouncements of the Judicial Committee. A.I.R. 1940 Pat. 707=19 Pat. 688=7 B.R. 250=191 Ind. Cas. 773.

——**Binding effect.**

Law can scarcely be logical, where it is moulded and modified to give effect to intruding custom. It is not the function of the High Court for that reason to cavil at an established principle if it has support of the Judicial Committee. Its illogic, if any, has to be mended only by resort to legislation. A.I.R 1939 Mad. 614= 49 L.W. 717=1939 M.W.N. 522=(1939) 1 M. L. J. 831=I.L.R. (1939) Mad. 622=189 Ind. Cas. 123.

——**Principle enunciated by Board must be followed in India.**

It is not open to the Courts of India to question any principle enunciated by the Board, which must, therefore, be followed irrespective of the inconvenient and embarrassing results which may attend the application of that principle. A.I.R. 1938 Nag. 423=1938 N. L. J. 237=I.L.R. (1939) Nag. 88=179 Ind. Cas. 82.

——**Pronouncements of — Whether should be viewed as enactments.**

The Courts in India are bound by the decisions of the Privy Council on questions of law and no Court in this country would ever entertain an agreement that a view of the law expressed by the Privy Council should not be strictly followed. But the pronouncements of their Lordships of the Judicial Committee should not be viewed as enactments of the legislature. A.I.R. 1938 Pat. 278=19 P.L.T. 281=4 B.R. 656=17 Pat. 430=175 Ind. Cas. 783.

——**Appeal preferred to Privy Council even when no appeal lay—Appeal heard—Value of precedent.**

Where even when no appeal lies to the Privy Council, an appeal is preferred to it and is heard by the Privy Council, the mere hearing of the appeal by the Judicial Committee is not necessarily to be regarded as a ruling by the Board that such an appeal is maintainable. A.I.R. 1937 Mad. 930=1937 M.W.N. 762=46 L.W. 416=177 Ind. Cas. 177.

——It is open to the Court not to rely upon a Privy Council case on the ground that it was inapplicable but the Judge is hopelessly in error when he refuses to follow it because it was of a date anterior to a ruling of his High Court and that he was bound to follow that ruling in preference to the judgment of the Privy Council. A.I.R. 1936 Lah. 183=38 P.L.R. 337=161 Ind. Cas. 300.

——**Decisions of Judicial Committee—Whether binding on King's Bench Division.**

Per **Mukerji, J.**—It is undisputed that the authority of the Judicial Committee, so far as its effect on Indian Courts is concerned, is far greater than that of any other Court in the British Isles. Decisions of the Privy Council, though entitled to very great weight everywhere, are not binding on King's Bench Division. A.I.R. 1933 Cal. 419=39 C.W.N. 770=36 Cr. L. J. 1053=61 C. L. J. 376=63 C. 217=156 Ind. Cas. 1055 (F.B.).

——Every decision of the Judicial Committee must be treated to be correct and if there is apparent conflict between two decisions, it must be taken that they are applicable to different sets of facts. A.I.R. 1932 Cal. 436=36 C.W.N. 183=138 Ind. Cas. 139.

——It is the duty of the High Court to loyally follow the decisions of the Judicial Committee and to accept the principles of law laid down by that tribunal. A.I.R. 1931 Rang. 113=132 Ind. Cas. 284 (F.B.).

——**Binding nature of.**

It is not open to the Indian Courts to consider how far the principle laid down by the Privy Council is in accordance with either the letter or spirit of any personal law as is expounded in the books or as understood by the parties. The Privy Council decisions are binding on the Indian Courts and the latter are bound to follow them. A.I.R. 1925 P.C. 272 and 32 Bom. 499, Foll. 116 Ind. Cas. 499=25 N.L.R. 144=A.I.R. 1929 Nag. 98 (F.B.).

——**Privy Council—Binding nature of.**

It is not open to the Courts in India to question any principle enunciated by the Privy Council even if it was unnecessary, for the decision of the suit before their Lordships to lay down those principles. A.I.R. 1925 P.C. 272, Rel. on. 12 N. L. J. 75=26 N.L.R. 39=A.I.R. 1929 Nag. 211.

——**View of law assumed by Privy Council is not binding.**

The assumption of a certain view of law in a judgment of the Privy Council for the purpose of deciding another question cannot be regarded as a binding decision. It has even less force than an **obiter dictum;** for it is not necessary to prove or decide what is admitted. 107 Ind. Cas. 244=50 All. 232=25 A. L. J. 922=A.I.R. 1928 All. 52.

——It is not open to the Courts in India to question any principle enunciated by the Privy Council. 108 Ind. Cas. 501=52 Bom. 385=30 Bom. L.R. 330=10 A.I.Cr.R. 118=29 Cr. L. J. 403=A.I.R 1928 Bom. 130.

——The interpretation which their Lordships of the Privy Council put upon a prior Privy Council case is binding upon all the Courts of India. 112 Ind. Cas. 496=55 Cal. 903=32 C.W.N. 913=A.I.R. 1928 Cal. 670.

——Privy Council decision is binding on all Indian Courts as soon as promulgated. 101 Ind. Cas. 155=51 Bom. 231=29 Bom. L.R. 269=A.I.R. 1927 Bom. 157.

——Privy Council decision not on appeal from India—Indian High Courts are not bound by it. 99 Ind. Cas. 700=A.I.R. 1927 Mad. 261=52 M.L.J. 8.

——**Binding nature of.**

It is not open to the Courts in India to question any principle enunciated by the Privy Council, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them, whether on account of "judicial dignity" or otherwise, to question its decision on any particular issue of fact. Any application for review of judgment on grounds permssible by law only lies to the Judicial Committee. 91 Ind. Cas. 370=28 O.C. 352=52 I.A. 398=24 A.L.J. 1=47 All. 883=1926 M.W.N. 83=43 C.L.J. 51=6 L.R.P.C. 195=3 O.W.N. 1=13 O.L.J. 19=28 Bom.L.R. 1110=30 C.W.N. 626=A.I.R. 1925 P.C. 272=50 M.L.J. 18 (P.C.).

——**Binding nature of.**

The decision of the Privy Council is binding on all the Courts in the Indian Empire and cases decided by the High Courts in India before that decision are not of any assistance at all. 72 Ind. Cas. 14=11 L.B.R. 451=2 Bur.L.J. 34=A.I.R. 1923 Rang. 122.

——The Privy Council are not bound by the reasons of their decision in a previous case. 60 Ind. Cas. 534=43 All. 228=48 I.A. 195=19 A.L.J. 317=23 Bom.L.R. 654=33 C.L.J. 388=25 C.W.N. 564=1921 M.W.N. 300=2 P.L.T. 257=A.I.R. 1921 P.C. 62=40 M.L.J. 387 (P.C.).

——Privy Council decision after full consideration of question—No positive result arrived at—Decision must receive great weight. 11 L.B.R. 163=A.I.R. 1921 L.B. 37.

——Privy Council—Dicta.

Though a decision of the Privy Council is only an authority for what it decides the general remarks of the Privy Council are ordinarily considered as having binding force in this country. 19 C.W.N. 972=16 Cr.L.J. 641=30 Ind. Cas. 465.

——Privy Council decision in appeals not from for Indian tribunal—How binding.

A Privy Council decision is binding on Indian Courts though not given in an appeal from an Indian tribunal. 38 Mad. 941=(1913) M.W.N. 558=14 M.L.T. 137=25 M.L.J. 162=20 Ind Cas. 546.

——Mixed question of law and facts.

Conclusions arrived at by the Privy Council on a mixed question of law and facts are entitled to great weight even where its judgment is not **res judicata.** 37 Mad. 22=24 M L.J. 652=10 M.L.T. 298=(1911) 2 M.W.N. 328=12 Ind. Cas. 389.

——Judicial Committee's decision—Opposed to principles of law—How far binding upon courts of India.

The decisions of the Judicial Committee are binding upon courts in India and all they can do is loyally to accept and follow them if they are in point. (1903) 30 C. 666=7 C.W.N. 916.

21. Same High Court.

(a) Single judge
(b) Division Bench
(c) Full Bench.

21 (a). Same High Court—Single judge.

——Decision of Single Judge of High Court—Duty of another judge to follow.

If there is a decision of a Single Judge of a High Court upon a question of law, (not given **per incuriam**), it is not right for any other single Judge of that Court whatever his own views may be to depart from it. The Judge may express his own views about the matter but his decision should be in accordance with the previous decision. 42 C. 1140, referred to. 54 C.W.N. 832.

——Decision by single judge of High Court—If binding on another single Judge of same High Court. I.L.R. (1946) Bom 258=47 Bom.L.R. 098=223 Ind. Cas. 195=47 Cr L J. 378=A.I.R. 1946 Bom. 38.

——Decision by single judge of High Court—Duty of another judge to follow. I.L.R (1945) Bom. 702=46 Bom.L.R. 916=A.I.R. 1945 Bom. 173.

——Co-ordinate jurisdiction.

Generally speaking, a Judge ought to follow a decision of a Court of co-ordinate jurisdiction as to the construction of an Act of the Legislature, but Judges are not entitled to legislate, or to bind their successors to a construction of an Act, which the language plainly does not justify. A.I.R. 1943 Bom. 141=45 Bom.L.R. 240=I.L.R. (1943) Bom. 480=207 Ind. Cas. 300.

——Decision of Judge on original side of High Court.

A Judge on the original side of the High Court should follow the decision of another Judge sitting on the same side, but such decision is not binding on judges hearing appeals from the original side. 42 Cal. 1140=19 C.W.N. 820=21 C.L.J. 584=30 Ind. Cas. 681.

——Case law—Decision of single Judge, how far binding on the successors.

A Judge sitting on the original side of the High Court is ordinarily bound to follow the judgment of another judge when the latter has decided a question of law or laid down certain principles of practice or procedure or judically construed any provision of the law prevailing in the country; but the former is not bound to follow the latter's findings of facts based on the evidence recorded by him when the evidence that mny be available before the judge in a later case may be fuller and more reliable and may be to lead him to a different conclusion. 11 B. 441; 20 B. 511, not Foll. (1907) 10 Bom.L.R. 417=33 B. 122.

21 (b). Same High Court—Division Bench.

——Division Bench of High Court—Power to come to a conclusion contrary to that of another Bench of co-ordinate jurisdiction.

One Division Bench of a High Court is not entitled to embody in a judgment a conclusion which is contrary to that of another Bench of co-ordinate jurisdiction. 1950 A.L.J. 353=1950 A.W.R. 348=A.I.R. 1950 A. 480.

——Bench decision of High Court—Duty of single Judge to follow.

It is not open to a single Judge of a High Court to refuse to follow a Bench decision, because there is some other decision of a higher Court which he prefers, when the Bench has discussed and explained that decision of that higher Court. A single Judge is bound to give effect to the view of a Bench on any particular case. I.L.R. (1948) 1 Cal. 469.

——Decision of single Judge or of Bench of High Court—How far binding on another Judge of that Court.

While a decision given by a Judge of a High Court, sitting alone, must receive the respectful and careful consideration of another Judge of that Court, it is not binding upon him. A single Judge of a High Court is, however, bound to follow the decision of a Bench given on appeal from the Original Side of that Court, if it covers the matter which is before him and cannot be distinguished. If there is more than one such authority, and they are in conflict with each other, he must follow that which he considers to be preferable. I.L.R. (1947) 2 Cal. 113.

——Bench decisions have greater authority.

Bench decisions are of greater authority than decisions of single Judge and should be followed in preference to those of a single Judge. A.I.R. 1946 All. 389=I.L.R. (1946) All. 178=223 Ind. Cas. 467=1946 O.W.N.H.C. 188.

——Decisions of another Division Bench.

The decisions of the Divisional Courts upon question of law are binding upon Courts of first instance and are, as a general rule, followed by other Divisional Courts as a matter of judicial comity, but if a Division Bench does not accept as correct the decision on a question of law of another Division Bench, it may refuse to follow the decision of the latter Bench and form its own opinion or may refer the matter to a Full Bench, for which the rules of High Court provide. But a Court of co-ordinate jurisdiction, though it may refuse to follow a previous decision of another Court of co-ordinate jurisdiction, if it considers it to be wrong, cannot overrule such decision. Overruling is an act of superior jurisdiction. Where a precedent is merely not followed, the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other and the law remains in doubt until settled by some higher authority. A.I.R. 1943 Nag. 340=1943 N.L.J. 596=I.L.R. (1944) Nag. 1=214 Ind. Cas. 130 (F.B.).

——Single Judge cannot overrule view of Division Bench.

A ruling of a Judge sitting singly cannot overrule the view of a Division Bench. A.I.R. 1942 Pat. 42=7 C.L.T. 38=198 Ind. Cas. 271.

——Decision of one Division Bench—Binding effect on another Division Bench—Disagreement—Proper course.

While a Judge the High Court sitting alone is not bound on a question of law by the decision of another Judge sitting alone, this principle goes no further. The Division Bench is the final Court of Appeal in an Indian High Court, unless the case is referred to a Full Bench and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law. If a Division Bench does not accept as correct the decision on a question of law of another Division Bench the only right and proper course to adopt is to refer the matter to a Full Bench. A.I.R. 1940 Mad. 356=51 L.W. 408=(1940) 1 M.L.J. 400=1940 M.W.N. 393=I.L.R. (1940) Mad. 454=188 Ind. Cas. 250 (F.B.).

——A taxing Judge, whether acting administratively or judicially has to follow the law as laid down by a Division Bench of the High Court. (1940) 43 P.L.R. 101.

——High Court's interpretation of Privy Council rulings.

It is desirable that the interpretation put on a certain ruling of the Privy Council by a Bench of the High Court should be followed unless a larger Bench should dissent from that interpretation. A.I.R. 1937 Pat. 408=18 P.L.T. 187=16 Pat. 281=169 Ind. Cas. 963.

——Previous Bench decision.

A previous decision arrived at by a Bench cannot be overruled unless a Bench having power to overrule it is properly constituted. A.I.R. 1936 Pat. 54=160 Ind. Cas. 1103.

——Division Bench laying down law unambiguously—Another Bench of equal status not agreeing—Procedure.

It is a fundamental principle of the constitution of the Court, that where one Bench of the Court, in unambiguous terms has laid down the law in a certain sense, it is not competent for another Bench of equal standing to refuse to follow the earlier decision, or to give to the language used therein a meaning contrary to that which the words used would naturally bear. The proper and the only available course open to the latter Bench in such circumstances is to refer the question upon which there is a difference of opinion for determination by a Full Bench of the Court. A.I.R. Rang. 370=13 R. 570=36 Cr.L.J. 1487=158 Ind. Cas. 784 (F.B.).

——Conflicting decision—Single Judge differing from decision of Division Bench should submit case to Division Bench. 34 C.W.N. 31=A.I.R. 1929 Cal. 572.

——Mirza, J—The decision of a Bench of High Court admitting a case, as to the jurisdiction of High Court, is binding on the Bench subsequently hearing the case on merits. 112 Ind. Cas. 567=30 Bom.L.R. 1050=29 Cr.L.J. 1063=11 A.I.Cr.R. 324=A.I.R. 1928 Bom. 390.

——It is purely a point of practice of the Bombay High Court that no Bench of the High Court has power to bind all other Benches in future proceedings as to the practice to be adopted in all cases that may come before them. 108 Ind. Cas. 501=52 Bom. 385=30 Bom.L.R. 330=10 A.I.Cr.R. 118=29 Cr.L.J. 403=A.I.R. 1928 Bom. 130.

——Same High Court.

The judgment of a Bench is binding on the High Court sitting as a single judge. 86 Ind. Cas. 747=21 M.L.W. 224=A.I.R. 1925 Mad. 441.

Quaere.—Whether Judge on the Original Side is bound by judgment delivered on reference from Small Cause Court, especially since he is not bound by judgment of Division Bench on Appellate Side. 81 Ind. Cas. 721=51 Cal. 588=A.I.R. 1924 Cal. 733.

——Decisions on Appellate side Bench are not binding on the Original Side.

The decisions of an Appellate Side Bench are technically speaking, not binding on a Judge sitting on the Original Side; the reason being that the law administered on the Original Side is not the same as the law administered with reference to cases arising in the mofussil. 70 Ind. Cas. 371=49 Cal. 931=26 C.W.N. 845=A.I.R. 1923 Cal. 169.

——High Court—Opinion of Appeal Bench in former case is not binding on another Bench sitting as Court of first instance. 6 R.L.R. 623, Foll. 63 Ind. Cas. 819=48 Cal. 328=22 Cr.L.J. 691=A.I.R. 1921 Cal. 273.

21 (c). Same High Court—Full Bench.

——Full Bench of more Judges whether can by majority, overrule unanimous decision of Bench of more Judges than majority.

Obiter.—There can be no doubt that a Full Bench can overrule a Division Bench, and that Full Bench must consist of three or more Judges but it would seem anomalous to hold that a later Full Bench can overrule an earlier Full Bench, merely because the later Bench consists of more Judges than the eariler. If that were the rule, it would mean that a Bench of seven Judges by a majority of four to three, could overrule a unanimous decision of a Bench of six Judges, though all the Judges were of co-ordinate jurisdiction. A.I.R. 1941 Bom. 408=43 Bom. L.R. 861=43 Cr.L.J. 167=I.L.R. (1942) Bom. 26=197 Ind. Cas. 416.

——High Court—Full Bench, when satisfied that view previously taken in High Court about law of limitation is wrong. can declare correct law especially when its effect is to enlarge period.

If, on a consideration of the decisions on the point in question, the Full Bench of the High Court is satisfied that the view previously taken is the wrong view, there is no reason why it should not accept and declare what is the correct view; more particularly is this the case where the effect is not to deprive persons who have lent money under a bond, of an extended period of limitation to which formerly they had been held entitled but rather to enlarge the period of limitation by doing which there can be no deprivation of rights. A.I.R. 1941 Oudh 210=16 Luck. 464=1941 A.W.R.C.C. 108=1941 O.W.N. 361=193 Ind. Cas. 481 (F.B.).

——Single Judge and Full Bench—Doubt on question of law.

It is open to a Single Judge of the High Court to entertain a doubt on any question of law, but he is bound to follow the Full Bench ruling and the operative portion of his order must be in strict accordance with the ruling of the Full Bench and should in no way deviate from it. A.I.R. 1936 All. 555=1936 A.L.J. 736=1936 A.W.R. 531=164 Ind. Cas. 200.

——Same High Court—Full Bench decision—Scope.

A Full Bench case decided by three Judges although it may be a decision of two Judges against the decision of a third, is always entitled to respect from a Division Bench presided over by two Judges 119 Ind. Cas. 103=1929 A. L. J. 769=51 All. 910=A.I.R. 1929 All. 593.

——Full Bench ruling of a High Court is binding on Divisional Bench of that Court until expressly disagreed to by Privy Council. 99 Ind. Cas. 762=A.I.R. 1927 All. 244.

——Full Bench decision—Binding nature of.

(1907) 11 C.W.N. 613=34 Cal. 735=5 C. L.J. 569.

——Special Bench, powers of.

A special Bench to which a question involving the reconsideration of a decision of a Full Bench was referred cannot consider the correctness or otherwise of a decision of a Full Bench on another question not referred and which was raised in the course of the argument before the Special Bench. In the present case which came from the Sambalpur District:

Held, that the Full Bench ruling in 14 C. 730 applied, and that the suit which was for the foreclosure of a mortgage by conditional sale was governed by Art. 132 and not by Art. 147, and having been instituted more than 12 years after the due date was barred by limitation. The Special Bench gave effect to the plea of limitation although it was never raised in either of the courts below nor in the memorandum of appeal to the High Court, and was taken for the first time before the special Bench, the majority being of opinion that the point arose on the face of the plaint and there was no question of fact to be enquired into to enable the court to dispose of it. (1907) 11 C.W.N. 959=6 C.L.J. 237=34 C. 941 (F.B.).

22. 'Stare decisis.'

——Stare decisis.

See also Maxims.

——Stare decisis — Applicability — Texts of Hindu Law—Translation accepted and acted upon.

Where a certain translation of texts of Hindu Law has been accepted and acted upon by Courts of law as correct and on which questions of title to property have been decided, the principle of stare decisis would apply to prevent, a re-opening of the whole question involved on the ground that such translation is wrong. 3 Sau. L.R. 1.

——Stare decisis—Principle — Decision construing statutes—Value of.

In spite of the rule of stare decisis, decisions in progressively construing a statute must often be stepping stones rather than halting places. 28 Pat. 102=A.I.R. 1949 Pat. 293=30 P.L.T. 201.

——Stare decisis—Principle of—When applies and when does not apply.

The principle of stare decisis does not come into operation where the result of departing from an incorrect view of the law and following the correct view of the law is merely this, that in disputes on subjects to which that law applies a new set ofdefences will be put forward in the Courts. That principle is applicable only where the effect of departing from an established rule of decision will be to unsettle transactions which have been previously supposed to be finally settled. I.L.R. (1947) All. 520=1947 A.W.R. (H.C.) 112=1947 A.L.J. 85=1947 A. L. W. 284=A.I.R. 1947 A. 201 (F. B.).

——Stare decisis—Application of rule to fiscal matters.

The ordinary principles of stare decisis do not apply with their usual force where the question

involves no possibility of disturbance of titles but is a fiscal matter between Government and the litigant. 49 Bom.L.R. 72=A.I.R. 1947 Bom. 259 (F. B.).

——Stare decisis—Decisions of division Bench of longstanding—Power of Full Bench to overrule as erroneous.

A Full Bench of the High Court has undoubted power in proper cases to correctly expound the law and to overrule decisions to the contrary of Division Benches of the Court, even though such decisions are longstanding. 54 Mys. H.C.R. 12=28 Mys. L.J. 271 (F.B.).

——Stare decisis.

The doctrine of stare decisis cannot be invoked when a rule of law, which has prevailed in the Courts of a Province, has subsequently been overruled by their Lordships of the Privy Council A.I.R. 1946 Lah. 180=223 Ind. Cas. 20=48 Pun.L.R. 210 (F. B.)

——Principle set up by cases covering long period of years—Value of.

Courts in India will be reluctant to dissent from the cases which cover a long period of years. A I.R. 1940 Pat. 633=21 P.L.T. 897=20 Pat. 13=191 Ind. Cas. 340. (S. B.).

——Applicability of.

Principles of stare decisis do not apply and the Courts are not precluded from giving effect to what they consider to be the law when security of title is not affected and no injustice results from so doing. A.I.R. 1939 Nag. 186=I.L.R. (1939) Nag. 250=1939 N.L.J. 228=183 Ind.Cas. 128 (F.B.)

——Long course of decisions—Effect.

A Court of Law ought to hesitate before upsetting a long course of judicial decisions and particularly where, on the faith of such decisions, rights of the subjects have for a long time come into existence and dispositions of property have been made and entered into. A.I.R. 1937 Bom. 279 =30 Bom. L.R. 382=I.L.R. (1937) Bom. 508=170 Ind. Cas. 393. (F.B.)

——Applicability of principle.

When there is any doubt at all as to the correctness of one or other of two points of view, both being possible, the Courts should be always in favour of applying stare decisis, but when the Legislature intervenes, this is impossible, A.I.R. 1937 Rang. 56=167 Ind. Cas. 449.

——It would be dangerous to go back upon a long course of decisions and not to adhere to the well recognised principle of stare decisis. A. I. R. 1933 All. 634=1933 A.L.J. 1079=55 A. 743=148 Ind. Cas. 26

——Where decisions are directly contrary to a statute it is the duty of a Full Bench to overrule the privious decisions even though they might have stood for a very long time. But where the Act is atleast ambiguous and the Court does not feel absolutely able to overrule them, it would be unsafe to disturb the course of rulings. A.I.R. 1932 All. 617=1932 A.L.J. 941=55 A. 24=140 Ind. Cas. 631 (F.B.).

——Rule of.

The Courts in India must not depart from a long consistent course of decisions simply on the basis of a dictum or a supposed dictum of their Lordships of the Privy Council on a matter on which it was not directly necessary for their Lordships to decide in the case. A.I.R. 1931 All. 162= 1931 A.L.J. 122=53 A. 239=135 Ind. Cas. 119 (F.B.).

——Doctrine of.

The Courts must always hesitate to overrule decisions which are not manifestly erroneous and mischievous which have stood for many years unchallenged and which, from their nature, may reasonably be supposed to have affected the conduct of a large portion of the community in matters relating to rights of property. A.I.R. 1931 Pat. 241 (251)=12 P.L.T. 423=10 Pat. 670=133 Ind. Cas. 337 (F.B.).

——Stare decisis—Cases of contracts relating to land.

The principle of "stare decisis" is especially important in cases of contracts relating to land and a different view of law from that established by a series of decisions should not be taken. 32 Bom. L.R. 272=A.I.R. 1930 Bom. 213.

——Stare decisis—Applicability.

The principle of stare decisis ought to apply to a doubtful question of law, if it is so regarded, the decision on which may have affected the marital relations of many persons and the legitimacy of their offsprings. 113 Ind. Cas. 156= 32 C.W.N. 640=A.I.R. 1928 Cal. 549.

——In the matter of a fiscal enactment where the question is in doubt the rule of stare decisis should apply. 103 Ind. Cas. 657=A.I.R. 1927 Lah. 635.

——The principle of stare decisis should be applied unless there are strong reasons to the contrary as otherwise it would unsettle many titles. 103 Ind. Cas. 302=50 Mad. 687=25 M.L.W. 806= 1927 M.W.N. 269=A.I.R. 1927 Mad. 636=53 M.L.J. 203 (F.B.).

——Full Bench decision of long standing may be overruled if authorities are against it and its upsetting does not affect many titles. 98 Ind. Cas. 220=54 Cal. 266=44 C. L. J. 194=31 C.W.N. 14=A.I.R. 1926 Cal. 1153 (S.B.).

——Praticular plea being not raised in a series of cases—Presumption.

When a long series of cases, extending over a long period of time when parties are represented by eminent counsel, are decided in a way where if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad. 77 Ind. Cas. 689=21 A. L. J. 934=5 L. R. P. C. 1=28 C. W. N. 253=5 P. L. T. 1=2 Pat. L. R. Civ. 41= 1924 M. W. N. 68=19 M. L. W. 72=33 M. L. T. 457=51 I. A 129=46 All. 95=26 Bom. L. R. 500=11 O. L. J. 107=1 P. L. R. 1924 =41 C. L. J. 232=A. I. R. 1924 P. C. 50= 46 M.L.J. 23. (P. C.).

——Stare decisis—Applicability of.

The doctrine that the authority of long established decided cases is to be maintained, is not of universal application. It has no application where the decision does not embarrass trade or commerce nor affects transactions which may have been adjusted rights which might have been determined, titles which may have been obtained or personal status which may have been acquired. Great importance is to be attached to old authorities on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong and specially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based and practical injustice in the consequence that must flow from them it is they duty of the Court of ultimate appeal to overrule them if it has not lost the right to do so by itself expressly affirming, them. 31 C. L. J. 510=24 C. W. N. 818=58 Ind. Cas. 353. (F. B.).

——Stare decisis—Principle of—Applicability.

A long series of decisions based upon a clearly erroneous construction of an Act should not be followed, while a long series of decisions based upon a construction not free from doubt should not be disregarded. 41 Bom. 588=19 Bom. L.R. 579=41 Ind. Cas. 761 (F.B.).

——Precedent when should not be overruled.

Courts should not overrule decisions of long-standing unless they are mischievous and erroneous since they must have changed the relations of many persons as regards their property. 11 C.L. J. 106 = 5 Ind, Cas. 303.

——Stare decisis—Practice contrary to law.

A practice contrary to law cannot be followed even if it has prevailed for a long period and has been judicially recognised. (1910) M.W.N. 1=7 M.L.T. 290=5 Ind. Cas. 727.

——Stare decisis—Wrong practice—Alteration.

A wrong practice cannot be converted into right one through age, and if the practice of a court is not in conformity with what the legislature has laid down, it must be altered and one in conformity with law adopted. 5 L.B.R. 94=4 Ind. Cas. 289.

——Question merely of procedure.

Where the question is merely one of procedure, it will not be desirable to depart from the long course of decisions and upset what has been regarded in the Presidency as a settled cursus curiae for over 50 years. A.I.R. 1941 Mad. 161= I.L.R. (1941) Mad. 438=53 L.W. 27=(1941) 1 M.L. J. 45=1941 M.W.N. 149=196 Ind. Cas. 204 (F.B.).

——Stare decisis does not apply when point raised is one of procedure and not of substantive law. 119 Ind. Cas. 103=1929 A.L.J, 769=51 All. 910=A.I.R. 1929 All. 593.

——The principle of stare decisis has far less applicability to the law of procedure than to that of substantive law. 114 Ind. Cas. 524=6 Rang. 703=A.I.R. 1929 Rang. 41 (F.B.).

——It is better in matters of procedure that the principle of stare decisis should prevail. 112 Ind. Cas. 36=27 M.L.W. 475=A.I.R. 1928 Mad. 440.

——Principle of, does not apply to procedural decisions.

Per Sulaiman, Ag. C. J.—The principle of stare decisis does not apply to procedural decisions which cannot be considered to have affected any rights in property or title, or to have affected contracts and other dealings. 112 Ind. Cas. 73= 51 All. 237=26 A.L. J. 966=A.I.R. 1928 All. 629. (F.B.).

——Stare decisis—High Courts when to be followed.

In cases where no question of principle but only a question of practice or procedure arises the decisions of the High Court should be unanimous. 38 All. 280=14 A L. J. 204=32 Ind. Cas. 622.

23. Miscellaneous.

——Duty of Court—Duty to keep themselves informed of current decisions.

There is a duty on the part of the judiciary to keep themselves informed of the current decisions of at least their own Courts. 1946 M.W.N 571=231 Ind. Cas. 295=A.I.R. 1947 Mad. 106=59 L.W. 426=(1946) 2 M.L.J. 117.

——Overruled decisions—How far law—Overruling decision—Retrospective effect. See Berar Patels and Patwaris law. 1946 N.L.J. 59.

——An expression of doubt is a different thing from overruling. A I.R. 1943 Mad. 561=56 L.W. 241=1943 M.W.N 289=I.L.R (1944) Mad. 110=(1942) 1 M.L.J. 332=209 Ind. Cas. 104.

——When there is an obvious error made in dictating the judgment it cannot be said that such is the opinion of the High court. 119 Ind. Cas. 96=A I.R. 1929 All. 896.

——Language of an Act not ambiguous—Cases interpreting it are not necessarily binding.

Where an authority is cited merely as an illustration of a particular application of language in a statute which is not in dispute, a decision in such a case is not necessarily binding in another case. 100 Ind. Cas. 332=49 All. 464=25 A.L.J. 305=A.I.R. 1927 All. 292.

Point of law—Decision of a Bench is good until upset by Privy Council or overruled by Full Bench. 99 Ind.Cas. 677=50 Mad. 403=25 M.L.W. 61=1927 M.W.N. 8=38 M.L.T. 156=A.I.R. 1927 Mad. 288=52 M.L.J. 1.

—Until the Privy Council has made clear that it intended to overrule a long series of decisions of the Indian High Courts, they cannot be held to have been overruled. 100 Ind. Cas. 157=50 Mad. 380=25 M.L.W. 511=38 M.L.T. 51=1927 M.W.N. 248=A.I.R. 1927 Mad. 398=52 M.L.J. 161.

—Decisions which are not correct in law cannot be upheld even though they relate merely to a question of procedure. 106 Ind.Cas. 230=51 Mad. 46=26 M.L.W. 775=A.I.R. 1927 Mad. 1043=53 M.L.J. 824 (F.B.).

—Hard cases must not be allowed to make bad law. 100 Ind.Cas. 851=A.I.R. 1927 Oudh 183.

—Though a case under an Act which is no longer in force cannot be treated as an authority, nevertheless, it is a useful guide as to the construction of the Act in force instead. 97 Ind. Cas. 993=49 Mad. 903=74 M.L.W. 559=1926 M.W.N. 754=A.I.R. 1926 Mad. 1038=51 M.L.J. 354. (F.B.).

——Hindu Law—School of law.

The reason for the different results at which the Courts in the Bombay Presidency and the other Courts of India have arrived lies in the dominating influence of the particular commentaries. Further, it must always be remembered that the commentaries are only commentaries.

They do not enact; they explain and are evidence of the congeries of customs which form the law. 57 Ind. Cas. 545=48 Cal. 30=25 C.W.N. 243=47 I.A. 213=16 N.L.R. 187=18 A.L.J. 1049=22 Bom. L.R. 1070=28 M.L.T. 157=12 M.L.W. 679=1920 M.W.N. 483=3 N.L.J. 251=A.I.R. 1921 P.C. 59=39 M.L.J. 166 (P.C.).

——Discretion—Judicial.

Judicial limitations of a discretion imposed generally upon the Courts by the statutes expressly is very undesirable. 2 L.W. 1115=31 Ind. Cas. 536.

——Sudder Court—Proceedings of—Value of.

The Madras Sudder Courts proceedings being always treated as authoritative, the absence of precedents does not lower its value. 36 Mad. 380=(1911) 2 M.W.N. 529=22 M.L.J. 118=10 M.L.T. 521=12 Ind. Cas. 1007.

——Practice — Precedents — Upper Burma Courts—Law applicable—Case law.

The Upper Burma Courts are bound by Upper Burma Rulings. U.B.R. (1911) 1, 87=12 Cr.L.J. 448=11 Ind. Cas. 762.

——Precedents—Custom—Pre-emption.

Instances in which the existence of the custom of pre-emption is either admitted or assumed are not valueless as precedents. 96 P.R. 1910=192 P.L.R. 1910=8 Ind. Cas. 356.

——Plain proposition of law difficulty of finding authority for.

"The clearer a thing is, the more difficult it is to find any express authority or any dictum exactly in point". 1901 A. C. 246, ref. to. 4 Bom. L.R. 469=26 B. 689.

——Case Law—Decision of single Judge.

Court selling in banco are not bound by a nisi prius decision. (1909) 37 C. 467=7 Ind. Cas. 359=14 C.W.N. 1114.

——Unanimity among judicial decisions in India.

Per Jenkins, J.—It is desirable, and is in the interest of justice, that so far as possible there should be unanimity among several courts on those matters where local conditions do not call for different results. (1902) 4 Bom. L.R. 688=27 B 1.

——Judge's endorsement—"Heard pleaders on both sides"—Effect.

The endorsement of the Judge "Heard pleaders on both sides" does not mean necessarily that there was a contest on any particular matter. 52 C.L.J. 153=129 Ind. Cas. 843=A.I.R. 1930 Cal. 745.

——Preceptor.

See: Hind Law—Succession.

——Precepts.

See: Civil P. C., S. 46.

PRE-EMPTION

See also

(1) AGRA PRE-EMPTION ACT, 1922.
(2) BIHAR LAND REVENUE CODE.
(3) CUSTOM.
(4) DEED=CONSTRUCTION.
  (1) SALE DEED.
  (2) SALE OR LEASE.
(5) MAHAMEDAN LAW—PRE-EMPTION.
(6) OUDH LAWS ACT, 1876.
(7) PUNJAB PRE-EMPTION ACT.
(8) WAJIBULARZ.

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1. Basis of claim.

——Cannot be based on justice, equity and good conscience.

Where the custom of pre-emption set up by the plaintiff is a departure from the ordinary custom even as known to the Muhammadan Law, the custom must be proved to the satisfaction of the Court, especially when the right of pre-emption is a very weak right because it interferes with the freedom of contract and is opposed to a progressive state of society. The claim cannot be based on justice, equity and good conscience but only on custom.

Unit for purposes of custom may be, not only a district or a city or town but also a parish, a manor, a borough, a hamlet i.e, an area smaller than a district r town.

(Custom, held was not establishd) A.I.R. 1946 All. 133=1945 A.L.J. 407=I.L.R. (1945) All. 188=1945 A.W.R. (H. C.) 351 (2).

——Basis of claim—A person transferring land to another in exchange of latter's land—Transfer making latter co-sharer—Third party's suit for pre-emption—Subsequently, the former obtaining decree under S. 119, Transfer of Property Act (4 of 1882), for return of land—This fact, if entitles pre-emptor to pre-empt.

A suit for pre-emption does not lie against a vendee who, on the date of the sale sought to be pre-empted had an interest in the **mahal** even though that interest is defeasible.

Hence, where a person transfers land to another in exchange of the latter's land by which transfer the latter becomes a co-sharer, the fact that after the suit of pre-emption by a third person, the former has obtained a decree for return of the land under S. 119, T. P. Act, would not give the pre-emptor any right to pre-empt. A.I.R. 1940 All. 478=1940 A.L.J. 569=1940 A.W.R. 475=191 Ind. Cas. 385.

——Basis of claim.

Transfer of property worth Rs. 100 or upwards by compromise decree—No registered instrument—There is no right of pre-emption. A.I.R. 1931 All. 741=1930 A.L.J. 1564=53 All. 100=131 Ind. Cas. 242.

——Basis of elaim—Conditional exchange—Right of pre-emption—Fulfilment of condition—Fresh demands, necessity of.

A conditional exchange with a reservation entitling either party to take back the property would not give rise to a right of pre-emption.

Where the deeds of exchange reserved an option to both the parties to annul the transaction and get back the properties transferred in their lifetime but provided that the condition should not be binding on their heirs and representatives, and one of the parties subsequently died,

Held, (i) that there was no right of pre-emption during lifetime of the deceased as the exchange was conditional ;

(ii) that the right of pre-emption could not be exercised without fresh demands and a fresh claim for pre-emption after the death of the party. A.I.R. 1931 All. 106=1930 A.L.J. 1478=53 All. 169=130 Ind. Cas. 295.

——Basis of claim—Statute contract or custom.

A right of pre-emption must, in the absence of statute, be based either on contract or custom. 78 Ind. Cas. 145=22 A.L.J. 126=5 L.R.A. Civ. 50=A.I.R. 1924 All. 318.

——Basis of claim—Evidence of memory and tradition.

A claim for pre-emption which disturbs a **bona fide** purchaser in the quiet possession of his property should not be based on untrustworthy evidence. As the right has been conferred by the legislature upon persons in whose case formal records of pedigree cannot naturally be expected to be found, the courts have to depend upon such evidence as is based on memory and tradition. Because strict conditions like the production of document and records for proving the line of succession does not exist such evidence should not be rejected as unsatisfactory though the evidence produced requires to be strictly examined. 67 Ind. Cas. 264=20 A.L.J. 427=3 Lah. 48=35 Cal. L.J.

514=7 P.W.R. 1922=30 M.L.T. 237=49 I.A. 74= A.I.R. 1922 P.C. 139=43 M.L.J. 49 (P.C.).

——Basis of claim—Loss of community of interest—Loss of right.

The basis of the right of pre-emption is **prima facie** the co-ownership of the parties in the same mahal of a village. Parties who are no longer co-sharers, or sharers with each other in the bigger unit, unless there is something clear and distinct to the contrary, have no longer any right after a partition has separated them completely from their other co-sharers.

Subsequent to a perfect partition the same custom of pre-emption was regarded in the **wajib-ul-arz** of each of the new mahals as had been recorded in the **wajib-ul-arz** of the original mahal. The later **wajib-ul-arz** divided the co-sharers into five classes, the last of whom were **Malikan-deh.**

Held, that subsequent to the partition a member of the **malikan-deh** of the original **wajib-ul-arz** who was not a co-sharer in the newly formed mahal was not entitled to pre-empt. 61 Ind. Cas. 89=19 A.L.J. 141=A.I.R. 1921 All. 272.

——Basis of claim—Sale by Hindu father—Legal necessity—Right of sons.

A man cannot pre-empt a sale in which a portion of his own property has actually been legally and validly transferred. The sons of a Hindu father cannot claim to pre-empt when the whole property has been sold by the father for a family necessity. 42 All. 264= 18 A.L.J. 116=2 U.P.L.R. (All.) 32=55 Ind. Cas. 37.

——Basis of claim—Custom, contract or Muhammadan Law—Alternative.

Where a pre-emption suit based on custom, contract, or Muhammadan Law in the alternative is not supported by custom or contract, it may succeed under the Muhammadan Law if the formalities required by that law were duly performed. 36 All. 456=12 A.L.J. 681 =24 Ind Cas. 425.

——Basis of claim—Wanting—Effect.

Pre-emption cannot be granted to one who was not and had never been in possession of the share on the basis of which his claim to pre-empt was founded where the person who was in possession of the share claimed title to the share adversely to the pre-empter. 19 Ind. Cas. 749 (All.).

—Basis of claim—Exchange—The right of pre-emption arises in respect of exchange. 6 A. L. J. 735=3 Ind. Cas. 903=31 A. 539.

——Basis of claim—Suit based on contract—Contract coming to an end with termination of period of settlement.

A right of pre-emption was based on a contract recorded in a Wajib-ul-arz terminating with the term of the settlement. The settlement was in force both at the time of sale and at the time of the institution of suit but, not at the time the decree could be given.

Held, that the termination of settlement could not prevent the plaintiff from getting a decree in his favour. 31 All. 111=6 A.L.J. 51=1 Ind. Cas. 819.

——Basis of claim—Defeat of claim-

In a suit for pre-emption based on the ground that at the date of the sale the plaintiff pre-emptor was a proprietor in the village in which the property in suit was situated and the vendee was not, the vendee cannot defeat the pre-emptor's right by claiming that he became a proprietor in that village. After the date of the institution of the suit, but before the passing of the pre-emption decree. 91 P.R. 1909=148 P.L.R. 1909=161 P.W.R. 1909=4 Ind. Cas. 337 (F.B.).

——Basis of claim—Title—Limitation Act (15 of 1877), Art. 10.

The basis of a suit for pre-emption is the pre-emptor's title, and it is not affected by the question whether the pre-emptor is in possession or not. To such a suit Art. 10, Limitation Act, applies. (1905) 2 A.L.J. 151.

——Basis of claim—Compromise of suit, definition of for pre-emption—Suit for pre-emption on such compromise decree.

Pre-emptive right is a right to step into the shoes of a less qualified vendee or transferee, and therefore, there must be such a person acquiring property by a contractual relation of sale or transfer to entitle, one to institute a suit for pre-emption. A right of pre-emption cannot arise upon the transfer of property by virtue of a decree in another suit for pre-emption. (1903) A.W.N. 63=25 A. 334.

2. Circumvention of.

——Circumvention of—Adjoining owners—Sale in halves to defeat pre-emption—Validity—Tests.

Where two properties adjoin each other and the owner of one of them sells the further half of his property first and then the nearer half with a view to defeat his neighbour's right of pre-emption, the Court has to see whether the parties really entered into two separate transactions of sale or whether there was only one transaction and it was given the appearance of two separate sales merely to defeat the right of pre-emption and if there was in reality only one transaction, the adjoining owner is entitled to pre-empt. A.I.R. 1931 Lah. 436=12 Lah. 578=32 P.L.R. 801=135 Ind. Cas. 36.

——Circumvention of—Mortgage instead of sale.

When a man wishes to raise money transferring property and is absolutely indifferent as to the manner in which the property is transferred and in order to avoid the exercise of a right of pre-emption executes a mortgage instead of a sale of the property, no right of pre-emption arises even although the same results are obtained by the execution of the deed of mortgage as by a deed of sale. A.I.R. 1927 Oudh 40; A.I.R. 1927 Oudh 161 and A.I.R. 1928 Oudh 25, Foll. The proper method to decide a case like this is by the construction of the document and if the document is not a sale-deed there can be no right of pre-emption. 101 Ind. Cas. 282=2 Luck. 470=4 O.W.N. 265=A.I.R. 1928 Oudh 103.

——Circumvention of—Mortgage instead of sale.

Wazir Hasan, J.—Where a contract is not a completed and an executed contract in law until it is reduced to writing and registered, there is **locus penitentiae** till it is reduced to writing, and where the **locus penitentiae** is availed of for fear of a claim for pre-emption and a mortgage is executed instead of a sale, there is no right of pre-emption. A.I.R. 1914 P.C. 27, Rel. on. 101 Ind. Cas. 282=2 Luck. 470=4 O.W.N. 265 =A.I.R. 1928 Oudh 103.

——Circumvention of—Hiba-bil-ewaz.

It is not forbidden to a person to circumvent the law of pre-emption by taking a trunsfer which falls short of the sale but which may eventually have the same effect as a sale. There is nothing fraudulent in such a transaction.

Even though a transaction is thrown into the shape of hiba-bil-evaz in order to prevent the exercise of a right

of pre-emption, no right of pre-emption exists. A.I.R. 1927 Oudh 204 ; A.I.R. 1927 Oudh 40 ; 2 Luck. 416; A.I.R. 1927 Oudh 161 and 2 Luck. 470, Foll. 105 Ind. Cas. 116=4 O.W.N. 814=A.I.R. 1927 Oudh 576.

——Circumvention of—Transfer short of sale.

It is not forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale but which may eventually have the same effect as a sale. 16 O.C. 9 and 18 O.C. 109, Foll. 95 Ind. Cas. 747=29 O.C. 101=13 O.L.J. 655=A.I.R. 1927 Oudh 40.

——Circumvention of—Sale by some vendees with inferior rights.

If out of several vendees the one whose rights are inferior to those of the pre-emptor sells his share before the institution of the suit to a person having rights not inferior to the pre-emptors, the claim of the latter would be defeated, provided the latter sale is not sham or fictitious.

There is a difference between a fictitious or sham sale and a genuine sale which has been effected for the purpose of defeating pre-emptor. 69 P.R. 1898, Foll. 87 Ind. Cas. 652=7 L L.J. 179=26 P.L.R. 215=A.I.R. 1925 Lah. 413.

——Circumvention of—Exchange.

The law of pre-emption may be evaded by legal means, and there is therefore nothing illegal in effecting an exchange when the buyer apprehends that a sale effected in his favour would be pre-empted. 60 Ind. Cas. 576=4 L.L.J. 356=A.I.R. 1921 Lah. 192.

——Circumvention of—Colourable mortgage not effective.

No right of pre-emption arises in respect of a mortgage. The plaintiffs in a pre-emption suit can only succeed by showing that the transaction is such as to amount in substance to an out-and-out transfer of the property and that the right of redemption reserved to the mortgagors is merely nominal. The terms of the transaction must be such as to render it practically impossible for the mortgagors ever to recover the property. If the mortgagors merely resort to a mortgage instead of a sale for the purpose of avoiding pre-emption, it is perfectly within their right to do so so long as the mortgage is really a mortgage. 64 Ind. Cas. 744=24 O. C. 353=A.I R. 1921 Oudh 201.

3 Collusion.

——Collusion—Defence—Proof of.

It is necessary, before a pre-emption suit can be defeated on grounds of waiver and collusion, to establish by the strictest evidence that the object of the plaintiff was really to secure the land for the vendee, and a desire to annoy and defeat a rival pre-emptor is not sufficient. 58 P.R. 1912 and 103 P.R. 1914, Foll. 9 L.L.J. 486=29 P.L.R. 58=A.I.R. 1927 Lah. 872.

——Collusion—Presumption as to.

Where pre-emption was possible fraud would be presumed when, on the face of the document, it appears that the transfer was miscalled a lease when in reality it was a sale of under-proprietary rights. 87 Ind. Cas. 347=A.I.R. 1925 Oudh 714.

——Collusion—Duty of Court—Mahomedan Law.

Where a custom of pre-emption prevails the vendor and vendee cannot defeat the pre-emptor by dressing up the transaction in the garb of a lease. The same principle applies to cases of pre-emption under the Mahomedan Law. Where an issue as to the nature of the transaction is raised by the plaintiff. the Court is bound to determine its real nature and if after considering all the circumstances, namely, the sum which was paid down, the smallness of the rent and the value of the property, it came to the conclusion that it was a sale, it must hold that the right of pre-emption arose and determine whether the demands were made or not. 40 All. 322=16 A.L.J. 233=44 Ind. Cas. 227.

——Collusion—Presumption—Onus—Right of a son.

Unless the contrary is clearly established it is to be presumed that plaintiff sues for his own benefit. The mere fact that the plaintiff is a minor and the son of the vendor does not prove that the suit is for the benefit of vendor. The motive which led the plaintiff to institute the suit and the source from which funds are being derived do not prove that fact either and it is immaterial whether vendor is helping his son. It is for the defendant (vendee) to strictly prove that the suit had been instituted for the benefit of the plaintiff's father. It did not lie on the plaintiff to prove that the suit was not for the benefit of his father. A son has a right to pre-empt apart from and independently of his father. 7 P.R. 1912 Rel. on. 2 Lah. L.J. 226.

——Collusion—Colourable transaction.

N made a gift to a person as his near kinsman and as having rendered services to **N**. It was found that the donee was neither related to **N** nor had rendered any service to **N**. The transaction was held to be a sale and pre-emption was allowed. 70 P.R. 1916=118 P.W.R. 1916=129 P.L.R. 1916=35 Ind. Cas. 303.

——Collusion—Dismissal of suit.

To defeat a suit for pre-emption on the ground of collusion with the vendee strict proof of the plaintiff's object is really to secure the property for the vendee must be given. A motive to annoy and to defeat rival pre-emptors is not sufficient. 103 P. R. 1914=202 P.L.R. 1915=27 Ind. Cas. 93.

——Collusion—Fictitious sale by vendee—Effect.

A fictitious resale or gift by the vendee to another person with superior or equal right, cannot defeat the pre-emptor's claim. The alienee only stands in the shoes of the vendee. 164 P.W.R. 1913=282 P. L. R. 1913=20 Ind. Cas. 843.

——Collusion does not defeat right.

Pre-emption can be defeated by lawful means. A fraudulent form given to a transaction of sale cannot prevent a party from asserting his right of pre-emption. Where in a joint family one member mortgaged his property to one brother and subsequently sold the equity of redemption to another brother this was held to be such a fraudulent transaction as could not defeat the right of pre-emption. 5 O.L.J. 87=45 Ind. Cas. 231.

——Collusion—Device to defeat.

It is not a fraud to circumvent the law of pre-emption by taking a transfer which falls short of sale, but which may eventually have the same effect as a sale. 16 O C. 9=19 Ind. Cas. 679.

——Collusion—Part of consideration inserted in sale-deed to keep off pre-emption. 46 P. L. R. 1909=27 P.R. 1909=1 Ind. Cas. 888.

4. Condition precedent.

——Condition precedent—Right—Dates and property with reference to which the plaintiff has to show subsisting title.

The crucial dates on which the plaintiff in a pre-emption suit must establish his subsisting title are the date of the sale, the date of the suit and the date of the decree, but this has reference to the property on the strength of which the suit for pre-emption is brought. It has no reference to the property in respect of which the claim for pre-emption is made. 1947 A.L.J. 206=1947 A.L.W. 216=1947 A.W.R. (H. C.) 170=A.I.R. 1947 A. 297.

——Condition precedent—Right of—Proof of the subsistence on three dates—If necessary.

A plaintiff pre-emptor, in order to be able to maintain a suit for pre-emption must establish his right on three important dates. He must have a right of pre-emption at the time when the sale took place; he must have the same right at the time when the suit is brought and he must also prove that the right continued up to the date when a decree ought to have been passed in his favour, that is, the date on which the case was disposed of by the first Court. 1947 M.L.R. 45 (Civ.).

——Condition precedent—Exercise of right of Right is effectively exercised or enforced only when complete divestiture of vendee's title and vesting of title in pre-emptor takes place

A right of pre-emption can be said to have been effectively exercised or enforced only when the pre-emptor has become actually substituted for the vendee in the original bargain of sale. Where the pre-emptive right is sought to be enforced by means of a suit, such substitution takes place and the pre-emptive right is deemed to have been exercised or enforced only when the price has been paid by the pre-emptor into Court in compliance with the decree passed in his favour. When the right is sought to be enforced by means of a private treaty out of Court the substitution of the pre-emptor for the purchaser takes place and the pre-emptive right is exercised or enforced when the price is either paid or tendered to the purchaser and he has actually surrendered the bargain in favour of the pre-emptor. There can be no enforcement of the pre-emptive right except by complete divestiture of the vendee's title and the vesting of such title in the pre-emptor. A.I.R. 1946 Lah. 322=48 Pun. L. R. 505=227. Ind Cas. 2 (F.B).

——Condition precedent—No pre-emption suit maintainable where no title passes to vendee under sale-deed.

A pre-emption suit is not maintainable where no title passes to the vendee under the deed of sale. No pre-emption suit is, therefore, maintainable where the sale is found to be **benami** and fictitious and not intended to transfer any title to the vendee. A.I.R 1942 Oudh 206=1941 O.W.N. 1377=1942 A.W.R. 15=17 Luck. 555=198 Ind. Cas. 150.

——Conditions precedent—Assertion of title in vendor and sale by him.

In order to succeed in a case of pre-emption the pre-emptor must assert title in the vendor, and the fact that there was a conveyance by the vendor to the vendee which amounted to a sale, the deed of conveyance must clearly profess to sell the property and not merely be a promise to sell the property in the future. It makes no difference whether the vendor was out of possession or in possession, or whether there was a small or large chance of his getting his title acknowledged in Court. The vendee **qua** vendor and as against the pre-emptor is estopped from denying the title of his own vendor, and so, for the purposes of the pre-emption suit, the title must be assumed to exist, if alleged by the pre-emptor to exist. But it is necessary, in order for a transaction to amount to a sale, that there should be, as stated in S. 54, Transfer of Property Act, a price paid or promised or part paid and part promised, which means that the price must be stated or ascertainable at the time of the deed. The P.C. ruling in 21 Cal. 496 (P.C.) cannot be construed, that whenever the title of the vendor is in doubt the sale should be considered a sale of a share in a law suit, and not a sale of property. 92 Ind. Cas. 757=13 O.L.J. 469=3 O.W.N. 138=A.I.R. 1926 Oudh 196.

——Condition precedent—Right to pre-empt must exist up to date of suit-

To sustain a claim for pre-emption the plaintiff must prove not only that at the time of the sale he possessed the qualifications which conferred upon him the right to pre-empt the property, but also that those qualifications subsisted at the time when the suit was brought. 91 P. R. 1909; 95 P.R. 1901: 32 P.R. 1902; 43 P.R. 1915; 44 Cal. 47, Foll. 84 Ind. Cas. 610=A.I.R. 1924 Lah. 613.

——Condition precedent—Nature of right—Right to—Right not in existence at date of suit—Subsequent accrual of right.

In a suit for pre-emption, plaintiff, must show that he is entitled to pre-empt not only on the date of suit, but also on the date of the decree. Where the defendant became a co-sharer by gift during the pendency of the suit, the plaintiff, must fail. 42 All. 268=18 A.L.J. 220=2 U.P.L.R. (All.) 48=55 Ind. Cas. 71.

——Condition precedent—Nature of right—Right to—Existence of, at the time of suit essential.

To maintain a suit for pre-emption plaintiff must show not only that he had a right of pre-emption at the time of the sale but also that his right subsisted at the time of the institution of the suit. 47 P. W. R. 1915 =125 P.L.R. 1915=43 P.R. 1915=27 Ind. Cas. 29.

5. Contract.

——Contract—Covenent in transaction of sale entered into before T.P. Act came into force—Validity as between persons not parties to transaction or beyond the life time of the parties—Rules against perpetuities.

Pre-emptions are not exceptions to the rule against perpetuity and restrains on alienation. A convenant for pre-emption contained in a transaction of sale entered into before the T.P. Act came into force is within the mischief of the rule against perpetuities. If the contract goes beyond the contracting parties it is invalid and unenforceable, as it offends against the rule against perpetuities. Hence, though a condition reserving a right of pre-emption as betwen co-sharers may be regarded as a valid arrangement, it would be invalid if it sinned against the rule about perpetuities or were absolutely prohibitive of alienation. I.L.R. (1946) Bom. 997=231 Ind. Cas. 322=A.I.R. 1947 Bom. 191=48 Bom. L.R. 591.

——Contract offending against rule of perpetuities—Enforceability.

A contract which goes beyond the contracting parties themselves offends against the rule of perpetutiies and is unenforceable.

Where under a contract of sale entered into before the Transfer of Property Act was applied to the Presidency of Bombay, an owner sold two portions of his house to his two sons respectively with a covenant

reserving the right of pre-emption in favour of the sons in case either of them desired to sell his portion of the house

Held, that the convenant about pre-emption, though not governed by Ss. 10 and 14, T. P. Act, 1882, was binding only on the parties to the contract, and not on their heirs and representatives as it would then contravene the English Common Law rule agrinst restraints on alienation and perpetuity. (1946) 48 Bom. L.R. 591 (594) (D.B.).

A convenant for pre-emption in respect of land unrestricted in point of time and expressed to be binding on the parties does not offend the rule against perpetuities. A.I.R. 1943 Cal. 417=77 C.L.J. 216=I. L. R. (1943) 2 Cal. 605=208 Ind. Cas. 473 (F.B.).

——Contract—If can be enforced by a representative against a representative.

A covenant for pre-emption is not a restrictive covenant in that sense of the term. Such a covenant cannot, therefore, be enforced by a representative of the covenantee against a representative of the covenantor. A.I.R. 1939 Cal. 421=183 Ind. Cas. 750.

——Contract—Sale-deed—Construction—Indemnity clause—Intention of parties—Clause that vendee would be entitled to recover purchase-money proportionate to property lost—Significance of.

A sale-deed contained, **inter alia,** the following: "If on the claim being put forward by any one, part or whole of the property sold goes out of the possession of the vendee, or the property sold be not held to be the property in ownership of me, the executant, or be found to have been transferred by me, the executant, or any legal flaw be found out, then under all these circumstances, I shall be liable for every kind of defence and costs of suit and return of the consideration. The vendee is empowered to realise through Court his consideration money to the extent of the property gone out of possession, from my other movable and immovable property of every kind as well as from my person with costs of suit. I and my heirs shall have no occasion to object to the payment thereof:"

Held, that it was never the intention of the parties that the indemnity clause should apply to a case of pre-emption. The very fact that it was stipulated that in the contingencies mentioned the vendor would be liable to return the whole or part of the consideration money in proportion to the extent of the property going out of the hands of the vendee showed clearly that the clause was not actually intended to cover the eventuality of the property being lost to the vendee by a pre-emption suit and that it could not be held that the intention of the parties was that the vendee should recover part of the purchase-money if the property should go out of his hands by a suit for pre-emption. A.I.R. 1935 Oudh 75=10 Luck. 601=1935 O.W.N. 99=153 Ind. Cas. 715.

——Contract—Execution of indemnity bond by vendor in favour of vendee—Pre-emption decree—Right of pre-emptor to sue on indemnity bond.

Where the vendor executes a security bond in favour of the vendee and the contract of sale and the contract of indemnity are so closely connected that they can be considered to be parts of one transaction, a pre-emptor obtaining a decree in respect of the sale is entitled to sue upon the indemnity bond. A.I.R. 1934 All. 461=1934 A.L.J. 74=3 A.W.R. 252=149 Ind. Cas. 1213.

——Contract—Construction—First option to mortgagee to purchase.

A mortgage-deed contained a condition that if ever the mortgagor wished to sell or mortgage the mortgaged property, he should not be able to sell or mortgage it to any one except the mortgagee and that if the mortgagee was unwilling to purchase it or have it mortgaged in his favour, the mortgagor would be at liberty to transfer it elsewhere.

Held, that there was an intention to confer on the mortgagee a right of pre-emption in respect of the property. 113 Ind. Cas. 106=8 Pat. 243=9 P.L.T. 747=A.I R. 1928 Pat. 637.

——Contract—For a fixed term.

Where the intention of the parties that the contract of pre-emption should remain in force between themselves only, or only for a fixed period of time, is quite clear from the language of the document itself and the attending circumstances, it cannot be held that the contract nevertheless remains in force for all time to come and for all generations. 106 Ind. Cas. 372=25 A.L.J. 1095=A.I.R. 1927 All. 699.

——Contract—Validity—Construction.

One **M** transferred to **N** the whole of his interest in a village except one pie and the parties entered into a mutual agreement as a fundamental condition of sale that if either of them should wish to transfer the whole or part of his share in that village, that is to say as regards the transferee **N** what he was taking under the contract and as regards the transferrer **M** the single pie share which he was reserving to himself, they might do so by transferring it from one to the other, but if either of them desired or in fact attempted to transfer to a third person the other party was to have the right to pre-empt.

Held, that the agreement was valid and enforceable against the legal representatives of the parties and that it did not offend against the rule against perpetuities. 45 All. 492; A.I.R. 1923 All. 511; 82 Ind. Cas. 643 and 45 All. 478; A.I.R. 1923 All. 514 and 82 Ind. Cas. 646 overruled. 100 Ind. Cas. 683=49 All. 527=25 A.L.J. 289=A I.R. 1927 All. 170 (F.B.).

——Contract—Unlimited in point of time—Void.

A covenant for pre-emption, which is unlimited in point of time, is void on the ground that it is obnoxious to the rule against perpetuities, and that to test whether a covenant violates the rule against perpetuities, one must look not to the particular events which may have actually happened, but to all possible contingencies. A I.R. 1921 Cal. 162, Foll. 105 Ind. Cas. 54=9 P.L.T. 17=A.I R. 1927 Pat. 412.

——Contract—Offer of right—Non-acceptance—No effect.

A mere offer to give a sort of right of pre-emption to another by giving the latter the first opportunity to purchase the property when necessity to sell it arises in which there is nothing to compel the offeree to buy the property is not a contract to sell the property and until the offer is perfected by acceptance it is not binding. A.I.R. 1922 Mad. 16, Foll. Such an offer cannot be enforced against a transferee. 91 Ind. Cas. 181=1925 M.W.N. 609=A.I.R. 1926 Mad. 120.

——Contract—Validity—Uulimited in point of time-limits.

Per **Sulaiman, J.**—A contract of pre-emption or one for reconveyance does not come under the rule against perpetuities, because such covenants do not create equitable interest in land. The essence of a contract is that the liabilities which it imposes must be imposed on definite persons, within a definite time, and the rights created by it must of themselves be definite. By a definite time, is not meant a period which is to expire

on a fixed date but merely a period not unlimited in its duration. If a contract is supposed to bind an indefinite class of persons, generation after generation and to bind them for an indefinite length of time it completely loses its character of an obligation **in personam**. If no period of time is fixed by parties themselves the Court would not be justified under section 46 of the Contract Act in filling up the gap and fixing a time which it considers reasonable, such a contract is too vague, indefinite and uncertain to be enforced against the heir of the deceased party. Although under the provisions of Sec. 37 of the Indian Contract Act a contract of pre-emption can be enforced against the personal representatives of the promissor in case of his death before performance unless a contrary intention appears from the contract, nevertheless where a contract does not specify any period of time within which it has to remain in force, it is too vague, indefinite and uncertain to be capable of being enforced except as against the actual parties to the contract in their lifetime. 21 A L.J. 413, Foll. 85 Ind. Cas. 482=46 All. 514=22 A.L.J. 400=5 L.R.A. Civ. 761=A.I.R. 1924 All. 657.

——Contract—Who are affected.

A contract for pre-emption can be enforced against the representatives of the parties to the contract, and also against a person who has taken the property affected by the contract with notice of the contract or who has taken that property gratuitously. 85 Ind. Cas. 482=46 All. 514=22 A.L J. 400=5 L.R.A. Civ. 761=A.I.R. 1924 All. 657.

——Contract—Settlement—Only parties can enforce.

Where plaintiffs first got a footing in the village by purchase, some 7 or 8 years after the settlement wasmade, they are not entitled to enforce a contract of pre-emption which was entered into at the time of the settlement because even assuming that the record in the **wajib-ul-arz** is a record of contract, plaintiffs were no parties to the contract. 78 Ind. Cas. 519=46 All. 35=A.I.R. 1924 All. 449.

——Contract—Running with the land.

An agreement to supersede a custom allowing free transfer by all co-sharers is an agreement in relation to the right of transfer of the proprietary interest in the soil of the village. Such an agreement therefore runs with the land. 82 Ind. Cas. 92=11 O.L.J. 319=A.I.R. 1924 Oudh 382.

——Contract—Co-sharers—Mutual right—Duration.

Where by the terms of a **Wajib-ul-arz** of 1883, the co-sharers had created a mutual right of pre-emption, **held**, that the contract expired with their death. To lay down that it binds their heirs and legal representatives for an indefinite period, would be to contravene the rule of perpetuities. 82 Ind. Cas. 643=21 A.L.J. 413=45 All. 492=4 L.R.A. Civ. 231=A.I.R. 1923 All. 511.

——Contract—Validity—Unlimited in point of time-limits.

In respect of contract of the transfer of property by way of sale of pre-emption it must be held on general principles of jurisprudence that there should be some time-limit beyond which the performance of contract must not be allowed to be held in suspense or postponed. Although section 14 of the Transfer of Property Act deals only with transfer, the provision of that section could in some cases be practically defeated if covenants are not held to be void for remoteness on the ground that by themselves they create no interest in property. The same rule should be applied to a case, not of specific performance but of declaration of right. The law in England and India is substantially the same with regard to the enforcement of the contract. If such a contract purports to do by indirect means what the law forbids to be done directly, it is void. 82 Ind. Cas. 628=24 Bom. L. R. 449=47 Bom.191=A.I.R. 1922 Bom. 84.

——Contract—Validity—Unlimited in point of time—Limits——Nature not merely personal.

There was an agreement that, if the vendees of certain land sold for building thereon, wanted to sell it, it must be sold to the vendor at the original price and the building at the price agreed upon. The contention was that the covenant was void being against the rule of perpetuity.

Held, that agreement is not merely a personal contract; though it creates no interest in land, it creates rights which are capable of being enforced with regard to the land in certain circumstances against third parties and to that extent, they are not ordinary personal covenants. 82 Ind. Cas. 628=24 Bom. L.R. 449=47 Bom. 191=A.I.R. 1922 Bom. 84.

——Contract—Covenant in deed of partition—Proper sale price, meaning of.

A right of pre-emption reserved in a partition deed is valid as between the co-owners themselves. The ekrarnamah contained the following clause:—Any one of the parties desirous of selling....shall sell the same to the other party willing to buy the same at the proper sale price.

Held, that the proper sale price would be the market value. 14 C.W.N. 295=10 C.L.J. 626=4 Ind. Cas. 743.

——Contract—Agreement by co-sharers—Effect.

Agreement by co-sharers not to recognise a local custom of pre-emption binds their successors in title. 22 O.C. 20=1 U.P.L.R. (J.C.) 34=50 Ind. Cas. 800.

——Contract—Created by contract in Oudh.

A clause, put in a deed prohibiting transfer of property in favour of any person other than one mentioned therein creates a right of pre-emption in favour of such person. 2 O.L.J. 289=18 O.C. 104=30 Ind. Cas. 285.

——Contract—Relinquishment—Agreement in partition suit for pre-emption.

Held, that an agreement embodied in a compromise decree passed in a partition suit relating to some joint family property whereby a right to transfer to any one whom the transferor liked was conferred upon a a member, did not amount to relinquishment of the right of pre-emption. 6 A.L.J. 687=3 Ind. Cas. 515.

——Contract for pre-emption between Hindus—Repugnance to the doctrine of perpetuity.

Per Bhashyam Iyengar, J.—Whether a contract for pre-emption between Hindus might be repugnant under the Hindu law to the doctrine of perpetuities. (1901) 11 M.L.J. 132=24 M. 449.

——Contract—Incident to mortgage, and one arising under a contract—Quaere.

Per **Bhashyam Aiyangar,** J.:—Whether there is any difference between pre-emption which is incident to the mortgage under the law and pre-emption arising under a contract between the parties. (1901) 11 M.L.J. 132=24 M. 449.

——Contract—Perpetuity—Contract running with the land—Heir.

A contract between the vendor and purchaser that if the purchaser ever sold the property, the vendor should be given the first refusal, is void for remoteness and cannot be enforced against the heir of the purchaser or against one who has purchased it from him. 24 W.R. 351; 20 Ch. D. 562, foll. (1900) 5 C.W.N. 343.

6. Co-sharers.

(a) Amount of share.
(b) Condition precedent.
(c) Partition.
(d) Priority.
(e) Proof.
(f) Right to Pre-empt.
(g) Vendor's right.
(h) Who is.

(a) Amount of Share.

——Co-sharers—Amount of share.

When two or more persons are equally entitled to pre-empt a property each one of them is entitled to an equal share in the property pre-empted. 44 Bom. 887 =22 Bom. L.R. 698=58 Ind. Cas. 279 (F.B.).

——Amount of share—Concurrent suits for pre-emption brought by co-sharers having equal rights—Decree.

Where, pending a suit brought by one co-sharer for pre-emption another co-sharer, having equal rights with the first, filed a similar suit for pre-emption of the same sale, it was held that the second plaintiff was entitled to a decree for pre-emption in respect of one-half of the property sold. 7 A. 720, foll. (1905) A.W.N. 50 =27 A. 465=2 A.L.J. 690.

(b) Condition Precedent.

——Co-sharer—Condition precedent—He must be resident in village.

To claim pre-emption, a person must be resident co-sharer in the village. A person cannot be said to be a resident co-sharer if he has got no residential house of his own where he ordinarily resides, but has got a mere cow-shed for keeping cattle and for servants to look after them. A.I.R. 1937 All. 795=1937 A.L.J. 1089=1937 A.W.R. 960 (2)=172 Ind. Cas. 509.

——Condition precedent — Co-sharer — Hindu family—Transfer by widow for partial necessity —Subsequent transferee from reversioner, whether acquires vested title from date of transfer or date of paying off prior transferee.

A widow sold the share which she had inherited from her husband for Rs. 199. After the death of the widow, the reversioner sold this share to the plaintiff. The latter instituted a suit to set aside the widow's transfer and obtained a decree for possession on payment of Rs. 99. The plaintiff instituted a suit to pre-empt a sale effected during the pendency of the previous suit claiming co-ownership by virtue of the transfer from the reversioner:

Held, that the transfer by the widow not being void, the plaintiff acquired a valid title only after he had deposited Rs. 99 under the previous decree and he was not, therefore, a co-sharer on the date of the sale. A.I.R. 1931 All. 405=1931 A.L.J. 339=131 Ind. Cas. 251.

——Co-sharer—Condition precedent.

No right to pre-empt has ever been held to exist in Oudh, whether under a custom recorded in the **wajib-ul-arz** or under the Oudh Laws Act, in a person, who has got no proprietary right in the village. Relationship alone is not considered to be sufficient to confer a right of pre-emption on any individual. The person claiming the right by relationship must be a co-sharer in the village. 105 Ind. Cas. 136=4 O.W.N. 787=A.I.R. 1927 Oudh 367.

(c) Partition.

——Co-sharer—Partition—RIght subsists—New Mahals—No rights inter se.

Where according to the **wajib-ul-arz** a custom of pre-emption exists in favour of the co-sharers in the village and the single mahal has subsequently been partitioned and co-sharers in one mahal have ceased to have any interest in the other mahal, the custom of pre-emption continues. But, in the absence of any evidence to the contrary, it must be confined to each of the new mahals which have been formed, with the result that proprietors in one mahal cannot have any right of pre-emption as regards shares in the other mahals. 31 All. 623, Expl. 106 Ind. Cas. 372=25 A.L.J. 1095=A.I.R. 1927 All. 699.

——Partition—Imperfect effect.

Where a village is imperfectly partitioned into several pattis, all the pattis taken together form one mahal and the proprietors of this mahal are co-sharers of each other and not perfect strangers for purposes of pre-emption and the fact that the property to be pre-empted lies entirely within one of such pattis is immaterial. 103 Ind. Cas. 621=A.I.R. 1927 All. 692.

——Partition—New mahal—Separate unit.

Ordinarily, where a partition has taken place, the joint ownership is destroyed, and each mahal becomes a separate unit for the purpose of regulating the rights of the co-sharers, forming the proprietary body of that mahal **inter se**. 92 Ind. Cas. 353 (All.).

——Partition.

Where partition has been made under the Land Revenue Act the previous relationship between the parties for purposes of pre-emption continues till the partition becomes effective. 89 Ind. Cas. 114=47 All. 910= 23 A.L.J. 862=6 L.R.A. Civ. 451=A.I.R. 1925 All. 747.

——Partition—No new wajib-ul-arz—Pre-existing right not negatived—Proof of right.

Where a fresh **wajib-ul-arz** has not been prepared at partition, it does not necessarily follow as a matter of law or principle that the custom or contract in force before the partion is no longer to have effect or operation. 22 All. 1 and 37 All. 129, Foll.

The partition, however, would have the effect of confining the right to the new fiscal units unless the contrary is established by other evidence. A mere proof that prior to the partition of the village the custom of pre-emption existed would not be sufficient to entitle the plaintiff to a decree. It would be necessary for him to show, either on the construction of the **wajib-ul-arz** or by other evidence, that the custom of pre-emption which obtained in the unpartitioned mauza would survive on partition of that mouza into separate mahals, so as to give a sharer in one of the new mahals a right to pre-empt property in another of those mahals in which he was not a sharer at the date of

the sale. 37 All. 129, Foll. 87 Ind. Cas. 298=47 All. 470=23 A.L.J. 283=A.I.R. 1925 All. 449.

——**Co-sharer—Partition—Relation--New mahals—No rights inter se.**

After a perfect partition there is no community of interest between the co-sharers of one mahal and the co-sharers of another mahal and none of them can in any sense of the word be regarded as a co-sharer of the property of the others. 22 All. 1 (F. B.). Foll. 71 Ind. Cas. 408=20 A.L.J. 956=4 L.R.A. Civ. 15=A.I.R. 1923 All. 52.

——**Co-sharer—Partition—Entry in Wajib-ul-arz—Division into mahals.**

A co-sharer in an undivided village was to pre-empt a sale by another co-sharer according to the Wajib-ul-arz. The village was partitioned into several **mahals.**

Held, non-co-sharers in the new mahals are mere strangers and cannot claim pre-emption. 41 All. 426 = 17 A.L.J. 467=50 Ind. Cas. 209.

——**Co-sharer—Partition—Effect.**

Where the vendee ceased to be the co-sharer with the vender and the plaintiff became the co-sharer with the vendor under a partition, the plaintiff has a right to sue for pre-emption. 15 Ind. Cas. 704 (All.).

——**Co-sharer—Partition—Effect of.**

The pendency of a proceeding for the partition of a joint estate does not bar the claim of a co-sharer to pre-emption. 32 Ind. Cas. 893 (Cal.)

——Co-sharer—Partition—Partition of village—Different mahals—Right of a shareholder in one mahals to pre-empt—Property sold in different mahal. 22 A.L.J. 33, Foll. (1905) 2 A.L.J. 261.

——Co-sharer—Partition—Mortgage by conditional sale—Accrual of pre-emption when sale becomes absolute—Partition of mahal. 3 A. 610, Foll. 1902 A.W.N. 164=24 A. 493.

(d) Priority.

——**Co-sharer—Priority.**

Purchaser of share in whole **khata** is co-sharer in all **khasra** numbers comprised in **khata** and has a superior right of pre-emption as against purchaser of shares in some **khasra** numbers in the **khata.**

Persons are co-sharers in each **khasra** number comprised in a **khata** when they have a share in the whole **khata** and are entitled to pre-emption in preference to co-sharer in only some of the **khasra** numbers out of the **khata**. A.I.R. 1944 Pesh. 40=217 Ind. Cas. 91.

——**Priority—Vendor not bound to choose nearest.**

The vendor is entitled to choose amongst the whole body who are descendants of the same common ancestor but is not obliged to offer the option of purchase in the first instance to the descendant of nearer common ancestor or to a nearer descendant of the same common ancestor. 71 Ind. Cas. 655=A.I.R. 1923 All. 375.

——**Co-sharer — Priority — Relationship — No ground.**

If every **khata** in the village is distinct without any joint right or joint obligation with the other **khatas**, every **khata** would be in the position of separate **mahal** and the co-sharers of every **khata** would be separate and independent. Under these circumstances among the parties who are members of the village community so far as the right of pre-emption is concerned no right of preference is given on account of relationship. 77 Ind. Cas. 771=A.I.R. 1923 Oudh 159.

——**Co-sharer—Priority.**

A zamina khewat provided—Any sharer wishing to transfer his rights can transfer first to **Rishtad Arkaribi** then to **Rishtad Arbaidi** and then to **Shurkain Deh.** If all of them refuse, the sharer may transfer his property to any one he chooses. Sharers (Hissadars) and sharers in the village (**Shurkain Deh**) shall have preference if they pay the same price as the stranger transferee.

Held, that a near relative who was not a co-sharer of the vendor in the same mahal had no right of pre-emption. 17 Ind Cas. 521 (All.).

——**Co-sharer—Priority—Equal degree—Loss of preferential right.**

Where a co-sharer of equal degree joins a co-sharer of an inferior decree in making a sale he forfeits his right as such and a suit for pre-emption can lie against him. 34 All. 542=10 A.L.J. 70=15 Ind. Cas. 174.

——**Co-sharer—Priority—Shurkai—Patti.**

Co-sharers in a patti are **shurkai patti; and one shurkai patti** is not preferred in pre-emption to another **shurkai patti**. 6 Ind. Cas. 169. (All.).

——**Co-sharer—Priority—Vendee stranger subsequently becoming co-sharer.**

Where a co-sharer in a thok has preference over a co-sharer in a Mahal, the right of plaintiff co-sharer in a thok, is not defeated by reason of the vendee's becoming subsequently a co-sharer in the Mahal. 7 A.L.J. 77=5 Ind. Cas. 520.

——**Co-sharer—Priority right.**

The right of pre-emption of a vendee, a co-sharer in land purchased by virtue of a previous sale cannot be affected by a suit to avoid and set aside the previous sale. Priority question must be decided with relation to the state of things existing at time of the sale and not at any later period. 27 P.W.R. 1919=90 P.R. 1919=52 Ind. Cas. 557.

——**Co-sharers—Priority.**

The mere fact that the vendors and the vendees are co-sharers in some **shamilat** land appertaining to all the **patti** does not invest the vendees with any better right. Where a **khata** forms a subordinate and separate **entity** in a **patti**, in which defendants vendees have no share, and if the **patti** in which defendants-vendees were co-sharers formed a separate sub-division of the same mahal, the plaintiffs who are co-sharers in the same **patti** have a preferential right of pre-emption. 22 O.C. 297=54 Ind. Cas. 632.

(e) Proof.

——**Co-sharer—Proof.**

The burden lies on the party that claims the status of a co-sharer to prove it. 1939 A L. J. 337=1939 A.W.R. (H.C.) 303.

——**Co-sharer—Proof—Whether prima facie evidence of existing title.**

If a plaintiff sues for pre-emption on the ground that he is a co-sharer in such a **mohal** or in a village, and there is a bare denial or non-admission by the defendant, it is not his duty to bring evidence beyond

the contents of the **khewat** generation after generation until one reaches some document showing transfer or until one reaches the first settlement to show title. The denial contained in the written statement is meant to be nothing more than a denial that the plaintiff was entered as a co-shater in the particular village. An entry in the **khewat** is **prima facie** evidence that there is an existing title and the defendant's objection is met by such an entry. A.I.R. 1939 Oudh 233=1939 O.W. N. 736=1939 A.W.R. 111=1939 R.D. 455=14 Luck. 678=185 Ind. Cas. 604.

——Proof—Co-sharer executing waqf of his property and constituting himself mutawalli—**Subsequent purchaser of share in** mahal **by him—Whethe as a proprietor.**

A person claiming to be a co-sharer must show that he is entitled as a proprietor to a share or part of a **mahal**. The mere fact that he is in possession in a different capacity cannot suffice.

Where a co-sharer in **mahal** executes a deed of **waqf** and appoints himself a **mutawalli** and subquently purchases a share in the **mahal**, he no more remains a proprietor after the creation of the **waqf** and is not entitled to any share in the **mahal** as a proprietor, though as a **mutawalli** he is entitled to hold possession. Consequently, he cannot resist a suit for pre-emption of the share purchased by him. A.I.R. 1937 All. 581=1937 A.L.J. 726=1937 A.W.R. 226=171 Ind. Cas. 367.

——Co-sharer—Proof—Hindu family—Deed of exe change executed by manager, whether defeasible.

Every deed of exchange executed by the manager of a joint Hindu family is not necessarily defeasible. Whether it can or cannot be avoided by the other members of the family will depend on its special circumstances and even if the other members of the family are not parties to the suit, it is open to the defendant vendees to lead evidence in order to satisfy the Court that circumstances exist which make the document binding on the family. A.I.R. 1931 All. 211=1931 A.L.J. 54=130 Ind. Cas. 448.

(f) Right to pre-empt.

——Right to pre-empt.

Where a Hindu brother sells his own share by the sale-deed but does not sell the family property nor does he act as manager of the family, a co-parcener may sue for pre-emption of the property sold. A.I.R. 1945 All. 5 =1944 A.L.J. 508=1944 A.W.R. 285=1944 O.W.N. 279=I.L.R. (1944) All. 662=217 Ind. Cas. 319.

——Co-sharer—Right to pre-empt—Joint Hindu family—Right of member.

Where property of a joint Hindu family is sold by the father as a manager of the joint family for legal necessity or otherwise, a member of the family can pre-empt the property out of his own separate funds and acquire the property as his separate property and not for the benefit of the joint family. A.I.R. 1943 Oudh 414=1943 A.W.R. 86=1943 O.W.N. 309=19 Luck. 257=209 Ind. Cas. 305.

——Co-sharer—Right to pre-empt—Oudh-Superior proprietor creating under-propietary right and selling it to person who is already proprietor and under-proprietor—Co-sharer, if can pre-empt.

A superior proprietor created an under-proprietary right which he sold to a person who was already a proprietor and also an under-proprietor. A pre-emption suit was brought by the co-sharer in the **mahal** concerned and the defence of the vendees was that under the Oudh Laws Act, being under-proprietors they came before a superior proprietor and he could not, therefore, pre-empt a sale of under-proprietary rights made in their favour.

Held, that the vendees had a preferential right to the would be pre-emptor and his suit must fail. A.I.R. 1940 Oudh 390=1940 O.W.N. 409=15 Luck. 475=1940 A.W,R. 202=187 Ind. Cas. 843.

——Co-sharer—Right to pre-empt—Minor member of Joint Hindu family—Sale binding on member.

In a joint Hindu family, the **karta** can always act and does always act in the interest of the entire family and he can give consent on behalf of a minor member to a sale. If the sale is binding on the minor, he is not entitled to pre-empt the property nor can he challenge the validity of the sale in a suit for pre-emption. The principle of estoppel applies to the case. A.I.R. 1933 All. 758=55 A .972=145 Ind. Cas. 547

——Co-sharer—Right to pre-empt—Hindu family—Purchase by some members of joint Hindu family—Suit by other members for pre-emption.

Where some of the members of a joint Hundu family purchase property, there is a presumption that it is acquired in the interest of all the members and a member of the family cannot, therefore, claim to pre-empt the sale merely on the ground that his name was not specifically mentioned as a vendee in the sale deed in question. A.I.R. 1932 All. 80=1931 A.L J. 341=131 Ind. Cas. 555.

——Co-sharer—Right to pre-empt—Co-sharer cannot pre-empt against mukarraridar of another co-sharer.

As a mukarraridar cannot claim pre-emption, the co-sharer, on the doctrine of reciprocity which is well understood in the Mohamedan law, cannot claim pre-emption against the mukarraridar. A co-sharer therefore cannot pre-empt against a mukarraridar of another co-sharer. 5 P.L.J. 740, Foll. 117 Ind. Cas. 865=8 Pat. 251=11 P.L.T. 24=A.I.R. 1929 Pat. 214.

——Right to pre-empt—Lands held in severality.

Where all the lands belonging to the parent **khatas** are held in severalty, the mere existence of a common **khata** containing certain barren, uncultivated or abadi lands which usually remain the property of all the co-sharers of the village till a partition is formally effected, cannot make a person who belongs in other respects to one class or category a joint co-sharer with another who belongs to another class or category as regards any separate interest, the latter may sell. No account is taken of the appurtenances in the **shamlat khatas** for the determination of his right of pre-emption. 82 Ind. Cas. 526=46 All. 674=5 L.R.A. Civ. 469=A.I.R. 1924 All. 753.

——Right to pre-empt—Relation of previous husband—Cannot.

A pre-emption suit by the uncle of the deceased former husband of the vendor on the ground that he is either a "sharik aziz qarib" or a "sharik aziz baced" of the vendor, **i.e.**, he has a preferential right than the vendee who is a co-sharer, will not lie. 64 Ind. Cas. 943=20 A.L.J. 56=A I.R. 1923 All. 128.

——Co-sharer—Right to pre-empt.

Where a village consisted of a **mahal** and a resumed **muafi** each held under separate engagements with Government and provided with separate Record of Rights but **co-sharers** of the **mahal** which formed the bulk of the

village had agreed with Government in the Wajib-ul-arz that they "shall take the jama of the resumed **muafi** and pay it along with over jama," this agreement did not make them responsible for the revenue assessed on the **muafi**, in which they had no interest and therefore, no right of pre-emption could arise between the owners of the **mahal** and the owners of the **muafi**. 38 All. 260=14 A.L.J. 313=33 Ind. Cas. 23.

——Co-sharer—Right to pre-empt—Mahal Resumed muafi.

If the wajib-ul-arz of a village gives a right of pre-emption, between co-sharers, there is no right of pre-emption in respect of a resumed **Maufi** by a person who is nota co-sharer in the plot though he is a co-sharer in the **Mahal**. 19 Ind. Cas. 119 (All.).

——Co-sharer—Right to pre-empt—Person having defeasible title in patti.

A defeasible title to a share in a patti acquired by a person does not give him the right to pre-empt another share in the same **patti** as a co-sharer. 32 **A**. 45; 4 A.L.J. 351, Foll. 35 All. 296=11 A.L J. 297=18 Ind. Cas. 959.

——Co-sharer—Right to pre-empt—Vendee becoming prior to the institution of the suit—Pre-emptor cannot succeed.

Vendees-defendants, strangers to the suit 8 villages, purchased certain shares in them on 11th June, 1907. The suit to pre-empt this sale was instituted on 5th October, 1907. On 21st August, 1907, the appellants-defendants purchased certain other shares in 5 out of 8 villages. The plaintiff-respondent sued to pre-empt the sale of 21st August and got a decree in his favour, but failed to pay the purchase money and the suit was dismissed.

Held that failure to pay purchase money by the pre-emptor invested absolute ownership in the purchaser of the sale of 21st August, 1907. They became co-sharers in the 5 villages. They cannot be ousted and the sale of 11th June, 1907, cannot be pre-empted so far as those 5 villages are concerned. 7 A.L.J. 344=6 Ind. Cas. 566.

——Co-sharer—Right to pre-empt.

A person who was not a co-sharer with the vendor in the same "Mahal" was held to have no right under the "Wajib-ul-arz" to pre-empt although he was a co-sharer in the village. 32 All. 63=6 A.L.J. 958=4 Ind. Cas. 138.

——Co-sharer—Right to pre-empt—Creation by contract—Failure to exercise right.

One of several co-heirs has no right as against the other co-sharers to contract that a mortgage of his share of property should have a right of pre-emption in the property, and if the pre-emptor fails to enforce his right within limitation, his claim though barred is not extinguished. He could set up his equity by way of defence but he may be successfully confronted with pleas of laches, waiver, acquiescence and other forms of equitable estoppel. 49 Ind. Cas. 910 (Lah.).

——Co sharer—Right to pre-empt—Value of possession.

Recent acquisition of possession by itself is not enough to support a claim to pre-empt as a co-sharer, though such possession is sufficient title against trespasser. 19 O. C. 190 Note=37 Ind. Cas. 172.

——Co-sharer—Right to pre-empt—Village divided into several Mahals—Right of pre-emption given to co-sharers in the village—Right among co-sharers of thoks.

The **wajib-ul-arz** of a village gave a right of pre-emption to an agreement in the following terms: "Any of the parties desirous of selling the lands alloted to his share shall sell the same to the other party willing to buy the same at the proper sale price, the sale to anybody else shall be invalid, but if the parties do not purchase at the proper sale price the other party shall be entitled to sell to others." Let it be known that the value of the partitioned property is or will be Rs. 600.

Held, that the covenant is valid in law against the covenantor, and a suit to enforce the right of pre-emption is maintainable, especially when, as in the present case, the third party purchaser from one of the parties to the covenant had notice of the covenant in the agreement when he made the purchase. The words "proper sale price" in the covenant means the market price and not the share of the seller in the purchase money which the plaintiff and the co-owners paid for the property when they bought it. If the plaintiff desires to exercise his right of pre-emption in the case he must pay the purchase money mentioned in the deed of sale of the third party purchaser. 10 C.L. J. 626=14 C.W.N. 295=4 Ind. Cas. 743.

——Co-sharer—Right to pre-empt.

If a 'Wajib-ul-arz' gives a right of pre-emption to a 'Hissadar' the right vests in the actual co-sharers in the village. The mere record of person's name in 'Khawap' does not confer a right to pre-empt. 4 Ind. Cas. 419 (All.).

(g) Vendor's right.

——Co-sharer—Vendor's right—Rights of—Effect of their refusal.

A Vendor can sell his property to any one other than a co-sharer and get his refusal. He is not however entitled to offer one price to the co-sharers and then sell to the strangers at a smaller value without informing them. 15 A.L.J. 315=39 Ind. Cas. 637.

——Co-sharer—Vendor's right.

Where a custom of pre-emption is that a person should first offer to sell his property to a co-sharer before sale to a third party, he is not bound to offer it a second time after the agreement to sell to the third party. 40 All. 690=16 A.L.J. 683=46 Ind. Cas. 761.

(h) Who is.

——Co-sharer—Who is.

Proprietors who do not own any fractional share in the entire property in mahal cannot be considered as co-sharers in the mahal. 1930 A.L.J. 1023=125 Ind. Cas. 578=A.I.R. 1930 All. 729.

——Co-sharer—Who is—Gorakhpur District—Arazidars are not.

The particular class of proprietor called, in the District of Gorakhpur, an arazidar, is not a co-sharer and will not therefore come within the provisions of a **waj-ib-ul-arz** relating to the pre-emptive rights of co-sharers. A.I.R. 1923 All. 129, Foll. 101 Ind. Cas. 518=A.I.R. 1927 All. 540.

——Co-sharer—Who is—Joint Hindu family—Sons are co-sharers.

Where sons and their father form one joint Hindu family and a property is purchased from the joint family funds, the sons must be considered as co-sharers with their father, although the father alone is recorded as co-sharer in the revenue papers, in order to contest a claim for pre-emption regarding that property. 96 Ind. Cas. 383=A.I.R. 1926 Oudh 592.

——Co-sharer—Who is.

The nephew of the maternal Grandlather of the husband of the vendor is not a near relation (**hissedar quaribi**). He is a distant relation (**hissedar baidi**) of the vendor's husband. 87 Ind. Cas. 298=47 All. 470=23 A.L.J. 283=A.I.R. 1925 All. 449.

——Co-sharer—Who is.

Where a person purchased a plot of land situated within a share in a village.

Held, he was to be deemed a co-sharer in the village and such a person would be treated as a co-sharer in the village even though his name did not appear in the revenue papers. 77 Ind. Cas. 35=46 All. 70=21 A.L.J. 763=4 L.R.A. Civ. 507=A.I.R. 1924 All. 305.

——Cosharer—Who is.

A co-sharer by belonging to the same Hindu family as the vendor and by becoming member of the family by marriage is a Hissedar Karibi. 78 Ind. Cas. 382=46 All. 327=22 A.L.J. 247=5 L.R.A. Civ. 184=A.I.R. 1924 All. 534.

——Co-sharer—Who is—Hissedar karibi.

The expression **hissedar karibi** by itself is ambiguous and may apply either to a co-sharer who is nearer in space or a co-sharer who is nearer in blood relationship. The particular meaning to be given to it depends upon context. 84 Ind. Cas. 701=4 L.R.A. Civ. 550=A.I.R. 1924 All. 456.

——Co-sharer—Who is.

A widow who under Hindu Law is entitled to maintenance is not a co-sharer for the purposes of pre-emption. 77 Ind. Cas, 933=4 L.R.A. Civ. 55=A.I.R. 1923 All. 161.

——Co-sharer—Who is—Meaning of words.

The plaintiff in a pre-emption suit was the widow of a person who was descended from the same ancestor as the vendor. Custom laid down to categories of co-sharers who might pre-empt—**ashkhas jaddi** and **shurkai deh**.

Held, that **ashkhas jaddi** would mean persons descended from a common ancestor. As the plaintiff was not personally such a one, and as she was suing in her own right as co-sharer, having inherited her husband's estate, she could not be included in the expression. "**ashkas jaddi.**" 64 Ind. Cas. 191=19 A.L.J. 820=A.I.R. 1921 All. 199.

——Cosharer—Who is—Muafidars.

The **wajib-ul-arz** in the chapter about co-sharers dealt with the rights of pre-emption in case a "**hissedar**" transferred his property. No custom of pre-emption was recorded in the Chapter dealing with the rights of **Muafidars**.

From the kewat it was plain that the owners of the Muafi plots were not co-sharers in the Mahal.

Held, that a part of a resumed Muafi plot was not a "share" and the clause in the **wajib-ul-arz** regarding pre-emption did not apply to it. 64 Ind. Cas. 480=19 A.L.J. 859.

——Co-sharer—Who is--Shamilat land, Vendor Co-sharer in, but not in Patti—Effect.

A vendee who is not a cosharer in the sub-division, in which the share ought to be pre-empted is situated, does not become one, because some land appurtaining to the village has been lumped together as belonging to all the pattis instead of being imperfectly partitioned. The position of the Shamilat land appurtaining to each **patti** follows or forms part of the patti to which it belongs and no right of pre-emption can be claimed in respect of it. 22 O.C. 297=54 Ind. Cas. 632.

——Co-sharer—Who is—Rishtedar garibi.

Who is the grandfather's brother's daughter's son is a **rishtedar garibi.** 40 Ind. Cas. 595 (All.).

——Co-sharer who is.

Where a person has been a recorded co-sharer in possession of property by virtue of a sale and no steps havbeen taken for three years to set aside the sale, or to oust him from possession, he must be regarded as coe sharer for the purposes of a pre-emption suit. 29 Ind. Cas. 549 (All.).

——Co-sharer—Who is—Birtdars.

Birtdars holding on behalf of **Pakhtadars** having no right of pre-emption in case of a sale of proprietary or under-proprietary rights except as members of the village cummunity, are not co-sharers of a sub-division of a tenure. 20 Ind. Cas. 474 (Oudh 17.).

——Co sharer—Who is—Oudh Laws Act (XVII of 1876)—Birt-holder in a Mahal, if a co-sharer.

A birt-holder in a Mahal which was sold by an under-proprietor cannot be considered a co-sharer, as his rights are not superior to those of the under-proprietor. 13 Ind. Cas. 631 (Oudh).

——Co.sharer—Who is—Owner of grove land unassessed to revenue.

The owner of grove land unassessed to Govt. revenue is not a co-sharer and as such has not got any right of pre-emption. 11 Ind. Cas. 21 (All.).

——Co-sharer—Who is—Shafi-e-Jar—Shafi-e-Khalit.

On partition of a Mahal into two mahals the owner of one cannot pre-empt the other Mahal or any portion of it on the ground of vicinage. Where a tenant waters his field in one Mahal from his well in another mahal the owners of the two mahals are not shafi-e-khalit, though the two owners may be tenants in common of a choupal, which is nothing but a house and can be used for any purpose for which a house can be used. Ownership of a house is distinct from ownership of of Zamindari. 33 All. 28=7 A.L.J. 879=7 Ind. Cas. 404.

——Co-sharer—Who is—Person receiving only a Malikhana allowance.

A person who is entitled to only a **Malikhana** allowance is a stranger to the co-parcenary body and a sale to him is liable to pre-emption. A person who is not a member of the proprietary body amongst whom a custom of pre-emption exists and has no common rights and liabilities with the members of the proprietary body is for the purposes of pre-emption a stranger. 7 Ind. Cas. 70 (All.).

——Co-sharer—Who is—Sharik—Meaning of.

Sharik means a co-sharer or partner with the vendor and does not mean a near relative of the vendor. 7 A.L.J. 415=6 Ind. Cas. 115.

——Co-sharer—Who is—Hissadar Deh—Meaning.

Per **Stanley C. J.—Hissadar Deh**-means co-sharer in a village and subsequent partition of the village has no effect so as to change its meaning.

Per Bannerjee J.—Hissader Deh means co-sharer of the vendor, and a person who became a co-sharer in another mahal, at the time of partition has no right to pre-empt. 32 All. 265=7 A.L.J. 133=6 Ind. Cas. 17.

——Co-sharer—Who is—Wajib-ul-arz—Construction—Khewat.

The expression "**Rishtadaran Karibi**" means near relation by blood or marriage. If the husband has inherited property from his wife, the wife's half sister is **Rishtadaran Karibi**. A co-sharer in the same half of the Khewat is a Shikmi **Hissadar**. If the vendor is co-sharer in one half of Khewat and the Vendee in another half of Khewat, the vendee is not Shikmi **Hissadar** of the vendor. 5 Ind. Cas. 669 (All.).

——Co-sharer—Who is—Haquiat muzfarika.

The owners of **haquiat Muzfarika** assessed to Govt. revenue being persons jointly and severally liable to Govt. for the assessment were Hissadars and so could exercise the right of pre-emption in the event of that plot being sold. 3 Ind. Cas. 91 (All.).

——Co-sharer—Who is—Owner of plot of grove land not assessed to revenue.

Held, also that the owner of a plot of grove land not assessed to revenue is not a co-sharer in the village so far as rights of pre-emption are concerned. 1907 A.W.N. 229=4 A.L.J. 541.

——Co-sharer—Who is—Grove, purchaser of—Sharer—Wajib-ul-arz.

A purchaser of a grove not being liable for payment of Government revenue is not a co-sharer in the village and is not entitled to pre-empt. (1904) 2 A.L.J. 788=1905 A.W.N. 264=28 A. 246.

7. Custom.

(a) **Abrogation of.**
(b) **Applicability.**
(c) **Burden of proof.**
(d) **Essentials.**
(e) **Evidence of.**
(f) **Existence of.**
(g) **Extinction of.**
(h) **Kinds of.**
(i) **Mahomedan Law.**
(j) **Origin and growth of.**
(k) **Presumption.**
(l) **Proof of.**
(m) **Scope and effect of.**
(n) **Wajib-ul-arz.**
(o) **Who can plead.**
(p) **Miscellaneous.**

(a) Abrogation.

——Custom—Abrogation of—Partition—No abrogation—But scope narrowed.

A partition does not abrogate a custom of pre-emption. A custom may survive but its scope may be narrowed as it often is when partition is effected. The effect of a partition may be to deprive a certain number of those, who were formerly entitled to pre-emption of their right but the custom cannot be entirely abrogated. It may still apply to other classes when the partition has not deprived of the right of pre-emption. A partition is the act of parties and even if some of the sharers in a village choose to seek a partition and bring about by their own act their exclusion from a right they formerly enjoyed, the other sharers who remain within the co-parcenary body should not be deprived of the right they had. The proper view appears to be that the custom persists and is applicable to all who notwithstanding the partition continue in the same relation or relations as formerly entitled them to claim pre-emption. 22 All. 1 and 13 A. L. J. 236. Foll. 78 Ind. Cas. 659=46 All. 424=5 L. R. A. Civ, 273=A.I.R. 1924 All. 603.

——Custom—Abrogation—Partition—Addition of a new class—No abrogation of old ones.

The custom of pre-emption relating to two categories of pre-emptors was mentioned in the **wajib-ul-arz** of 1875. On a partition in the year 1894 the new **wajib-ul-arz** introduced the co-sharers in the other **mahals** as a third class of pre-emptors.

Held, the second **wajib-ul-arz** merely added a third class of pre-emptors which would be preferred by agreement to strangers. But the previous custom of pre-emption was not abrogated. 64 Ind. Cas. 646=44 All. 117=19 A.L.J. 911=A.I.R. 1922 922 All. 160.

——Custom—Abrogation—Partition—Effect of.

Where there has been a partition of a village into separate mahals, a sharer in one of the new mahals who claims a right of pre-emption in respect of land in another mahal (of which he was not a sharer at the date of sale) must show either on the construction of the wajib-ul-arz or by other evidence that the custom of pre-emption survived the partition. From the fact that a fresh wajib-ul-arz has not been prepared at the partition, it does not follow as a matter of law or principle that the custom or contract in force before partition is no longer to have effect or operation; the question must depend on the circumstances of each case and the inferences to be drawn from the evidence. 37 All. 129=42 I.A. 10=13 A.L.J. 236=19 C.W.N. 893=17 M.L.T. 193=2 L.W. 303=21 C.L.J. 237=28 M.L.J. 556=17 Bom. L.R. 393=(1915) M. W. N. 581=28 Ind. Cas. 34 (P.C.).

——Custom—Abrogation—Partition, effect of—Custom, if changes.

A custom cannot change but a person who is entitled to pre-empt under custom prior to partition of village may lose that right as result of the partition. After the preparation of wajib-ul-arz which showed equal right of pre-emption, partition took place whereby the vendors and the vendee became proprietors of a different mahal in the same village. It was held that plaintiff was entitled to pre-empt. 8 A.L.J. 1013=12 Ind. Cas. 177.

——Custom—Abrogation—Partition-perfect.

A perfect partition in itself does not necessarily abrogate a custom of pre-emption prevailing in the village. 7 Ind. Cas. 572 (All.).

(b) Applicability.

——Custom—Applicability—Hindus in Bihar.

According to the prevailing custom in Bihar, the law of pre-emption is applicable to Hindus. A.I.R. 1943 Pat. 96=21 Pat. 799=9 B.R. 105=204 Ind. Cas. 41.

——Custom—Applicability—Akora in N.W.F.P.

There is no custom of pre-emption in Akora (N.W.F.P.). A.I.R. 1942 Pesh. 25=199 Ind. Cas. 705.

——Custom—Applicability—Kumaun District (U.P.)—Transfer of grant by grantee before settlement—Right of pre-emption, if can be claimed.

Every village in Kumaun District consists of two portions, a measured portion which constitutes the village proper and consists of the **abadi** and the cultivated land, and an unmeasured portion consisting of a large area of land in which the residents of the village have grazing and timber right and some other rights. The unmeasured land is the property of the Government and the proprietors of the village proper have no right in the same except rights by way of customary easement. The Government as the owner of the unmeasured land has the right to grant the same to whomsoever it likes and a grant, if made, confers proprietary right on the grantee and constitutes a separate revenue **Mahal** until the next revision of settlement, when it is usually included in the village in which it lies. Where the grantee makes a transfer of his grant before such settlement, a co-sharer in a village has no right to claim pre-emption in respect of such transfer. A.I.R. 1938 All. 529=1938 A.L.J. 711=1938 A.W.R. 464=177 Ind. Cas. 857.

——Custom—Applicability.

Even if the Agra Pre-emption Act does not apply, right of pre-emption can be exercised, if such a custom is established. A.I.R. 1937 All. 620=1937 A.L.J. 790=1937 A.W.R. 639=171 Ind. Cas. 354.

——Custom—Applicability—Village extending—Extension, if has that custom.

If the custom of pre-emption prevailed in a particular town and the same town had expanded in the ordinary course of things, the custom of pre-emption would also be enforceable in the extended boundaries of the original town where the custom had prevailed. A.I.R. 1937 Lah. 167=164 Ind. Cas. 610.

——Custom—Applicability—Hindus of Sylhet.

As a matter of law in the District of Sylhet, Hindus have the same right of pre-emption under the provisions of Muhammadan Law as Muhammadans themselves have in that District and the plaintiff need not adduce evidence to prove the existence of such custom. A.I.R. 1935 Cal. 17=61 Cal. 694=156 Ind. Cas. 512.

——Custom—Applicability—Kumaun (U.P.)—Sale by widow—Pre-emption by married daughter of co-widow.

Where, in Kumaun, after the death of two brothers, their widows got possession of the estate half and half and one of the widows sells her half share, the married daughter of the other cannot sue for pre-emption, A.I.R. 1933 All. 391=55 All. 487=1933 A.L.J. 502=144 Ind. Cas. 389.

——Custom—Applicability—Kumaun (U.P.)—Joint Hindu family—Brothers—Claim for pre-emption.

If it be true that the members of a joint Hindu family in Kumaun hold property as the members of a joint family property do in Bengal, that is to say, as tenants-in-common, then one brother can pre-empt property sold by another brother. In such cases, it cannot be said that the vender and the pre-emptor are one and the same person. A.I.R. 1933 All. 216=1933 A.L.J. 81=145 Ind. Cas. 379 (2).

——Custom—Applicability—Kumaun (U.P.)—Relatives of third degree—Pre-emption inter se.

Under the custom prevailing in Kumaun, a relative of the vendor within the third degree has a right of pre-emption against any purchaser who is an unrelated or a more distantly related co-sharer, but there is no right of pre-emption **inter se** if both the plaintiff and the vendee are within the third degree. A.I.R. 1932 All. 133=1932 A.L.J. 108=134 Ind. Cas. 464.

——Custom—Applicability.

Held, that the custom of pre-emption was not proved to prevail in the Mohalla Raja Sahib of Jagadhri Town. 30 P.L.R. 599=11 L.L.J. 378.

——Custom—Applicability—Division of a Mahal.

The settlement record evidenced the existence of the custom of pre-emption in the village. But at the time of the settlement and for some time later, one of the mahals had been the exclusive property of a single individual. Subsequently it had been transferred to several persons.

Held, that in respect of a property situated in the Mahal the custom of pre-emption applied. 87 Ind. Cas. 340=23 A.L.J. 249=6 L.R.A. Civ. 256=A.I.R. 1925 All. 362.

——Custom—Applicability—Law of pre-emption is lexi loci.

The law of pre-emption has not been adopted as the personal law of non-Muhammadans in Bihar or in the other localities where the custom exists; it is merely a **lexi loci.** If a non-Muhammadan who is by custom amenable to the law of pre-emption in a particular locality is the owner of a property in another locality where a similar custom exists, he is not amenable to the custom in the new locality, for, although it is a similar custom it is not the same custom to which he has become amenable by reason of the fact that he is a native of or domiciled in a particular locality. A native of Delhi (owner) is not bound by the custom which exists in Bihar, even though there is similar custom in Delhi. 67 Ind. Cas. 706=1922 P.H.C.C. 360=1 Pat. 774=3 Pat. L.T. 556=A.I.R. 1922 Pat. 567.

——Custom—Applicability.

Custom of pre-emption cannot be applied to the sale of the right of a Zamindar to receive certain allowances from the **Muafidars** of a village. 59 Ind. Cas. 188=42 All. 262=18 A.L.J. 210.

——Custom—Applicability—Hindus of Surat—Houses—Agricultural lands.

Hindus in Surat have adopted the Mahommadan law of pre-emption by a long-established custom with regard to houses. It is an open question whether Hindus have adopted any law which gives a right of pre-emption with regard to agricultural lands. It is not advisable to extend any customary law which is in conflict with the personal law of the parties unless there is evidence that such alien law has been adopted. 60 Ind. Cas. 901=45 Bom. 604=23 Bom. L.R. 81=A.I.R. 1921 Bom. 188.

——Custom—Applicability—Ahmedabad.

There exists a custom of pre-emption among Hindus in Ahmedabad. 44 Bom. 696=22 Bom. L.R. 806=57 Ind. Cas. 590.

——Custom — Applicability — Mohalla Rahamat-Ullah qureshi, Lahore.

Pre-emption prevails in Mohalla Rahmat-Ullah qureshi, Lahore. 77 P.R. 1916=33 Ind. Cas. 338.

——Custom—Applicability—Lahore City—Kunch Dalo.

The custom of pre-emption prevails in the region of the Lahore City of which Kuncha Dalo forms a part, whether it be called Wachhowali or Kanjar Phala. 9 P.R. 1915=19 P.L.R. 1916=28 Ind. Cas. 957.

——Custom—Applicability — Banga, Jallundhur District.

A well-established custom of pre-emption exists in Banga, Jallundur District. 73 P.R. 1913=275 P.L.R. 1914=21 Ind. Cas. 855.

——Custom—Applicability—Adhlapi tenure—Multan Tahsil.

The Custom of pre-emption exists in Mauza Fajja, Tahsil Multan in respect of a transfer of land upon an Adhlapi tenure. 25 P.R. 1913=213 P.L.R. 1913=19 Ind. Cas. 739.

——Custom—Applicability—Dasuba.

In the town of Dasuba the custom of pre-emption in the house property is prevalent. 61 P.R. 1912=185 P.W.R. 1912=15 Ind. Cas. 934.

——Custom—Applicability—Mohalla and Kuchas.

The custom of pre-emption prevails in the Mohalla Multani Darwaza in the Ferozepore District as well as in the Kuchas comprised therein. 62 P. R. 1912=69 P.W.R. 1912=119 P.L.R. 1912=13 Ind. Cas. 719.

——Custom — Applicability — Mohalla Sathar Lahore city—Conversion of house into Dharmasala.

There is a custom of pre-emption in respect of houses in Mohalla Sathan in the city of Lahore. The character of the property at the date of sale determines whether the Punjab Pre-emption Act, S. 13 (2) applies to the property. If at the date of the sale, the property sold is a house, it is immaterial whether subsequently to that date, the house was converted into and used as a **Dharmasala**. 22 P.R. 1911=185 P. L. R. 1911=52 P.W.R. 1911=10 Ind. Cas. 848.

——Custom—Applicability—Jallundur city.

Custom of pre-emption prevails throughout the whole of the old city of Jallundur. 70 P.R. 1909=102 P. W. R. 1909=140 P.L.R. 1909=2 Ind. Cas. 984.

——Custom—Applicability—Kot Nau Sub-division of Khem Kari, Lahore District.

There is a custom of pre-emption in respect of sale of houses in Kot Nau sub-division of the town of Khem Kari in the Lahore District. 32 P.R. 1909=69 P. L. R. 1909=38 P.W.R. 1909=1 Ind. Cas. 897.

——Custom—Applicability—Katra Amar Singh.

Katra Amar Singh is a separate division of Amritsar and the Custom of pre-emption by vicinage does not exist in regard to houses in the katra. **Obiter.**—The term —"Sub-division" includes what is known as **katra** in the city of Amritsar. 154 P. R. 1882, foll. 9 P.R. 1909=19 P. W. R. 1909=1 Ind. Cas. 438.

——Custom—Applicability—South Canara—Othi mortgage—Plea to action on othi.

An **othi** mortgage does not in South Canara by custom carry with it the right of pre-emption. Such a right even if it exists cannot be pleaded in defence to an action on the **othi**. (1911) 2 M.W.N. 486=12 Ind. Cas. 626.

——Custom—Applicability—Essentials—Both parties Hindus.

Where the custom of pre-emption is judicially noticed as prevailing in a certain local area, it does not govern persons who, though holding land therein for the time being are neither natives of, nor domiciled in, the district. The right of per-emption will not arise on a sham sale merely intended to defraud the rights of the pre-emptor. But if the purchaser under an invalid sale should sell by a valid sale, the pre-emptor has an option, and may take the mansion on the first or second sale. (1905) 9 C.W.N. 874=32 C. 988.

(c) Burden of proof.

——Custom—Burden of proof—Custom of pre-emption—Existence of, in old part of town is not sufficient to prove its existence in new business part of recent growth—Onus lies heavily on plaintiff to prove existence of Custom in new part.

The existence of custom of pre-emption in the old part of a town is not sufficient to show and the custom exists also in the new business part of recent growth and the inclusion of certain land within the municipal limits of a town does not necessarily mean that the new area has become a part of the town for purposes of pre-emption. The burden lies heavily on the plaintiff claiming to pre-empt on the basis of custom to prove affirmatively the existence of the custom of pre-emption which is a weak custom more particuiarly when it is not based upon the wajib-ul-arz but upon the Mohammadan law with certain important elements lacking, to wit, the two demands. The fact that suits for pre-emption on the basis of custom were brought is not sufficient to prove the existence of custom of pre-emption when the suits always ended in compromise decrees under which they were at the request of the plaintiffs dismissed. A.I.R. 1946 All. 133=1945 A.L.J. 407=I.L.R. (1945) All. 888.

——Custom—Burden of proof—Hindus of Sylhet in Assam—Right to claim pre-emption

By custom, the Hindus of the District of Sylhet are entitled to the benefit of the Muslim law of pre-emption. In order to entitle the plaintiff to a decree for pre-emption, he has to prove that he made to **talabs talab-i-mawasibat** the 'first demand,' and **talab-i-isad** the 'second demand' in accordance with the Muslim law of pre-emption. A.I.R. 1941 Cal. 20=I.L.R. (1941) 1 Cal. 457=72 C.L.J. 181=45 C.W.N. 96=193 Ind. Cas. 82.

——Custom—Burden of proof—Building sites in Benares City.

The burden of proving the existence of a custom of pre-emption with regard to building sites is on the party who alleges the existence of such a custom and he cannot succeed by merely establishing that there is a custom of pre-emption with regard to houses. But ordinarily, the same principle of exclusion of strangers would apply to building sites as applies to houses and if a custom of pre-emption with regard to houses is proved, slight evidence ought to be sufficient for establishing that the same custom applies to building sites. A.I.R. 1932 All. 193=1931 A.L.J. 1149=54 All. 76=136 Ind. Cas. 616.

——Custom—Burden of proof—Unusual custom.

In order to establish an unusual or extraordinary custom which will entitle mere near relations who are not co-shares to pre-empt, the pre-emptor has to produce unambiguous and positive evidence. 95 Ind. Cas. 268=A.I.R. 1926 All. 479.

——Custom—Burden of proof.

The burden of proving the custom lies on the plaintiff. The plaintiff pre-emptor cannot succeed by merely proving that a custom of pre-emption exists in the village. He has to show that particular custom exists which would entitle him to a decree against the defendant vendee. 82 Ind. Cas. 526=46 All 674=5 L.R.A. Civ. 469=A.I.R. 1924 All. 753.

——Custom—Burden of proof—Town divided into sub-divisions.

Where a town is divided into sub-divisions, the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub-divisions in which the property is situate and that the onus is not discharged by proof of the custom in the neighbouring sub-divisions. 73 Ind. Cas. 658=4 Lah. 176=A.I.R. 1924 Lah. 161.

——Custom—Burden of proof.

Cases of pre-emption, when the issue is as to the existence or non existence of custom should be decided on their own facts and circumstances. The plaintiff

should prove not merely that some custom prevails, but the particular custom under which he claims. 38 Ind. Cas. 157 (All.).

——Custom—Burden of proof.

The custom of pre-emption based on the wajib-ul-arz of 1865 applies only when a co-parcenary relation exists and not when perfect partition has taken place. In a suit for pre-emption it lies upon the plaintiff not merely to prove the custom of pre-emption but to prove the existence of a custom under which he himself has a right, that is to say, he has to prove existence of a custom which gives right to a person who is not a co-sharer with vendor. 38 All. 27=13 A.L.J. 951=30 Ind. Cas. 947.

——Custom—Burden of proof—Entry in Wajib-ul-arz—Karibi and baidi.

In a suit for pre-emption against another co-sharer the onus lies on the plaintiff to prove not only that the custom exists but that under it he has a right to pre-empt as against another co-sharer. In such a case the mere production of the Wajib-ul-arz the meaning of which is doubtful, is not enough to discharge the onus. The terms karibi and Baidi are ambiguous. They refer to nearness or distance in space or in relationship. 28 Ind. Cas. 306. (All.).

——Custom—Burden of Proof—Wajib-ul-arz.

Where the Wajib-ul-arz provide for pre-emption only in case of simple sales usufructuary mortgages and mortgages by way of conditional sale, a suit based on custom pre-emption of the sale effected by a foreclosure decree in a mortgage by conditional sale will not lie. The issue in a pre-emption case is not the construction of the Wajib-ul-arz but the existence of the custom and the onus is on the plaintiff to prove the custom, 43 A. 605, Foll. 24 Ind. Cas. 271 (All.).

——Custom—Burden of proof.

The existence or non-existence of a custom of pre-emption must be proved in the same manner as any other question. The onus of proof of existence of such a custom is on the plaintiff. 33 A. 605, Foll. 15 Ind. Cas. 54 (All.).

——Custom—Burden of proof—Wa ib-ul-arz—Variation.

In a pre-emption suit, plaintiff alleged that he was co-sharer with the vendor in the same **Kura** and that the vendee though a co-sharer was not a co-sharer in the same **Kura**, and that by custom plaintiff had the right to pre-empt. Three different Wajib-ul-arzes were produced which gave different versions. In such a case plaintiff must prove not only that a custom of pre-emption prevailed as against the stranger but also the existence of a custom which gave him the right of pre-emption against the defendant vendee as soon as the nature of latter's position was ascertained. 8 A.L.J. 1070=12 Ind. Cas. 179.

——Custom—Contract—Burden of proof—Fresh settlement.

Held, that if a right of pre-emption was based on contract, it would cease, unless specially renewed at a fresh settlement; but if based on custom, the burden of proof would be on the defendants to show that a custom proved to have once existed had come to an end. Mere purchase by strangers once or twice unopposed was insufficient. 1906 A.W.N. 174=3 A.L.J. 561.

(d) Essentials.

——Custom—Essentials and proof—Recent out-growth of city—Proof.

A custom must be ancient and immemorial and a custom of pre-emption cannot possibly be proved in a comparatively recent **abadi.** A person, therefore, alleging custom of pre-emption in a recent out-growth of a town separated by the fields must prove that custom obtained in such locality. A.I.R. 1938 Lah. 64=39 P.L.R. 881=175 Ind. Cas. 492.

——Custom—Essentials—Antiquity and certainty.

The custom of pre-emption cannot be said to be a custom in contravention of the ordinary law of Oudh. It is the ordinary law as far as the village communities are concerned, but it can only be extended to towns, if there is proof that the custom is ancient and invariable. Such a custom must "possess that condition of antiquity and certainty on which alone their legal title to recognition depends. There can be no distinction drawn between the land lying outside the town and the land lying inside it; and if a special custom is proved appertaining to the inhabitants of a town in respect of their agricultural land that same custom must, failing strong evidence to the contrary, apply also to that portion of their property which is situated in the town itself. 118 Ind. Cas. 813=6 O.W.N. 412=A I.R. 1929 Oudh 278.

——Custom—Essentials—Need not be immemorial.

The fact that more than 100 years ago (and about 55 years prior to the last settlement) there was a single proprietor in the village is not by itself sufficient to rebut the presumption arising from the entries in three successive **wajib-ul-arzes**, as to the existence of a custom of pre-emption among the co-sharers. A period of hundred years and even of 55 years is not necessarily too short for the growth of a custom of pre-emption in the United Provinces where such a custom is well-known to be very common. It is not essential to show that such a custom is immemorial. 17 All. 87 and 28 All. 434, Foll. 87 Ind. Cas. 298=47 All. 470=23 A.L.J. 283=A.I.R. 1925 All. 449.

——Custom—Essentials of—Individual.

Custom cannot exist with respect to one individual. 39 All. 480=15 A.L.J. 422=40 Ind. Cas. 427.

(e) Evidence of.

——Custom—Evidence—Finding of—Interference in second appeal—Onus of proof—Prevalence of custom in some of surrounding Mohallas, evidentiary value.

The question of the existence of custom is substantially a question of fact, and the finding would ordinarily be binding in second appeal. But, if the Court below has approached the question from a wrong standpoint or has thrown the burden of proof on the wrong party or has wrongly assumed a condition to be necessary, which is not required, the finding may be vitiated. Similarly if it has acted upon illegal evidence or acted upon evidence which is legally insufficient to show that the custom is general and of universal application, the finding may be interfered with. Or, if in any other way, a proposition of law is mixed up with the finding, the latter may become a mixed question of fact and law. Acts found to be done in pursuance of the alleged custom would be facts, but the conclusion whether the facts found fulfilled the requirements of the law may be a question of law.

The evidence of the existence of a custom of pre-emption in the surrounding **mohallas** cannot be of great weight where, in some other adjoining **mohallas**, it does not prevail. A.I.R. 1931 All. 104=1930 A.L.J. 1555=53 All. 308=131 Ind. Cas. 217.

——Custom—Evidence of—Wajib-ul-arz — Entry recognising free right of alienation by co-sharer —Absence of right of pre-emption.

Where the statement of **wajib-ul-arz** as to the custom of free right of alienation by a co-sharer of his share of the property in favour of any person whatsoever is unambiguous and clear, it may be taken to record the

custom of the village excluding the right of pre-emption in cases of sales and mortgages. A.I.R. 1931 Oudh 348 =8 O.W.N. 321=15 R.D. 190=131 Ind. Cas. 899.

——Custom—Evidence of—Instances of distant muhallas.

Instances of the existence of a custom of pre-emption taken from other muhallas which are at a distance and not adjacent can be of very little use to determine whether the custom exists in a particular muhalla. 119 Ind. Cas. 236=A.I.R. 1929 Lah. 336.

——Custom—Evidence—Recital in wajib-ul-arz.

A recital in a **wajib-ul-arz** as to custom of pre-emption raises a presumption of existence of such a custom and it cannot be rebutted by a previous **wajib-ul-arz** which contains a similar clause but its pre-amble indicates that it cannot possibly be a record of custom. The mere circumstance that there is no entry of the right of pre-emption in the **dustur dehi** is of no importance. 37 All. 129 (P.C.), Foll. 95 Ind. Cas. 106 (All.).

——Custom—Evidence of.

An entry in a **wajib-ul-arz** made at the settlement of 1885 in the United Provinces, as to the custom of pre-emption in a village is of particular importance. 87 Ind. Cas. 298=47 All. 470=23 A.L.J. 283=A.I.R. 1925 All. 449.

——Custom—Evidence of.

The mere fact that the **wajib-ul-arz** records a right of pre-emption in favour of owners of contiguous villages does not by itself render the **wajib ul-arz** useless as evidence of custom. 78 Ind. Cas. 508=5 L.R.A. Civ. 228=A.I.R. 1924 All. 925.

——Custom—Evideuce of Instances of sales to strangers.

A custom of pre-emption of which there is **prima facie** evidence in the entry in the **wajib-ul-arz** is not necessarily negatived by three instances of sales to strangers. 22 A.L.J. 766=5 L.R.A. Civ. 577=A.I.R. 1924 All. 791.

——Custom—Evidence of.

An ambiguous **wajib-ul-arz** is insufficient to prove the custom of pre-emption which plaintiff is bound to prove in a suit for pre-emption. 79 Ind. Cas. 417=46 All. 370=22 A.L.J. 342=5 L.R.A. Civ. 189=A.I.R. 1924 All. 541.

——Custom—Evidence of—Sales anterior to date of custom.

In order to prove the existence of a custom it is not necessary to establish that sales or transfers had taken place prior to the establishment of that custom. It may well have been that the custom was so strong and so invariably complied with that no co-sharer had the courage of selling the property to a stranger. 81 Ind. Cas. 10=22 A.L.J. 572=5 L.R.A. Civ. 369=46 All. 627=A.I.R. 1924 All. 523.

——Custom—Evidence of Gorakhpur District.

About the **Zamima Khewat** of 1885 of Gorakhpur it must be assumed that it was prepared in the manner directed by the Board of Revenue, that is to say, it must be taken that the proprietors must be other than Mahomedans and expressly desired to have the custom of pre-emption recorded and must have adduced proof before the Settlement Officer, conclusive to show that the custom existed. 79 Ind. Cas. 630=22 A.L.J. 7= A.I.R. 1924 All. 424.

——Custom—Evidence of.

Owing to special instructions given to Settlement Officers in the **wajib-ul-arzes** of 1885 in Basti and Gorakpur Districts the record of custom of pre-emption raises a very strong presumption. 79 Ind. Cas. 584= 46 All. 205=22 A.L.J. 62=5 L.R.A. Civ. 33=A.I.R. 1924 All. 371.

——Custom—Evidence of.

In the absence of any statutory enactment or any entry in the public record-of-rights the custom may be deduced from a long series of decisions. Where a rule of custom is deduced from previous judgments it should in no way be departed from merely because it is thought more equitable that a new rule should prevail. 78 Ind. Cas. 145=22 A.L.J. 126=5 L.R.A. Civ. 50=A.I.R. 1924 All. 318.

——Custom—Evidence of—Entry in wajib-ul-arz.

A **Wajib-ul-arz** by itself is good **prima facie** evidence of custom and it is not necessary to corroborate a **wajib-ul-arz** by proof of instances in which pre-emption has been allowed. The evidence afforded by the **wajib-ul-arz** may be rebutted by other evidence. The fact that the **wajib-ul-arz** contains many provisions relating to matters of contract does not prevent it being treated also as a record of custom. 79 Ind. Cas. 41=46 All. 47=21 A.L.J. 801=A.I.R. 1924 All. 274.

——Custom—Evidence of—presumption—Wajib-ul-arz—Rebuttal.

An entry in the **wajib-ul-arz** of 1882 raised a presumption of the existence of the custom. To rebut this evidence the defendants proved that in the year 1840 there was a single proprietor in the mahal.

Held, the circumstance of there being a single proprietor in 1840 does not necessarily rebut the presumption of custom raised by the entry in the **wajib-ul-arz** of 1882. 74 Ind. Cas. 297=A.I.R. 1924 All. 146.

——Custom—Evidence of—Wajib-ul-arz—Good evidence—Limits.

An entry as to the right of the pre-emption recorded in a **wajib-ul-arz** is certainly good **prima facie** evidence of the existence of the custom unless there is internal evidence in the **wajib-ul-arz** itself or some other evidence or circumstance to rebut it.

Where the **wajib-ul-arz** contained an express statement as to the existence of a right of pre-emption in favour of **bhai haqiqi** and then **quaribi**, then pattidars and then co-sharers in other pattis as against strangers, but aiso contained a statement that an issueless co-sharer shall have no right to make a gift of his property in favour of a person not entitled (**gair mustahaq**) and if such a transfer takes place then on the death of the co-sharer his legal heirs would be the owners of the property.

Held, that an entry, which lays down that a right exists which cannot be based on a custom having the force of law, is valueless as evidence to prove such custom. 74 Ind. Cas. 322=21 A.L.J. 542=4 L.R.A. Civ. 281=A.I.R. 1924 All. 52.

——Custom—Evidence of — Wajib-ul-arz—Prima facie evidence of custom.

The entries in the **wajib-ul-arzes** drawn up at the two settlements of 1833 and 1860 are **prima facie** records of an existing custom of pre-emption. There were at least three co-sharers in the former year and a number of co-sharers in the latter.

Held, this evidence is not sufficiently rebutted by a note recorded at the time of settlement of 1860 to the effect that this village had been waste or desolated up to the year 1829. 75 Ind. Cas. 751=21 A.L.J. 60=45 All. 185=4 L.R.A. Civ. 305=A.I.R. 1923 All. 150.

——Custom—Evidence of—Value of instances.

Even admitting that cases of pre-emption inad joining Mohallas are relevant, such cases can be of no value where the sub-division in question is bounded on some

sides by sub-division in which the custom of pre-emption does exist and on other sides by sub-divisions in which it does not exist. 4 L.L.J. 371=A. I. R. 1921 Lah. 279.

——Custom—Evidence of—Compromise pre-emption decrees.

Although it cannot be held that a case, in which pre-emption was decreed on an admission or a compromise, is valueless and has no probative force, yet a judgment based upon a compromise or confession cannot be placed on the same footing as that in which after contest a custom was held to be proved or negatived. 61 Ind. Cas. 325=2 Lah. 83=70 P.L.R. 1921=A.I.R. 1921 Lah. 69.

——Evidence of Custom—Custom need not be immemorial.

In order that a custom of pre-emption may be held to be established, it is not necessary to show that the custom is immemorial in the sense of the English common law. Hence, where in a village which came into existence after 1846 there was found in 1869, evidence of a custom of the pre-emption amongst the co-sharers, and further evidence of such a custom in 1885. it was **held** that the custom was sufficiently established for the courts to give effect to it. 17 A. 87, 1905 A.W.N. p. 266 and 23 B. 668 Foll. 1906 A.W.N. 80=28 A. 434.

(f) Existence of.

——Custom—Existence of—Delhi City.

The custom of pre-emption prevails generally throughout the city of Delhi. 223 I.C. 474=48 P.L.R. 156=A.I.R. 1946 Lah. 432.

——Custom—Existence of—Kohat city in N. W. F. P.

The custom of pre-emption exists in Kohat city of the N.W.F. Province. A.I.R. 1945 Pesh. 9=1945 Pesh. L. J. 9=218 Ind. Cas. 367.

——Custom—Existence of—Peshawar city.

The custom of pre-emption is in existence in the Jahangirpura Sub-division of Peshawar City. A. I. R. 1943 Pesh. 76=209 Ind. Cas. 113.

——Custom—Existence of—Hindus within walled city of Ahmedabad.

Even amongst Hindus within the walled city of Ahmedabad, there is a custom of pre-emption in respect of house property.

Quaere.—It is doubtful if the custom of pre-emption can be confined to house property and not be extended to open site. A.I.R. 1941 Bom. 262=43 Bom. L. R. 581=I.L.R. (1941) Bom. 460=195 Ind. Cas. 464 (F.B.).

——Custom—Existence—Mouza Safipur—Right pre-emption of in respect of grove.

The **wajib-ul-arz** of **Mauza** Safipur shows that there exists a custom of pre-emption in that **mauza,** and such a right, therefore, exists in respect of grove land situated in a **mohal** of that **mouza** and paying reveuue A.I.R. 1940 Oudh 116=1939 O. W. N. 1129=1944 A.W.R. 20=15 Luck. 261=185 Ind. Cas. 277.

——Custom—Existence—Mohalla Tumbrian or Pirzadagan in Sonepet Town (Punjab).

The custom of pre-emption exists in **Mohalla** Tumbrian or Pirzadagan in the town of Sonepet in the Punjab. A.I.R. 1932 Lah. 608=33 P.L.R. 781=139 Ind. Cas. 656.

——Custom—Existence of.

Custom of pre-emption is held to prevail in Muhalla Dialpura of Karnal town. 119 Ind. Cas. 236=A.I.R. 1929 Lah. 336.

——Custom—Existence of.

The custom of pre-emption exists in the town of Naraingarh. 108 Ind. Cas. 624=A.I.R. 1928 Lah. 571.

——Custom—Existence of.

In the town of Chhapal in the Amritsar District the custom of pre-emption was held not proved. 81 Ind. Cas. 740=6 L.L.J. 587=A.I.R. 1925 Lah. 88.

——Custom—Existence of.

The custom of pre-emption does obtain in the sub-division Husain Agabi of the City of Multan. 75 Ind. Cas. 910=A.I.R. 1924 Lah. 700.

——Custom—Existence—Delhi City.

It is settled beyond all doubts that in the Delhi City the custom of pre-emption prevails very generally in respect of sales of residental houses. 83 Ind. Cas. 180=5 Lah. 109=A.I.R. 1924 Lah. 495.

——Custom—Existence of.

There is no custom of pre-emptiom in respect of sales of house property in Katra Amar Singh. 4 L.L.J. 371=A.I.R. 1921 Lah. 279.

——Custom—Existence of—City of Delhi proper.

The Custom of pre-emption prevails generally throughout the City of Delhi, but that applies only to the City proper as circumscribed by the City walls constructed during the Moghul period, and has no application to a suburb which has grown up since the British rule. It is for the plaintiff to adduce satisfactory evidence to show that the custom of pre-emption prevails in such a suburb. No such custom exists in Fahar Ganj being a suburb of Delhi. 61 Ind. Cas. 325=2 Lah. 83=70 P.L.R. 1921=A.I.R. 1921 Lah. 69.

——Custom—Existence of—Share of Mahal confiscated by Government—Custom already prevailing, effect of.

The custom of pre-emption already existing in a mahal is not affected by the confiscation of a share of a mahal by the Government and the grantee of a confiscated share has a right of pre-emption against a stranger. 36 All. 451=12 A.L.J. 725=26 Ind. Cas. 494.

(g) Extinction.

——Custom—Extinction of—Single proprietor.

A Custom of pre-emption which exists in a particular mahal (whether co-extensive with mauza or not) comes to an end when the mahal comes into the sole possession of a single proprietor. 118 Ind. Cas. 661=1929 A.L.J. 1127=A.I.R. 1929 All. 662.

——Custom—Extinction—Single proprietor.

Prima facie a statement of the custom of pre-emption contained in the **wajib-ul-arz** is good evidence that the custom exists, but the presumption that the record is a record of custom may be overturned and, once property comes into the hands of a single proprietor, the custom of pre-emption must come to an end. 115 Ind. Cas. 785=50 All. 792=26 A.L.J. 564=A.I.R. 1928 All. 345 (F.B.).

——Custom—Extinction of.

A custom of pre-emption is not negatived by the mere fact that the property has remained in one family for a very long time. 96 Ind. Cas. 553=A.I.R. 1926 All. 675.

——Custom—Extinction of — Single joint family proprietor.

The rule that where a whole mahal comes to be owned by a single proprietor, the custom must be deemed to have been extinguished, is not applicable to a case where the whole of the mahal comes to be owned by a single joint family consisting of several members. A.I.R. 1924 All. 371, Foll. 96 Ind. Cas. 544=24 A.L.J. 703.

——Custom — Extinction of—Village owned by one.

Where the whole of a village consisting of only one mahal comes to be owned by a single proprietor, the custom of pre-emption is extinguished and does not merely fall in abeyance. 39 All. 480, Foll. 96 Ind. Cas. 640 (All.).

——Custom—Extinction of—Single proprietor.

It is not correct to say that if it is shown that certain property in the course of time becomes the exclusive property of an entire family any custom relating to pre-emption must necessarily lapse. The true doctrine is that if the custom of pre-emption exists and if it so happens that the property to which if relates eventually comes into the hands of a single individual proprietor the custom is there and then extinguished. 79 Ind. Cas. 584=46 All. 205=22 A.L.J. 62=5 L.R.A. (Civ.) 33=A.I.R. 1924 All. 371.

——Custom — Extinction — Village acquired by another caste.

Where a custom of pre-emption was recorded in a village at a period when the whole body of co-sharers were the direct descendants of the founder of the village, and subsequently the entire village was acquired by another family of another caste.

Held, that the custom which was a family or communal custom unconnected with the ownership of the property did not apply to the new community.

Such a case is a very different case from those in which an outsider comes in and obtains a share in a village and becomes a member of a pre-existing co-parcenary body in which there is an existing custom. 64 Ind. Cas. 110=19 A.L.J. 767=A.I.R. 1921 All. 238.

——Custom—Extinction of—Single owner.

A wajib-ul-arz prepared during the sole proprietorship of a mahal by a single individual cannot record a custom of pre-emption. The vesting of the entire mahal in a single owner will put an end to the custom even if pre-existing. 63 Ind. Cas. 295=19 A.L.J. 614=A.I.R. 1921 All. 53.

——Custom—Extinction of—Village held by single proprietor.

Once the village comes into the hands of a single proprietor the custom of pre-emption recorded in the wajib-ul-arz comes to an end. 17 A.L.J. 345=50 Ind. Cas. 179.

(h) Kinds of.

——Custom—Kinds of.

Per Sulaiman, J.—In U. P. two kinds of custom of pre-emption generally prevail. The first is of a kind where it is the duty of every co-sharer before he sells his property to offer it to the other co-sharers in a certain prescribed order. The other kind of custom is that when property has gone out of the hands of the co-parcenary body by a sale to a stranger certain classes of pre-emptors have a right to pre-empt the sale in a certain order of priority. Under the second kind there is no right inter se, that is to say, no right of pre-emption when a sale takes place in favour of any of the co-sharers but there is a priority of claim when rival suits of pre-emption are instituted against a stranger transferee. 82 Ind. Cas. 526=46 All. 674=5 L.R.A. (Civ.) 469=A.I.R. 1924 All. 753.

(i) Mahomedan Law.

——Custom—Mahomedan Law — Presumption as to.

In cases where the particulars of a custom are fully set forth and any of those particulars are contrary to or inconsistent with the Muhammadan Law, that custom cannot be co-extensive with Muhammadan Law. Where there is the existence of a right of pre-emption without specifying how that right is to be enforced or exercised, or without laying down the full particulars of that custom, the presumption is that that right of pre-emption is in accordance with the rights allowed by the Muhammadan Law. 2 A.L.J. 482; 13 A.L.J. 704, Foll. 81 Ind. Cas. 10=22 A.L.J. 572=5 L.R.A. (Civ.) 369=46 All. 627=A.I.R. 1924 All. 523.

(j) Origin and growth.

——Custom—Origin and growth.

The origin of customary law of pre-emption in the United Provinces was the rules of Muhammadan Law which were found prevalent in these parts and the custom grew up somewhat on these lines. A.I.R. 1936 All. 732=1936 A.W.R. 492=1936 A.L.J. 456=58 All. 873=161 Ind. Cas. 753.

——Custom—Origin and growth.

Pre-emption in village communities in India had its origin in the Mahomedan law and was adopted after the moghul rule. In course of time customs of pre-emption grew up or were adopted among village communities, either in accordance with Mahomedan law or with a variation. A custom of pre-emption was in all cases the result of agreement among the shareholders of the particular village. The object is as far as possible to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist are valuable rights, and when they depend on a custom or upon a contract, the custom or contract as the case may be must if disputed, be proved. 37 All. 129=42 I.A. 10=13 A.L.J. 236=19 C.W.N. 393=17 M.L.T. 193=2 L.W. 303=21 C.L.J. 237=28 M.L.J. 556=17 Bom.L.R. 393=(1915) M.W.N. 581=28 Ind. Cas. 31 (P.C.).

(k) Presumption.

——Custom — Pre-emption — Presumption — Town founded by Moghuls.

The principles of the law of pre-emption were introduced in this country by the Mahomedan conquerors, as the law of pre-emption is essentially a part of Mahommedan jurisprudence, and a cus-

tom of pre-emption must be presumed to exist in a town founded by the Moghuls. 223 Ind. Cas. 474=48 P.L.R. 156=A.I.R. 1946 Lah. 432.

——Custom—Presumption— Mohalla Bakshi Ram Sahai of Karimpura, Sub-Division of Peshawar City.

The custom of pre-emption exists in **Mohalla** Bakshi Ram Sahai situated in Karimpura which is a Sub-Division of Peshawar City.

If, in a definite **Mohalla** of sub-division of a town, the custom of pre-emption exists, it must be treated as existing throughout the whole of the sub-division.

The custom, therefore, must be taken to exist in the whole of the Karimpura Sub-Division and, therefore, in **Mohalla** Baildaran of that sub-division. A.I.R. 1942 Pesh. 94=204 Ind. Cas. 202.

——Custom—Presumption — Existence in a portion.

If in a definite Mohalla or sub-division of a town the custom of pre-emption exists, it must be treated as existing throughout the whole of the sub-division.

Chuni Mandi is a part of Multani Mohalla where the custom of pre-emption exists. 71 Ind. Cas. 893=A.I.R. 1924 Lah. 335.

——Custom—Presumption—Existence of old custom.

In the absence of evidence to the contrary, the old custom regarding pre-emption among co-sharers of different **mahals** in a village would continue even after the partition. 65 Ind. Cas. 832 =20 A.L.J. 223=A.I.R. 1922 All. 182.

——Custom—Presumption — Wajib-ul-arz—Mortgage by conditional sale—Ripening into complete transfer.

A custom of pre-emption evidenced by a **wajib-ul-arz** as regards a simple sale only, cannot be taken to apply to the case of a mortgage by conditional sale ripening subsequently into a complete transfer. 12 A.L.J. 611=25 Ind. Cas. 413.

——Custom—Presumption—Wajib-ul-arz.

A Court ought to hold that the custom of pre-emption exists where the wajib-ul-arz is clear and distinct as to the existence thereof and there is no evidence to the contrary. 36 All. 471=12 A.L.J. 800=24 Ind. Cas. 464.

——Custom — Presumption — Shirista Nizamat noting only one proprietor if rebuts such presumption.

A custom of pre-emption is **prima facie** presumed to exist from a wajib-ul-arz, dated 1833 of a village settled with birt-holders; such a presumption is not rebutted by the mere fact of the existence of a Shirista Nizamat noting only one proprietor ever since 1802; especially when a number of birt-holders had signed the wajib-ul-arz in 1833. 8 A.L.J. 947=11 Ind. Cas. 258.

——Custom—Presumption—Rebuttal of.

The production of a Kaifiat Sarishta Nizamat as evidence to rebut the presumption of a pre-emption custom according to wajib-ul-arz was held to be insufficient. 10 Ind. Cas. 328 (All.).

——Custom — Wajib-ul-arz — Presumption—Rebutting evidence—Nature of.

Strong evidence is necessary to rebut the presumption of a custom of pre-emption raised in a wajib-ul-arz and the mere fact that the land in question was held revenue free for some period would not be enough to rebut the same. 11 Ind. Cas. 238 (All.).

——Custom—Presumption—Wajib-ul-arz.

Evidence of a patwari to rebut presumption of pre-emption custom, according to wajib-ul-arz is altogether insufficient. 10 Ind. Cas. 233 (All.).

——Custom—Presumption.

If a Wajib-ul-arz of a village records a right of pre-emption as current and a later wajib-ul-arz is silent as to the right, the custom of pre-emption is deemed to exist in the village. 2 Ind. Cas. 855 (All.).

——Custom—Presumption—New abadi.

A totally new abadi added to a town should be regarded as its distinct sub-division for the purposes of pre-emption, even if no one has yet intended it as a **mohallah.** The custom of pre-emption cannot be presumed to exist in the new **abadi** only because it prevails in the town. The case is different where the limits of a town are extended by erecting house after house to meet the press of population. The **abadi jadid** of the old village of **Garhi Awan** now a suburb of Hafizabad, is a distinct sub-division and no custom of pre-emption obtains therein. 102 P.W.R. 1910 =84 P.R. 1910=7 Ind. Cas. 716.

(1) Proof of.

——Custom—Proof—Hindus in Bihar—Darbhanga.

The Muhammadan Law of pre-emption has long been judicially recognized as existing among the Hindus in Bihar. In districts where its existence has not been judicially noticed, the custom will be a matter to be proved. The custom of pre-emption has been judicially recognised as existing among the Hindus in Darbanga. A.I.R. 1942 Pat. 366=8 B.R. 475=198 Ind. Cas. 890.

——Custom — Proof — Judicial instances.

Pre-emption cases not decided on merits but decided on compromise or admission, cannot be treated as sufficient proof of the existence of the custom of pre-emption. A.I.R. 1942 Pesh. 25 =199 Ind. Cas. 705.

——Custom — Wajib ul-arz—Construction.

When a **wajib-ul-arz** says that there is a custom of pre-emption on a transfer of a share, it applies not only to transfer of a complete share but also to a portion of it. A.I.R. 1940 Oudh 116=1940 A.W.R. 20=1939 O.W.N. 1129=15 Luck. 261 =185 Ind. Cas. 277.

——Custom — Wajib-ul-arz — Construction of—Instances.

The right of pre-emption is one that has been recognised by the Muhammadan Law, and originally was limited to that law. Subsequently, it was adopted by the Hindus, and became modified in different places by local usage. Thus, in different villages, the custom of pre-emption began to vary and the incidents of it differed from place to place. In towns, the right recognized by Muhammadan Law has not become modified by local custom.

A right of pre-emption in accordance with the usage of the country is clear and definite enough to form proof of a custom.

Where the **wajib-ul-arz** for a **kasba** contained

the words dastur shafaibamujib riwaj-i-mulk wa Shastra ke ("rules as to the right of pre-emption. There is a custom of pre-emption in accordance with the usage of the country and the Shastra.").

Heid, that the words "wa Shastra ke" did not convey any reference to local custom and that unless it is shown that the ordinary rule of Muhammadan Law is to be modified by these words, that rule must be held to apply and the custom of pre-emption, which it is clearly the intention of the wajib-ul-arz to record must, therefore, be the custom as understood in Muhammadan Law.

The mere fact that in a number of instances transfers had taken place in favour of strangers, without a right of pre-emption being claimed is not sufficient to disprove the existence of a custom or to prove that a custom which has been proved has fallen into disuse. A.I.R. 1935 All. 236= 1935 A.L.J. 108=4 A.W.R. 1229=153 Ind. Cas. 172.

——Custom — Proof of—Sufficiency — Existence in the city.

The facts that a decree for pre-emption for a piece of land in the city was passed so far back as the year 1865 and that possibly a similar decree had been passed some years earlier would not be sufficient to show that such a custom extended to lands within the city. On the contrary the fact that no instance of the pre-emption of such lands could be established between the year 1865 and the year 1920, when this suit was brought, is the strongest possible proof that no such custom exists. 45 B. 604, Foll.

The considerations which apply in the case of village property do not apply necessarily to property in the cities. The custom in the villages has grown up out of the desire to prevent the intrusion of strangers into the co-parcenary bodies. No such consideration would arise in the cities, where people of all classes congregate together. 74 Ind. Cas. 379=21 A.L.J. 385=45 All. 501= 4 L.R.A. Civ. 430=A.I.R. 1923 All. 513.

——Custom—Proof.

Although the custom may no doubt grow up again, its growth will have to be established by evidence. 39 All. 480, Foll. 115 Ind. Cas. 785 =50 All. 792=26 A.L.J. 564=A.I.R. 1928 All. 345 (F.B.).

——Custom—Proof—What amounts to.

Where in 1860 the original contract about pre-emption of 1833 was varied by introducing the preferential right of a near co-sharer and then of the co-sharer of the thok and last of all, of the co-sharers of the village, and the settlement of 1860 had come to an end, and no papers of the new settlement had been put,

Held, the custom of pre-emption in the village in which the property in dispute is situate was not proved. 83 Ind. Cas. 771=21 A.L.J. 95=4 L. R.A. Civ. 110=A.I.R. 1923 All. 260.

——Custom—Proof of.

Where the vendees exhibited several sale-deeds in respect of which no objection was taken by any co-sharer though the sale-deeds were in favour of strangers, pre-emptors were held to have failed to prove that a custom of pre-emption prevailed in the village. 70 Ind. Cas. 957=21 A.L.J. 61=4 L.R.A. Civ. 82=A.I.R. 1923 All. 254.

——Custom — Proof of—Entry in wajib-ul-arz.

Statements in Wajib-ul-arz as to the existence of a right of pre-emption not in contravention of Hindu or Mahomedan law, are reliable prima facie evidence of a custom of pre-emption. 37 All. 129=42 I.A. 10=13 A.L.J. 236=19 C.W. N. 793=17 M.L.T. 193=2 L.W. 303=21 C.L. J. 237=28 M.L.J. 556=17 Bom.L.R. 393= (1915) M.W.N. 581=28 Ind. Cas. 34 (P.C.).

——Custom — Proof of — Wajib-ul-arz—Construction of.

The provisions regarding pre-emption in a village were contained in a wajib-ul-arz, Chapter II of which was headed thus:—"Mutual rights of the co-sharers, based on custom of particular contracts." Paragraph 14 of the Chapter was headed "Custom relating to the right of pre-emption". The clause gave a right of pre-emption first to a near co-sharer then to a co-sharer in the patti, afterwards to a co-sharer in the thok and lastly to a co-sharer in the mahal.

Held, that the wajib-ul-arz clearly evidenced a custom of pre-emption in respect of the mahals to which it related. 17 C.W.N. 981=17 Ind. Cas. 844 (P.C.).

——Custom — Proof—Wajib-ul-arz, entry in.

At the time of the Mutiny in 1857 a village was confiscated by the Government who held it for 21 years and then granted it to a stranger and not to the original proprietor. Wajib-ul-arz prepared one year after this did not state the actual facts. In a suit for pre-emption the entry in the wajib-ul-arz was relied on to prove the existence of a custom of pre-emption.

Held, that the entry in Wajib-ul-arz was no proof of the custom of pre-emption but that it was merely a record of the wishes of the Zemindars. 18 A.L.J. 569=2 U.P.L.R. (All.) 156 =56 Ind. Cas. 73.

——Custom — Proof of — Wajib-ul-arz, entry in.

The mention of the existence of the custom of pre-emption in two wajib-ul-arzes drawn up at a considerable interval of time, the admission of its existence by the co-sharers in the village and the fact that previous sales have been in favour of co-sharers are sufficient to establish the existence of the custom. 54 Ind. Cas. 875 (All.).

——Custom — Proof of — Wajib-ul-arz—Property in possession of Government.

The Government confiscated certain property in 1857. While it was in the possession of Government in 1860 an entry was made in the wajib-ul-arz recognising a custom of pre-emption. The entry was repeated in 1870.

Held, that the two entries were not good evidence of custom. 18 A.L.J. 118=2 U.P.L.R. (H.C.) 37=54 Ind. Cas. 786.

——Custom — Proof of — Wajib-ul-arz—Wishes of co-sharers.

Where an entry in a wajib-ul-arz dealing with pre-emption records the wishes of the co-sharers as to what should happen in the future, such entry is not binding on the co-parcenary body as a village custom. Nor is such entry proof of the existence of the custom of pre-emption. 2 U.P. L.R. (H.C.) 44=54 Ind. Cas. 768.

——Custom — Proof of — Wajib-ul-arz—Interpretation.

When considering the existence or non-existence of a custom of pre-emption, the language of the particular **wajib-ul-arz relied** on in proof of the custom ought to be taken into consideration. 16 A.L.J. 879=48 Ind. Cas. 220.

——Custom — Proof of — Plaintiff within custom at the time of sale.

Where a custom of pre-emption is proved a plaintiff who can show that he comes within the custom at the time of the sale is entitled to the benefit of the custom. 40 All. 617=16 A.L.J. 509=46 Ind. Cas. 125.

——Custom—Proof.

Where Wajib-ul-arzes differed materially regarding the rights of persons entitled to pre-empt, **held** that they did not establish a custom of pre-emption. 40 Ind. Cas. 73 (All.).

——Custom—Proof of — Sales to strangers—Material evidence.

In trying the existence or otherwise of a custom of pre-emption, every instance of a sale to a stranger is material evidence and a mere vague statement as to such sales without the sale deeds or certified copies thereof, is not sufficient. A.W.N. (1905) 16, Not foll. 35 All. 472=11 A.L.J. 759=21 Ind. Cas. 72.

——Custom — Proof of—Wajib-ul-arz — Construction—Muafi plots.

Where a **wajib-ul-arz** provides for pre-emption only in case of a sale by a co-sharer in the Zamindari, it is insufficient to prove a custom of pre-emption in respect of **muafi** lands. 21 Ind. Cas. 53 (All.).

——Custom—Proof—Wajib-ul-arz.

Two **wajib-ul-arzes** recorded two contrary statements about the custom of pre-emption, the former in favour and the latter against.

Held, as the latter negatived the inefrence of existing any custom of pre-emption in a village, no custom exists there. 16 Ind. Cas. 41 (All.).

——Custom—Proof.

A custom of pre-emption should, like any other custom, be proved by clear and sufficient evidence. 15 Ind. Cas. 251 (All.).

——Custom—Proof—Wajib-ul-arz.

Where a custom of pre-emption is alleged to exist, the Court should be satisfied by proper and sufficient evidence given by the parties that such a custom exists. A finding based merely on the construction of certain words in the **wajib-ul-arz** would not suffice. 14 Ind. Cas. 303 (All.).

——Custom — Proof — Evidence.

The quantum of evidence necessary for proof of a custom of pre-emption, is one dependant upon the circumstances of each particular case. 11 Ind. Cas. 316 (All.).

——Custom — Proof — Wajib-ul-arz—Doubtful entry.

A doubtful entry in **Wajib-ul-arz** unsupported by any corroborative evidence is sufficient to establish custom, if custom on which the claim is based, must be established. 8 A.L.J. 632=10 Ind. Cas. 448.

——Custom—Proof.

A custom of pre-emption recorded in a **wajib-ul-arz** is not disproved by entries in register of transfers, the register is evidence only of transfers. 10 Ind. Cas. 225 (All.).

——Custom—Proof—Wajib-ul-arz.

Where a **wajib-ul-arz** contained a clause in favour of pre-emption but another part of the settlement record showed that up to 1818 the land was uncultivated and also that there was hardly any transfer it was held that **wajib-ul-arz** recorded a contract of pre-emption, that the pre-emptive clause of the **wajib-ul-arz** raised a presumption in favour of custom but the presumption was sufficiently rebutted if the pre-emptive clause be read with the rest of the record. 8 A.L.J. 381=9 Ind. Cas. 485.

——Custom — Proof of — Wajib-ul-arz—Construction.

A clause in **wajib-ul-arz "Dustur-i-haq i-shufa"** and providing that each co-sharer should first offer his share in a certain order to his co-sharers is **prima facie** evidence of the existence of a custom. (1897) 3 A.W.N. 3, Foll. 8 A.L.J. 770=9 Ind. Cas. 810.

——Custom — Proof — Variation in the terms of Wajib-ul-arzes.

Held—Variation between two **Wajib-ul-arzes,** of two successive settlements, as to the manner of the exercise of the right of pre-emption disproves the existence of a custom. A custom to be valid, must be certain. 3 Ind. Cas. 640 (All.).

——Custom—Proof.

At a time when the land did not belong to any Zamindari an entry by the Settlement Officer as regards the right of pre-emption will neither be evidence of custom nor of contract. 3 Ind. Cas. 40 (All.).

——Custom — Proof — Construction of wajib-ul-arzes.

Since **Wajib ul arz** of 1863 was prepared when Reg. 7 of 1822 was in force and under instructions from the Board of Revenue to record rights based on custom, it continued in force as regards the right of pre-emption. The silence in the record of rights of 1860 is not a silence from which any inference opposed to the existence of the right of pre-emption can be drawn. 37 All. 533=6 A.L.J. 779=3 Ind. Cas. 2.

——Custom — Proof — Instances.

Pre-emption prevails in Mohalla Rahmatullah Qureshi Lahore. Unchallenged sales do not prove that the pre-emption custom did not prevail in the locality. A vendee's admission of the custom is valuable as a precedent. Instances from adjoining Mohallas are relevant evidence when there is other evidence to prove it. 77 P.R. 1916=33 Ind. Cas. 338.

——Custom — Proof of—Instances in adjoining lands.

To prove the custom of pre-emption instances of the enforcement of the right in the adjoining streets or mohallas are relevant. The circumstance that a particular bazar is essentially a street of shops and prostitute lodgings is immaterial if pre-emption has been enforced as a matter of right in certain cases. Extra judicial compromises are valid instances of the existence of custom and each case must be decided on its own facts.

Held, that in this case the custom of pre-emption was proved to exist. 168 P.W.R. 1916 =27 Ind. Cas. 778.

——Custom—Proof of.

When a town is subdivided the pre-emptor must prove affirmatively the existance of the custom of pre-emption in the particular sub-division where the property is situate. Proof that the custom exists in neighbouring sub-divisions is not sufficient. 100 P.R. 1892; 17 P.R. 1895; 70 P. R. 1899; 83 P.R. 1901; 16 P.R. 1902; 42 P.R. 1903; 99 P.R. 1906, Rel. Even if the locality in which the property in suit is included is not situate in any sub-division, the pre-emptor must prove that the pre-emption prevails in that locality irrespective of the fact that it does or does not prevail in other sub-divisions of the city. The right of pre-emption is a right of a very special kind, and as it hampers the free disposition of property it requires to be clearly and unequivocally shown to exist before it is enforced. 109 P.R. 1900, Rel. The custom of pre-emption does not exist in Baba Malak Sub-division of the town of Nakodar. 59 P.R. 1911=48 P.L.R. 1912=198 P.W.R. 1911 =12 Ind. Cas. 859.

——Custom—Proof—Instances.

Cases in which the vendees admit the existence of a custom of pre-emption are as valuable as cases in which the Court finds the existence of such custom established. But between such cases and those in which the vendee after denying the existence of the custom is eventually induced to come to terms with the pre-emptor and to compromise the dispute, there is very substantial distinction. 91 P.R. 1911=127 P.L.R. 1911=217 P.W.R. 1911=10 Ind. Cas. 330.

——Custom—Proof—Village or tribal.

In Punjab the custom of pre-emption is a village custom and not a tribal custom; hence the existence of such a custom in one Guzar village, is not a proof of the existence of such a custom in another. 7 P.R. 1910=14 P.W.R. 1910=49 P.L.R. 1910=5 Ind. Cas. 249.

——Custom — Proof — Wazib-ul-arz — Effect.

An entry in wajib-ul-arz, that every co-sharer may freely alienate his own share, negative the custom of pre-emption. 22 O.C. 20=1 U.P.L.R. (J.C.) 34=50 Ind. Cas. 800.

——Custom—Proof—Consent decree.

Suits decreed by mutual consent of the parties do not establish a custom of pre-emption in a village, if such a custom is not otherwise proved to exist therein. 3 O.L.J. 415=36 Ind. Cas. 668.

——Custom—Proof of.

The recognition of a claim for pre-emption in the village in a previous suit when no defence as to the non-prevalence of a custom of pre-emption was put forward, will not establish the custom so as to disallow the contention as to its non-existence in a subsequent suit. 1 O.L.J. 152=17 O.C. 105=23 Ind. Cas. 943.

(m) Scope and effect of.

——Custom—Scope and effect of—Oudh Laws Act.

The Act (18 of 1876) did not in any sense purport to create a right of pre-emption. It merely recognised the custom already prevailing and laid down that a particular custom of pre-emption was to be presumed, unless there was a custom or contract to the contrary, but that such right of pre-emption could only exist where there was a village community. 102 Ind. Cas. 307=1 L.C. 10 =A.I.R. 1927 Oudh 227.

(n) Wajib-ul-arz.

——Custom—Wajib-ul-arz—Addition of new class—Custom—Negation.

The introduction of new categories of pre-emptors in the wajib-ul-arz in addition to the ones mentioned in previous wazib-ul-arzes does not necessarily negative the existence of a custom of pre-emption in favour of a co-sharer as against a stranger. 87 Ind. Cas. 298=47 All. 470=23 A.L.J. 283=A.I.R. 1925 All. 449.

——Custom — Wajib-ul-arz — Discrepancies between wajib-ul-arzes of various dates—Custom not proved.

There were three wajib-ul-arzes. The first wajib-ul-arz did not purport specially to record a custom of pre-emption. The next one purported to record a custom of pre-emption. The last wajib-ul-arz merely said that the customs recorded in the first wajib-ul-arz will remain in force. No reference was made therein to the wajib-ul-arz of the intermediate settlement. There was in several respects a material variation between the first two wajib-ul-arzes.

Held: that an ancient and invariable custom of pre-emption was not proved to have existed in the village, the evidence adduced being ambiguous both as regards the incidents attaching to the rigst of pre-emption and the circumstances in which that right came into existence. 86 Ind. Cas. 786=6 L.R.A. (Civ.) 121=A.I.R. 1925 All. 336.

——Custom—Wajib-ul-arz.

Settlement Rubkar is not complete wajib-ul-arz. Absence of entry therein does not disprove custom of pre-emption. 92 Ind. Cas. 335=5 L.R.A. (Civ.) 609=A.I.R. 1925 All. 44.

——Custom—Wajib-ul-arz.

The presumption raised by the entry in a wajib-ul-arz is not rebutted by the circumstance that more than 100 years ago the villages were owned by a single proprietor. 80 Ind. Cas. 902=22 A.L.J. 785=5 L.R.A. (Civ.) 561=A.I.R. 1924 All. 859.

——Custom—Wajib-ul-arz—Entry negativing.

A custom of pre-emption is negatived by entry in wajib-ul-arz showing that all co-shares agreed that there would since the time of such agreement be no custom of pre-emption in vogue. 22 A.L.J. 810=5 L.R.A. (Civ.) 639=A.I.R. 1924 All. 793.

——Custom—Wajib-ul-arz—Reasonableness.

A person who is merely a resident of the village and is neither a co-sharer nor a relation of the vendor can pre-empt if the wajib-ul-arz so provides; such a custom is not necessarily unreasonable. 79 Ind. Cas. 438=21 A.L.J. 822=4 L.R.A. (Civ.) 557=A.I.R. 1924 All. 86.

——Custom — Wajib-ul-arz — Variation in two Wajib-ul-arzes—Effect.

Where a first wajib-ul-arz records no right of pre-emption but a subsequent wajib-ul-arz prepared after 30 years, records such right, no cus-

tom can be said to have sprung up between the 30 years and the right of pre-emption cannot be recognised. 6 Ind. Cas. 839 (All.).

——Custom — Wajib-ul-arz — Variations in two wajib-ul-arzes.

If the terms of a wajib-ul-arz prepared at settlement differs from those of the wajib-ul-arz prepared at partition, the document is not a record of custom of pre-emption. 32 All. 261=7 A.L.J. 314=5 Ind. Cas. 267.

——Custom—Wajib-ul-arz — Rules of the Board of Revenue for the settlement of the Gorakhpur and Basti districts. 1901 A.W.N. 115.

(o) Who can plead.

——Custom—Who can plead—Hissedar patti.

Where certain property was situate in a place to which the Pre-emption Act did not apply and it appeared that the share in the milak was jointly held by the proprietors,

Held, that a customary right to pre-empt can be pleaded only by hissedar patti. Meaning of patti stated. 1930 A.L.J. 1023=A.I.R. 1930 All. 729.

——Custom—Who can plead.

Under the custom prevailing in Kumaun where the asl village and the laga village are held under one revenue engagement, the hissedar of the laga village is not entitled to pre-empt against a hissedar in the asl village. 78 Ind. Cas. 145=22 A. L.J. 126=5 L.R.A. Civ. 50=A.I.R. 1924 All. 318.

(p) Miscellaneous.

——Custom — Miscellaneous — Custom disputed —Duty of Court.

When, in a pre-emption suit, the existence of the custom in a particular locality is definitely in dispute, the Court cannot refuse to frame issue on that point on the ground that the existence of pre-emption in that locality was common knowledge. A.I.R. 1942 Pesh. 73=202 Ind. Cas. 668.

8. Custom or contract.

See also PRE-EMPTION—WAJIB-UL-ARZ.

——Custom or contract—Inference from wajib-ul-arz.

Where a wajib-ul-arz contained a clause in matters recording rights of pre-emption to the effect that if a stranger has inherited property from an issueless co-sharer he would not be entitled to the right of pre-emption,

Held: that the existence of the right of pre-emption was a matter of contract and not of custom. 78 Ind. Cas. 587=46 All. 140=5 L.R.A. Civ. 7=A.I.R. 1924 All. 542.

——Custom or contract—Confiscation and re-grant —Subsequent entry in wajib-ul-arz.

Where the village was confiscated by the Government during the mutiny and a re-grant was made in the year 1859.

Held, when the re-grant was made, in the circumstances above-mentioned, there could not have been any custom of pre-emption in existence. At some subsequent settlement a record was made in the wajib-ul-arz which purported to be a record of custom.

Held, having regard to the history of the village, this record must be deemed to be a record of contract and not of custom. 73 Ind. Cas. 536 =21 A.L.J. 99=4 L.R.A. Civ. 362=A. I. R. 1923 All. 282.

——Custom or contract—Wajib-ul-arz of 1870 is a record of custom.

The wajib-ul-arz drawn up in 1870 and prepared in accordance with the Circular of the Board of Revenue No. 24 of 1868; that "The wajib-ul-arz should be a record of the customs and usages prevalent in the estate" contained the entry 'jikr-haq-i-shufa' (account of the right of pre-emption).

Held: the record was a record of custom and not of contract. 20 A.L.J. 954=4 L.R.A. Civ. 17=A.I.R. 1922 All. 537.

——Custom or contract—Wajib-ul-arz—Construction.

A wajib-ul-arz provided, "If a co-sharer has to sell and mortgage his hakeat and a mortgagee has to sub-mortgage, then at the time of transfer it will be incumbent that he should after giving information sell and mortgage for a proper price, and then he (the vendor) will have power to transfer it to whomsoever he likes."

Held, that the wajib-ul-arz recorded a custom of pre-emption. A wajib-ul-arz must be deemed to record a custom unless the document itself indicates, or it is otherwise proved, that it records a contract. 1897 A.W.N. 3, Foll. 33 All. 85= 7 A.L.J. 902=7 Ind. Cas. 181 (F.B.).

——Custom or contract —Wajib-ul-arz—Saharanpur District.

The entries in a wajib-ul-arz are prima facie to be regarded as referring to customs rather than to agreements. The Court however can take into consideration when considering the evidence as a whole, the language which is used in the wajib-ul-arz along with other evidence. If on a consideration of the entire evidence the Court is not satisfied that a custom exists, the finding is a finding of fact with which the High Court cannot interfere in second appeal. There is no law or decision to the effect that a custom of pre-emption does not exist in Saharanpur District. 37 All. 524=13 A.L.J. 717=29 Ind. Cas. 1001.

——Custom or contract—Entries in wajib-ul-arz.

References in wajib-ul-arz to pre-emption are to be taken as references to customs and not contracts. The fact that a wajib-ul-arz is for a settlement for a certain number of years does not prevent co-sharers from recording their customs therein. 12 A.L.J. 527=25 Ind. Cas. 301.

——Custom or contract—Issue — Wajib-ul-arz—Evidence.

It is the existence of a custom of pre-emption and not the construction of the wajib-ul-arz based on custom that is the subject of issue. The wajib-ul-arz however, is a piece of evidence to be carefully considered. 33 A. 65, Rel. on. 24 Ind. Cas. 422 (All.).

——Custom or contract—Wajib-ul-arz—Construction—Value of.

In pre-emption cases, the wajib-ul-arz is in some cases, evidence of great importance. But the existence or non-existence of a custom of pre-

emption does not and cannot depend upon the construction of a **wajib-ul-arz** which is to be taken into consideration and carefully considered. There is no class of evidence which varies so much in its importance as does a **wajib-ul-arz**. 17 Ind. Cas. 594 (All.).

——**Custom or contract — Wajib-ul-arz—Evidence —Perfect partition.**

In a suit for pre-emption, the onus is upon the plaintiff to prove the existence of the custom of pre-emption. It is necessary for him not merely to establish the existence of some custom of pre-emption but he has to establish the existence of a particular custom which entitles him to pre-empt as against the defendant. There is no difference between the mode of proof of a custom of pre-emption and any other custom. The existence or non-existence of a custom of pre-emption cannot be said to depend upon the construction of a **wajib-ul-arz**. The **wajib-ul-arz** is not the custom. It is merely evidence of custom, and no class of evidence is more likely to vary in value according to circumstances than that of the **wazib-ul-arz**. 32 A. 363, Rel. The main object of the custom of pre-emption is to avoid admitting strangers into the co-parcenary body. A co-sharer in one of the mahals transferred his share to another person, a mortgagee, in the same mahal. A co-sharer of the village who was a co-sharer in a different mahal, brought a suit for pre-emption.

Held, that the suit could not succeed. 16 Ind. Cas. 361 (All.).

——**Custom or Contract — Wajib-ul-arz—Question of proof—Partition.**

After perfect partition of the village into three mahals, a **wazib-ul-arz** was prepared which was a copy of the one before the partition. Plaintiff brought a pre-emption suit, in which he was a co-sharer in a **mahal** different from that in which the property was situate, **held** that if the suit was based on contract, plaintiff should fail as he was not a party to the **wajib-ul-arz** and if the suit is based on custom. It is for the plaintiff to prove that a particular custom prevails. The question to be decided is the proof of the existence of the custom and not merely the construction of the **wazib-ul-arz**. 33 All. 605=8 A.L.J. 996=12 Ind. Cas. 98.

——**Custom or contract.**

It is a question of evidence in each case, whether a right of a pre-emption exists by custom or contract. 11 Ind. Cas. 426 (All.).

——**Custom or contract—Wajib-ul-arz — Construction.**

The **Wajib-ul-arz** of 1863 of a village gave the right of pre-emption, first to the own brothers of the vendor or nephews having a common ancestor; second to a co-sharer in another patti. The **Wajib-ul-arz** of 1873 which was headed "Right of co-sharers **inter se** based upon custom or contract" provided "If a shareholder wishes to transfer, he shall do so to his own brother, then to near relations, if they refused, then to the co-sharer of the patti and after them to the co-sharers in the village." After the preparation of this latter **Wajib-ul-arz** the village was partitioned. The pre-emptor was a brother but not a co-sharer of the vendor, and had no right of pre-emption. 8 A. L.J. 515=10 Ind. Cas. 1003.

——**Custom or contract—Wajib-ul-arz — Construction.**

The first **wajib-ul-arz** conferred the right of pre-emption generally. The second gave the right first to near co-sharers and secondly to co-sharers in the other **thoke**. The third one gave the right in order to near pattidars of the same thok, the pattidars of the village. It was held (Banerjee J. dissenting) the documents recorded a contract. 8 A.L.J. 401=9 Ind. Cas. 911.

——**Custom or contract—Wajib-ul-arz — Construction.**

The **wajib-ul-arz** of a village run as follows:—"No suit for pre-emption has yet been brought. We agree that the custom of the right of pre-emption should prevail in future."

Held, this was evidence of a contract and not of an existing custom. (5 A.L.J. 470; 32 A. 201 Foll.) 9 Ind. Cas. 562 (All.).

——**Custom or contract—Wajib-ul-arz — Construction.**

The **wajib-ul-arz** of 1833 contained a clause of pre-emption in favour of the co-sharers. That of 1860 contained preference of near co-sharers to other co-sharers and next of the co-sharers in the same thoks to co-sharers of other thoks.

Held, these were evidence of custom and not of contract. 9 Ind. Cas. 552 (All.).

——**Custom or contract — Wajib-ul-arz — Presumption.**

A record in the **wajib-ul-arz** must be deemed to be the record of a custom unless the document itself or other circumstances indicate that the clause relating to pre-emption is the embodiment of a new contract. A.W.N. (1897) 3; 7 Ind. Cas. 181, Foll. 8 Ind. Cas. 526 (All.).

——**Custom or contract—Interpretation of document—Wajib-ul-arz — Variation of language—Regulation (7 of 1822).**

In a suit for pre-emption, **wajib-ul-arzes** of 1833 and 1869, were produced, the preamble to the former was worded thus:—"Having well understood the following matters **we** willingly accept them." It then dealt with the right of pre-emption in the following terms "mode of sale or transfer of whole or part of share" giving the right of pre-emption to co-sharers as against strangers, and concluded with the words "therefore we write this **ikrarnama** so that it may be of use in future. The **wajib-ul-arz** of 1869 provided that near co-sharers and other pattidars would have the right of pre-emption. Preference amongst them could be according to degree of nearness.

Held, (Stanley, C. J. dissenting); the **wajib-ul-arz** contained the record of custom and not a contract.

Per **Stanley, C.J.**—A custom to be binding must be unaltered, uniform, constant and definite. If the settlement of 1833 recorded a custom, then the co-sharers in the village at the time of the latter settlement of 1869 must be deemed to have abrogated it and to have adopted by, agreement the right of pre-emption which is recorded in the later **wajib-ul-arz** as more suitable to the then existing conditions. The variance in the rights

as defined in the two **wajib-ul-arzes** leads to the conclusion that the right recovered in 1869 cannot be treated as a right existing by custom.

(Per Knox and **Chamier, JJ.)**—The word **ikrar** does not necessarily mean a contract. It means **ratification** or **assent**.

Per **Chamier, J**:—In construing the **wajib-ul-arz** one must have regard to the document as a whole and bear in mind the law and instructions in which the document as a whole and bear in mind the law and instructions in which the document was prepared. The history of the preparation of these **wajib-ul-arzes** shows that there is a strong presumption that what is entered in them regarding pre-emption is a record of a custom. There is not necessarily any contradiction, between the two **wajib-ul-arzes**. The earlier gives the right of pre-emption to co-sharers so also does the later. It is incontestable that if the earlier **wajib-ul-arz** were the only record of the custom oral evidence might be given to supplement it and the later **wajib-ul-arz** being presumably more correct may be relied upon to supplement the earlier. 7 A.L.J. 1040=7 Ind. Cas. 680 (F.B.).

——Custom or Contract — Wajib-ul-arz — Construction — Variation in the terms of two Wajib-ul-arzes.

In the year 1833 the village was owned by two persons and the **wajib-ul-arz** gave the right of pre-emption to the co-sharer in the village. In the year 1860 the village was owned by several co-sharers and the **wajib-ul-arz** for the year gave the right of pre-emption first to the nearer co-sharer and to others.

Held, that both the **wajib-ul-arzes** were records of contract only and not of custom. 7 A.L.J., 406=6 Ind. Cas. 587.

———Custom or Contract — Wazib-ul-arz—Preamble.

The opening words of a preamble, do not help to determine whether the **Wajib-ul-arz** records a custom or contract of pre-emption. The circumstances of the case should be held more reliable than the entries in **Wazib-ul-arz**. 7 A.L.J. 519 =6 Ind. Cas. 151.

——Custom or contract—Wajib-ul-arz — Construction.

Cases of pre-emption should be decided on broad principles and nice distinctions should not be drawn. A **Wajib-ul-arz** recommending reference to the old **Wajib-ul-arz** in cases like pre-emption, is deemed to record a contract and not a custom of pre-emption. 32 All. 399=7 A.L.J. 365=6 Ind. Cas. 129.

——Custom or contract—Entries in Wajib-ul-arzes.

When entries in two **Wajiblul-arzes** as to pre-emption are uniform, and there are no expressions referring to contract, the entries record a custom and not a contract. 5 Ind. Cas. 667 (All.).

——Custom or contract — Variation in Wajib-ul-arzes—Rewaj Huq Shufa.

If the pre-emption clauses in the successive **Wajib-ul-arzes** differ, no custom but a contract of pre-emption is proved. 29 A. 295 Foll. **Riwaj huq shuffa** means currency of the practice of pre-emption. 5 Ind. Cas. 659 (All.).

——Custom or Contract—Wajib-ul-arz.

If two successive **Wajib-ul-arzes** differ as to the clause of pre-emption, the two documents show a contract and not a custom of pre-emption. 5 Ind. Cas. 424 (All.).

——Custom or contract—Partition of village — Separate **wajib-ul-arz** — Change in the language. 7 A.L.J. 314=32 A. 261=5 Ind. Cas. 267.

——Custom or Contract—Wajib-ul-arz.

An entry in **Wajib-ul-arz** to the effect that there has been no suit for pre-emption as yet, and that the right of pre-emption should be kept alive, records a contract and not a custom of pre-emption. 32 All. 201=7 A.L.J. 213=5 Ind. Cas. 212.

——Custom or Contract—Wajib-ul-arz.

The **Wajib-ul-arz** prepared at the two successive settlements provided for pre-emption in different words but the words used in the one did not conflict with the words used in the other.

Held, that the document recorded custom and that the variation in the language did not affect it. 8 A.L.J. 452=3 Ind. Cas. 819.

——Custom or contract — Wajib-ul-arz — Construction—Presumption of custom.

Held, that unless the terms of the **Wajib-ul-arz** clearly record a contract they must be deemed to record a custom. 3 Ind. Cas. 722 (All.).

——Custom or contract — Wajib-ul-arz — Construction—"For the future" meaning of.

A **Wajib-ul-arz** prepared at the Settlement of 1863 contained the following pre-emptive clause 'for the future if any **Khewatdar** wishes to sell or mortgage his property, he must transfer it for a reasonable price first to his own brother; then to some other relations and lastly if his relations refuse then to the other **Khewatdars of the Patti** and village." The next **Wajib-ul-arz** of 1890 was silent as to pre-emption, but contained "whatever customs exist in the village they are to be found entered in the **Wajib-ul-arz** prepared at the last Settlement." Subsequently the village was partitioned.

Held, that the words in the **Wajib-ul-arz** of 1863 "for the future" clearly show the recital of a contract and not a record of custom. From the significant silence of the **Wajib-ul-arz** in 1890 as to pre-emption it could reasonably be inferred that the co-sharers did not wish to continue the previous pre-emption contract. 6 A.L.J. 715=3 Ind. Cas. 534.

——Custom or Contract — Wajib-ul-arz—Ainda.

A remark, by a Settlement Officer that the word 'Ainda' was used in a **Wajib-ul-arz** where no custom is ascertained, but the co-sharers agree to certain matters, being recorded in the **Wajib-ul-arz** means that a contract and not a custom of pre-emption is recorded with the **Wajib-ul-arz**. 2 Ind. Cas. 623 (All.).

——Contract or custom — **"Lazi mhoga".**

It is always dangerous to construe one **Wajib-ul-arz** by another. 3 A.L.J. 850=1907 A.W.N. 17.

9. Decree.

(a) Appeal.
(b) Costs.
(c) Deposit.
(d) Extension of time.
(e) Form of decree.
(f) Improvements.
(g) Non-compliance.
(h) Operative date.
(i) Subsequent events.
(j) Time expiring on holiday.
(k) Transfer of.
(l) Miscellaneous.

(a) Appeal.

——Decree — Appeal — Court making order that as full amount had not been deposited before date fixed, suit stood dismissed—Order, held did not fall under S. 47, C. P. Code and was not appealable.

In a suit for pre-emption, a decree was passed in favour of the pre-emptor on payment of the sale price to the vendee on a fixed date failing which the suit was to stand dismissed. One day before the date fixed, the pre-emptor made an application praying that he should be allowed to deposit lesser amount as vendee had not paid out of sale price left with him by the vendor the amount due to the mortgagee of the vendor as agreed. That application was provisionally granted but subsequently dismissed and the Judge made an order that as the pre-emptor had failed to deposit the full amount within the time fixed by the decree, the suit stood dismissed:

Held, that the decree had fully disposed of the suit, and the order subsequently passed by the Court could not be treated as decree against which an appeal could be preferred.

Held, further that the order could not be said to have been passed under S. 47 and was, therefore, not appealable.

Held, also that the Court should have made an inquiry into the correctness or otherwise of the allegation of the pre-emptor and should not have held summarily that the decree had become void by the pre-emptor's failure to deposit the full amount of the purchase-price. A.I.R. 1939 Lah. 376=41 P.L.R. 381.

——Decree — Appeal — Plaintiff to deposit purchase-money less costs within certain time, on failure, suit to stand dismissed—Appeal.

In a pre-emption suit, the decree directed the plaintiff to deposit purchase-money less costs within a certain period. It was also provided that in default the suit would stand dismissed:

Held, that the plaintiff could appeal against the decree. A.I.R. 1939 Nag. 120=1939 N.L.J. 160=182 Ind. Cas. 962.

——Decree — Appeal — Interference by Court of Appeal.

In a case of pre-emption where artificial rights brought into existence by the Legislature are used to defeat the legal rights of persons dealing with property, no equities are involved and if a Court exercises its legitimate powers in a legitimate manner, a Court of Appeal would be loath to interfere unless any strong or cogent reasons exist justifying interference. A.I.R. 1938 Lah. 606=I.L.R. (1938) Lah. 598=40 P.L.R. 907=179 Ind. Cas. 110.

——Decree—Appeal—Land valued for jurisdiction at less than Rs. 5,000—Decree for pre-emption on payment of more than Rs. 5,000—Appeal lies to District Judge and not to High Court. A.I.R. 1936 Lah. 133.

——Decree — Appeal—Decree for possession on payment of certain amount—Appeal—Court-fees.

The court-fee payable on memorandum of appeal against a decree granting possession of a house by pre-emption on payment of Rs. 700 is ad valorem on that amount. A.I.R. 1934 Lah. 424=154 Ind. Cas. 1047.

——Decree—Appeal—Right of—Vendee accepting pre-emption money—No bar of right.

Withdrawal by the vendee of the money paid in the lower Court under its decree by the pre-emptor does not debar the vendee from appealing against that decree: 16 P.R. 1907; 83 P.R. 1912 and A.I.R. 1926 All. 661, Foll.; 82 P.R. 1868, Overruled by 31 P.R. 1907. 111 Ind. Cas. 814=A.I.R. 1929 Lah. 137.

——Decree—Appeal—Estoppel — Acceptance of deposit.

The fact that the defendant—vendee takes out of the Court the amount of pre-emption money deposited by the plaintiffs to his credit after filing of the appeal does not disqualify him from proceeding with the appeal. Such a conduct on his part does not amount to estoppel. 83 P.R. 1912 and 16 P.R. 1907, Foll. 96 Ind. Cas. 549=48 All. 616=24 A.L.J. 773=A.I.R. 1926 All. 661.

——Decree—Appeal—Deposit of price, if a condition precedent.

Payment of the purchase money decreed by the trial Court in a pre-emption suit is not a condition precedent to the right of a person to file an appeal from the decree by which that payment is directed, if the appellant disputes either the method of payment or the amount payable. 20 O.C. 290=5 O.L.J. 135=43 Ind. Cas. 219.

——Decree—Appeal— Withdrawal of deposit by vendee—Right to appeal.

A vendee in a pre-emption suit, who applies but does not actually withdraw the money deposited in Court by the plaintiff as per terms of the decree to be paid to him is not thereby estopped from appealing against that decree. 13 A.L.J. 677=29 Ind. Cas. 452.

——Decree — Appeal—Enhancement of price—No time fixed—Practice.

Where the Appellate Court in a pre-emption suit enhanced the amount decreed to be payable by the pre-emptor in the first Court, but omitted to fix any time for payment of the enhanced amount. The pre-emptor paid it within one month and a day.

Held, that the plaintiff pre-emptor was entitled to a reasonable time within which to pay the amount decreed and the time within which it was in fact paid was reasonable. 36 All. 514=12 A.L.J. 842=26 Ind. Cas. 65.

——Decree—Appeal—Withdrawal of money deposited by pre-emptor in Court.

A vendee appellant in a pre-emption case can proceed with his appeal against the pre-emption decree though he withdraws from the Court the

purchase money deposited by the pre-emptor under the pre-emption decree, 16 P.R. 1907, Foll. 83 P.R. 1912=170 P.W.R. 1912=15 Ind. Cas. 347.

——Decree—Appeal—Vendee declaring sale fictitious—Decree by first Court declaring right of pre-emption—Right of appeal—Sufficient interest.

W obtained from the Court of first instance a decree declaring his right to pre-empt in regard to a sale-deed by which **S** purported to transfer lands and houses to his wife **N** in lieu of part of her dower. **N's** defence was that she and her husband were on bad terms and that the sale-deed was fictitious and intended to defraud her of her dower. **N** appealed and the lower appellate Court allowed the appeal, holding that the sale was fictitious:

Held, that **N** had an interest entitling her to appeal. 1906 A.W.N. 160=3 A.L.J. 843.

——Decree—Appeal—Plaintiff ceasing to be sharer, effect of.

Where the pre-emptor was a sharer in the mauza at the time of the suit and continued **so at the date of the decree,** his right to pre-empt is not lost by his ceasing to be such sharer subsequently before the hearing of an appeal against the decree. (1903) A.W.N. 83=25 A. 421.

(b) Costs.

——Decree—Contest—Costs.

Where the pre-emptor has been denying the right of the vendee to ask for improvements and the vendee has been contesting the pre-emptor's right to pre-empt, it would be just that they should bear their own costs throughout. A.I.R. 1943 Pesh. 76=209 Ind. Cas. 113.

——Decree—Costs—Pre-emptor, if can deduct only balance of costs from purchase-price.

The rule permitting a pre-emptor to deduct costs payable to him from the purchase-price deposited is a rule of equity, and where there are cross orders as to costs, equity demands that the pre-emptor should only deduct from the purchase-price deposited the actual amount of costs, which he could recover, that is; the balance due to him after deducting the costs payable by him to the vendee. The pre-emptor cannot obtain any real assistance from the fact that the decree did not direct him to deposit the costs payable by him as well as the purchase price. It cannot help him to deduct from the sum to be deposited the whole amount of the costs awarded to him and the vendee to recover his costs from the pre-emptor by execution or any other means. A.I.R. 1937 All. 756=1937 A.W.R. 782=1937 A.L.J. 1114=172 Ind. Cas. 765. [Reversed in A.I.R. 1939 All. 228=181 Ind. Cas. 497=I.L.R. (1939) All. 261].

——Decree—Costs — Mesne profits and costs against deposit.

If in a suit for possession the Court passes a decree for possession conditional on plaintiff depositing a particular sum and grants costs and mesne profits till the date of delivery of possession the amount of costs and mesne profits can be set off against amount of deposit under the decree. A.I.R. 1930 All. 413.

——Decree—Costs—Costs can be deducted.

Where a pre-emption suit is decreed with costs the pre-emptor can claim to deduct the costs payable to him out of the amount he is directed to pay as pre-emption price. If he does not do so, he must deposit the entire pre-emption amount within the time fixed, failing which the decree cannot be executed. 80 Ind. Cas. 416=2 L.L.J. 770.

——Decree—Costs—Costs can be deducted.

Where the plaintiffs are given a decree for pre-emption with costs the deposit of a sum by them sufficient to cover the decree after deducting the costs which they are entitled to deduct would be sufficient compliance with the decree. It is immaterial what the plaintiffs intended to do, and the only real test is whether they have sufficiently complied with the decree. 10 Ind. Cas. 454, followed. 65 Ind. Cas. 250=23 P.L.R. 1922=4 Lah.L.J. 354=2 Lah. 294=111 P.L.R. 1921 =A.I.R. 1922 Lah. 142.

——Decree—Costs—Deduction of costs—Deposit of balance.

A pre-emptor directed to pay into Court a specific sum of money is entitled to deduct the amount of the costs awarded from the sum he is directed to pay into Court. 1 U.P.L.R. (H.C.) 181=18 A.L.J. 162=54 Ind. Cas. 395.

——Decree — Costs awarded to pre-emptor—Deduction of amount from price.

In a pre-emption decree the pre-emptor decree-holder is entitled to deduct the costs allowed to him. Where costs were allowed to a successful vendee in the first Court but its order was reversed on appeal the pre-emptor is not obliged to apply under S. 144, C. P. Code for the refund of the amount realised by the vendee from the pre-emptive price paid by the pre-emptor in Court. 96 P.W.R. 1918=47 Ind. Cas. 511.

——Decree—Costs — Deposit in Court—Cost deducted.

Held, that there was a proper deposit in spite of the fact that he had taken out Rs. 314 towards costs out of the amount directed by the decree to be paid. 34 All. 596=10 A.L.J. 153=15 Ind. Cas. 337.

——Decree—Costs—Application for restoration of possession—Costs not deposited by decree-holder —Set off.

The appellants obtained a decree for foreclosure on a mortgage. The respondents brought a suit and obtained a decree for pre-emption on payment of Rs. 2,100 "together with costs of the purchaser in the foreclosure case" which amounted to Rs. 25-12-0. The costs of the suit (amounting to Rs. 177) were, however, awarded to the plaintiffs. They deposited Rs. 2,100 within time but failed to deposit Rs. 25-12-0.

Held, that as the decree awarded the costs of the suit to the respondents they were entitled to set off that sum from the amount which they were ordered to pay and therefore Rs. 2,100 were in excess of the sum which they had to pay after deducting their costs. 1906 A.W.N. 198=3 A.L.J. 804=28 A. 676.

(c) Deposit.

——Decree—Deposit—Conditional—What is not.

Where a pre-emption decree requires certain amount to be paid in Court by the pre-emptor for payment to the vendees, and the pre-emptor pays

the amount as directed into the Court, the mere fact that he made an application praying that the amount might not be given to the vendees till the disposal of the appeal preferred by pre-emptor against the pre-emption decree does not make the deposit a conditional or invalid deposit so as to justify dismissal of the pre-emption suit. 119 Ind. Cas. 462=6 O. W. N. 644=A.I.R. 1930 Oudh 13.

——Decree—Deposit—Procedure.

The procedure controlling the deposit of purchase money in a suit for pre-emption is stated in Ss. 14 and 15 of the Oudh Laws Act, 1876, and not in the rules of the Code of Civil Procedure. The expression "purchase money" means the whole of the purchase money as specified in the decree: A.I.R. 1924 Oudh 104, Foll. 93 Ind. Cas. 1023 =1 Luck. 158=13 O.L.J. 109=3 O.W.N. 274= A.I.R. 1927 Oudh 69.

(d) Extension of time.

——Decree — Extension of time — Time for payment of pre-emption amount—Appellate Court, if can extend.

On an application made within time fixed for payment of pre-emption money, the Appellate Court can extend the time fixed by the trial Court for making deposit of purchase-money. A.I.R. 1940 Nag. 202=1940 N.L.J. 219=I.L.R. (1940) Nag. 157=189 Ind. Cas. 639.

——Decree—Extension of time—Filing of appeal, whether extends time for payment — Plaintiff's right to set off costs—Question whether vendee had paid amounts reserved for payment to third person cannot be raised after decree.

The mere fact that an appeal was filed to the lower Appellate Court by the defendant does not extend the period granted by the Court of first instance for payment of pre-emption money.

In a pre-emption suit, the plaintiff is entitled to deduct the sum of money due to him by way of costs from the pre-emption money.

The fact that the amount of the costs awarded to the plaintiff was reduced by amendment of the decree would not matter much where the deposit was made before the expiry of the time allowed by the Court and the decree was not corrected till the time had expired.

The question whether the vendee had paid the amounts reserved for payment to third person must be raised and decided in the course of suit and before the decree and not after the decree in the execution department. A.I.R. 1933 All. 113=141 Ind. Cas. 15.

——Decree—Extension of time for payment of purchase-money.

A plaintiff in a pre-emption suit must be ready to pay the purchase money whenever he can get possession of the property but if he wants some more time, he should specially request the Court for it. 16 A.L.J. 506=46 Ind. Cas. 75.

——Decree — Appeal — Extension of time—Good faith.

An Appellate Court is not bound to grant to a pre-emptor an extension of time for payment fixed by the original Court though it can and will probably grant extension to a pre-emptor whose conduct has been bona fide, and does not exhibit a contemptuous disregard of the order passed by the Court. But if the pre-emptor has paid to money into Court or made no tender of a sum to the Court or if the sum he has paid or tendered is unreasonably small, he cannot expect to be granted an extension of time. 21 P.R. 1915=31 P.L.R. 1916= 26 Ind. Cas. 433.

(e) Form of decree.

——Decree — Form of decree — Suit by vendor's son against the pre-emptor.

When a vendor's son sues the pre-emptor, he is entitled to have the sale set aside if any part of the consideration was invalid and not binding on the plaintiff. But if a portion of the consideration is good and binding on the plaintiff, he would be entitled to re-imburse to the defendant. The form of the decree should be a decree for possession in favour of plaintiff subject to his paying within the time fixed by the Court to the purchaser so much of the consideration as was required for the necessities of the family. 72 Ind. Cas. 134=45 All. 429=A.I.R. 1923 All. 248.

——Decree, form of. See DECREE FOR PRE-EMPTION, FORM OF. 11 M.L.J. 132=24 M. 449.

(f) Improvements.

———Decree — Improvements — Vendee's right to their value—Vendee making construction in spite of notice.

Where the pre-emptor, soon after the registration of the sale deed, gave notice to the vendees not to undertake any construction and then filed the suit without any delay, held that in the absence of a satisfactory explanation for the undue haste in taking up the work of construction the vendees could not be allowed the amount claimed by them on account of repairs and improvements. 1945 M.L.R. (Civ.) 54.

——Decree — Improvement by vendee—Compensation, when can be granted.

Claim for compensation for improvements by a vendee when a pre-emption suit is filed, is based on S. 51, T. P. Act. The question whether or not a transferee believed in good faith that he was absolutely entitled to the property cannot be the subject of any hard and fast rule but should be decided on the merits according to the circumstances of each case.

What constitutes good faith is a question of fact to be inferred from the circumstances of each case; failure to make due enquiry does not constitute good faith. The vendee acts in good faith, i.e., under the honest belief that he has secured good title to the property in question, and is the rightful owner thereof, and for this belief, there must be some reasonable grounds such as would lead a man of ordinary prudence to entertain it. The belief, in good faith includes not only acting honestly but includes due enquiry.

The existence of the right of pre-emption is well-known in the Province of Oudh, and it is a legitimate presumption to hold that the vendee would know of the existence of it. Where the vendee is not co-sharer in the village and even if

he does not know all the details of the law of pre-emption, he would certainly know that every co-sharer in the village would have the right of pre-emption and the vendee has not shown that he took any step whatsoever to assure himself that co-sharers would not pre-empt and makes improvements in property without waiting for the limitation for pre-emption to expire, he cannot be granted compensation in a suit for pre-emption against him. A.I.R. 1940 Oudh 266=1940 O. W.N. 375=1940 A.W.R. 175=187 Ind. Cas. 317.

——**Decree — Improvements — Bona fide—Compensation.**

The vendee of a land which is subject to the right of pre-emption is not necessarily deprived of his right to claim compensation for improvement made by him on the land by the mere fact that he erected the buildings with full knowledge of such right. If it be established that he constructed the buildings **bona fide,** he is entitled to compensation. If, however, the building is constructed in anticipation of a suit for pre-emption then he would probably not be entitled to compensation. 96 Ind. Cas. 825=A.I.R. 1926 Lah. 629.

——**Decree—Improvements.**

Where it is not shown that the vendee knew anything about the pre-emption suit before he made improvements and the improvements are made after the limitation for a suit for pre-emption, he is in equity entitled to compensation. 92 Ind. Cas. 986=8 L.L.J. 60=27 P.L.R. 172=A.I.R. 1926 Lah. 346.

(g) Non-compliance.

——**Decree — Non-compliance — Loss of right—No appeal.**

In a pre-emption suit, when a plaintiff does not deposit the amount decreed within the time fixed, he loses the right of pre-emption and an appeal against the decree is not competent. A. I. R. 1924 Oudh 102, Foll. 91 Ind. Cas. 130 (Oudh).

——**Decree — Non-compliance.**

A pre-emption decree was obtained by plaintiff subject to payment of purchase money within two months but the plaintiff failed to comply with the condition imposed on him by the decree. The Appellate Court set aside the decree. The plaintiff then filed a second appeal in which the decree and judgment of the lower Appellate Court were set aside and those of the first Court restored, but without extending time.

Held, that the decree-holder was not entitled to get possession in execution of his decree, as he had not complied with the condition laid down in the decree of the first Court. 89 Ind. Cas. 163=7 L.L.J. 161=6 Lah. 316=26 P.L.R. 183=A.I.R. 1925 Lah. 380.

——**Decree — Non-compliance — Strict compliance necessary—No extension — Failure of suit.**

In a pre-emption suit a compromise decree was passed. It provided that on plaintiff's failure to pay to the vendee certain sum by a certain date his suit must be dismissed. Within the time specified, the sum named in decree was paid by the plaintiff and the property was taken possession of by him. Afterwards it was discovered by the defendant that the plaintiff's deposit in Court was less than the sum mentioned in the compromise decree by four annas. The defendant then applied for restoration of the pre-empted property to him and dismissal of the plaintiff's suit.

Held: that it was not within the competency of the Court to extend the time specified in the decree for payment of the amount, that in this respect there was no distinction between a compromise decree and a decree passed after contest and that the plaintiff not having strictly complied with the decree, his suit must be dismissed and the defendant restored to the possession of the pre-empted property. 80 Ind. Cas. 1012=A.I.R. 1925 Lah. 91.

——**Decree—Non-compliance.**

Where plaintiff obtained a decree for pre-emption on payment of certain sum of money and was also awarded costs, to recover which he attached part of the money deposited by him and where on vendee's appeal the decretal amount was enhanced and the vendee was also awarded proportionate costs and where after the decision of the appeal the pre-emptor withdrew the amount attached by him and thus failed to keep in deposit the money decreed by the Appellate Court.

Held: the suit was liable to be dismissed as he did not comply with the order of the Appellate Court. 80 Ind. Cas. 540=A.I.R. 1925 Oudh 98.

——**Decree—Non-compliance.**

According to the compromise decree the pre-emptor was to tender money to the vendee and on his refusal to accept, to deposit it in Court within 30 days. The pre-emptor never informed the Court that money had been so deposited, or asked the Court to issue notice to vendee of the fact that the money was lying to his credit in the treasury.

Held: there had not been any effective compliance with the provisions of the decree. 71 Ind. Cas. 1034=21 A.L.J. 63=45 All. 276=4 L.R.A. (Civ.) 90=A.I.R. 1923 All. 250.

——**Decree — Non-compliance — Not fatal to appeal.**

Non-compliance with a pre-emption decree is not fatal to the further prosecution by the pre-emptor of his appeal. (70 P.R. 1890; 67 P. R. 1895, Followed.) 67 Ind. Cas. 844=4 Lah.L.J. 397=A.I.R. 1922 Lah. 36.

——**Decree — Non-compliance — Payment not made — Appellant disentitled to hearing on merits.**

A pre-emption decree directed plaintiff to pay the pre-emption price within a specified time but without doing so he preferred an appeal against the amount fixed.

Held, the fact that he had not complied with the terms of the decree as to payment is no ground for dismissing the appeal without going into the merits. 54 Ind. Cas. 756 (All.).

——**Decree — Non-compliance — Strict compliance—Essential.**

Strict compliance with all the terms of a pre-emption decree is essential. Where after the pre-emptor had obtained possession of the property it was found that the pre-emption price had

by mistake, been short paid to the extent of one rupee,

Held, the pre-emptors were bound to restore the property to the vendee notwithstanding the fact that at the time of the original deposit they could have deducted much more towards their costs. 2 Lah.L.J. 770.

——Decree — Non-compliance — Sale to stranger who before suit becomes sharer.

The defendants vendees in a suit for pre-emption, purchased certain shares in eight villages on 2nd June, 1907. They were admittedly strangers. A suit to pre-empt the sale was instituted on 5th October, 1907. Before this suit was instituted, namely on 29th August, 1907; the vendees purchased shares in five out of the eight villages. A suit to pre-empt this was brought and decreed. The pre-emptors, however, failed to deposit the price within time and they stood dismissed. The defendants thus became by virtue of their purchase, indefeasible owners, and co-sharers.

Held, that they could not be ousted from the five villages purchased by them. 7 A.L.J. 344=6 Ind. Cas. 261.

(h) Operative date.

——Decree — Operative date—Right — When effctively exercised — Pre-emptor securing an agreement to sell in his favour—If can be deemed to have enforced his pre-emptive right.

A right of pre-emption can be said to have been effectively exercised or enforced only when the pre-emptor has become actually substituted for the vendee in the original bargain of sale. Till such substitution takes place the vendee remains the owner of the property purchased by him and the prospective pre-emptor cannot claim to have any right to or in the subject-matter of the sale. Where the pre-emptive right is sought to be enforced by means of a suit, such substitution takes place, and the pre-emptive right is deemed to have been exercised or enforced, only when the price has been paid by the pre-emptor into Court in compliance with the decree passed in his favour. Till such payment has been made, the act of the pre-emptor in instituting the suit for pre-emption amounts to no more than a mere assertion of the right, which becomes a successful assertion of the right, when the suit culminates in a decree. Where the pre-emptive right is sought to be enforced not by means of a suit but by means of a private treaty out of Court, the substitution of the pre-emptor for the purchaser takes place and the pre-emptive right can be said to have been exercised or enforced, when the price is either paid or tendered to the purchaser and he has actually surrendered the bargain in favour of the pre-emptor. There can be no enforcement of the pre-emptive right except by complete divestiture of the vendee's title and the vesting of such title in the pre-emptor. By merely securing an agreement to sell in his favour, the pre-emptor cannot be deemed to have enforced his pre-emptive right. I.L.R. (1947) Lah. 213 =227 Ind. Cas. 2=48 P.L.R. 505=A.I.R. 1946 Lah. 322 (F.B.).

——Decree—Operative date.

The pre-emption decree made in terms of O. 20, R. 14, C. P. Code, is in the nature of a preliminary decree. It becomes operative as a decree dismissing the plaintiff's suit with costs in case the plaintiff fails to pay the full pre-emption price within the time allowed by the Court. On the other hand, it becomes operative as a decree entitling the plaintiff to claim possession of the pre-empted land in case he deposits the pre-emptive price within the prescribed time. A.I.R. 1939 Nag. 279=1939 N.L.J. 475=186 Ind. Cas. 21.

——Decree — Operative date—Profits — Pre-emptor not entitled to prior to deposit.

A pre-emptor cannot claim credit for profits prior to the date of the payment of the pre-emption money by himself. The purchasers are entitled to appropriate the profits till the pre-emptor becomes entitled by deposit of the pre-emption money to be substituted in their place. 110 Ind. Cas. 407=A.I.R. 1928 All. 667.

——Decree—Operative date.

A successful pre-emptor is vested with the rights of the vendee whom he dislodges not from the date of sale but from the date on which he enforces his rights, i.e., from the date on which he satisfies the conditions of his decree and brings it into operation. 73 Ind. Cas. 318=4 Lah. 137 =A.I.R. 1923 Lah. 451.

——Decree — Operative date — Right to standing crops.

In a pre-emption suit a decree was passed for possession but there was no mention as to crops in the decree.

Held: that the defendant could have removed the crops before the pre-emption money was paid into Court. After it was paid he had no right to them. As soon as the plaintiff paid the pre-emption money he became the owner of the land with its legal incident, the crop attached to it. 76 Ind. Cas. 193=A.I.R. 1923 Nag. 327.

——Decree—Operative date.

It is only when the terms of the decree are fulfilled and enforced that the persons having the right of pre-emption become owners of the property; such ownership does not vest from the date of sale, notwithstanding success in the suit. 44 Cal. 675 (P.C.) and 12 All. 234 (F.B.), Foll. 25 P.R. 1908; 44 P.R. 1903 and 30 P.R. 1893, Dissented from. 59 Ind. Cas. 744=3 L.L.J. 205=33 P.L.R. 1921=A.I.R. 1921 Lah. 30.

——Decree — Operative date—Mesne profits—Right to—When arises — C. P. Code O. 20, R. 14.

A pre-emptor cannot be regarded in the same light as an ordinary purchaser of an estate. His right to possession of the property and the consequential right to mesne profits arises only on the date when he pays the purchase price as finally decreed. 44 Cal. 675=32 M.L.J. 459=1 Pat. L.W. 527=15 A.L.J. 375=21 C.W.N. 786=25 C.L.J. 573=19 Bom.L.R. 437=6 L.W. 65=(1917) M.W.N. 470 and 811=22 M.L.T. 196=44 I.A. 80=39 Ind. Cas. 958 (P.C.).

——Decree — Operative date — Payment in accordance therewith — Right fructifies into titles.

A pre-emption right fructifies, after decree and payment in accordance with the decree into a title

to the property, which title however, may be subject to the decision in an appeal by a defeated litigant in the case. 19 O.C. 153=3 O.L.J. 683 =37 Ind. Cas. 163.

(i) Subsequent events.

——Decree—Subsequent events.

Vendee to pay off **zarpeshgidars** who were in possession, from purchase-money — Pre-emption suit in respect of property—Decree in favour of pre-emptor—Vendee entitled to withdraw deposit by pre-emptor without reference to **peshgi** money —Vendee so withdrawing — Suit by pre-emptor for possession or in alternative for **peshgi** money from vendee:

Held, that the vendee was not obliged to pay unpaid **peshgi** money to pre-emptor and that the pre-emptor was not entitled to possession without paying on **zarpeshgidar**. A.I.R. 1937 Pat. 594 =16 Pat. 360=4 B.R. 65=171 Ind. Cas. 720.

——Decree — Subsequent events — Money paid in Court—Decree set aside—Money attached and paid out to pre-emptor's creditors—Appeal—Decree confirmed—If pre-emptor can obtain possession without paying money deficient.

When a pursuance of a pre-emption decree, money was paid into Court, but the decree was set aside and in the meanwhile, a part of the money which was attached and paid out by the Court to one of the pre-emptor's creditors, and on appeal, the original decree was confirmed, **held** that though the Court was wrong in paying out the money before a final decree had been made in the suit, the pre-emptor cannot obtain possession without repaying the amount drawn out, especially as the vendor had not committed any default and the pre-emptor had benefited by payment out to one of his creditors. 36 All. 398 =12 A.L.J. 732=23 Ind. Cas. 869.

——Decree — Subsequent events — Deposit of money in Court — Decree-holder of pre-emptor drawing out money—Pendency of appeal—Pre-emptor entitled to possession with redeposit.

Where the pre-emptor deposited money in Court and his decree-holder removed a portion of it during the pendency of an appeal, **held** that on the appeal being allowed, the pre-emptor is entitled to possession without further deposit, since he had carried on the condition in the decree fully and had not removed the money wrongfully from Court. 11 A.L.J. 668=21 Ind. Cas. 67.

——Decree — Subsequent events—Effect of.

On the 11th June, 1919, defendant No. 2 executed a sale deed in favour of J defendant No. 1 of a certain share in Mahaban. This was followed by another sale-deed, dated the 11th of May, 1920 of another share in the same village. On the 12th of June, 1920, a suit for pre-emption was instituted by the plaintiffs-respondents to pre-empt the first sale. After the written statement in that suit had been filed J executed a deed of gift on the 17th of August, 1920, under which he transferred the shares sold under the previous two sale-deeds in favour of the idol defendant-appellant. It was after this transfer that a second suit to pre-empt the second sale was filed on the 29th of November, 1920. Subsequently on the 14th of February, 1921, one of the original vendors executed a deed which purported to be a deed of gift in favour of the defendant-appellant. The day after that a third suit was instituted to pre-empt this transfer. The Court of first instance disposed of all the three suits on the 28th of February, 1921, and dismissed all the three suits. On appeal the two suits for pre-emption were decreed and the third was remanded but was ultimately dismissed for default on 29th November, 1921.

Held, that the claim for pre-emption of the two previous sales cannot be defeated by virtue of the dismissal of the third suit on 29th November, 1921, long after the date of decree of the first Court. The dismissal did not operate to validate the gift from the date of its execution. 74 Ind. Cas. 382=21 A.L.J. 518=45 All. 561=4 L.R. A. (Civ.) 257=A.I.R. 1923 All. 526.

——Decree — Subsequent event — Death of pre-emptor—No effect.

Where the pre-emptor dies after the decree and pending the appeal, and the original vendor himself is his legal representative, the suit need not be dismissed on appeal, 130 P.R. 1916, Foll. A pre-emption decree cannot be affected by anything which happens after it is made. 73 Ind. Cas. 758=A.I.R. 1923 Lah. 310.

——Decree — Subsequent events — Rights under —Loss of title—Pendente lite.

The plaintiff asking in the first Court or in appeal for the first time for pre-emption must have an existing interest forming the basis of a decree in his favour. Once a decree in his favour has been passed subsequent events will not affect it. 6 O.L.J. 76=22 O.C. 3=1 U.P.L.R. (J.C.) 30=50 Ind. Cas. 190.

(j) Time expiring on holiday.

——Decree — Period for depositing money in Court expiring on holiday—Deposit on re-opening day — Validity — General rule of law.

Where the period for depositing the purchase-money in Court under a decree for pre-emption expires on a date on which the Court is closed, the plaintiff can deposit the money on the day on which the Court re-opens.

It is a recognised principle of law that where parties are prevented from doing a thing in Court on a particular day, not by any act of their own but by the Court itself, they are entitled to do it at the first subsequent opportunity. A.I.R. 1931 Lah. 386=32 P.L.R. 255=133 Ind. Cas. 434.

——Decree — Time expiring during holidays.

The last hearing of a pre-emption case was on the 20th August, 1919, when arguments were heard and the 29th August, 1919 was fixed for pronouncing the judgment. The plaintiff was given a decree on condition that he should pay a certain sum within a certain period. The Court was closed from the next day. The plaintiff tendered the money into Court on the next day on which the Court was open. In the meanwhile the period fixed by the decree had expired.

Held, that the payment was within time. 67 Ind. Cas. 772=3 L.L.J. 310=A.I.R. 1921 Lah. 6 (F.B.).

(k) Transfer of.

——Decree — Transfer of—Not capable.

A decree for pre-emption is not capable of transfer, so as to enable the transferee to obtain possession of the pre-emptional property in execution. 64 Ind. Cas. 191=2 Lah. 282=3 L.L.J. 553=98 P.L.R. 1921=A.I.R. 1922 Lah. 300.

(l) Miscellaneous.

——Decree—Jurisdiction.

When the money to be paid in a pre-emption suit exceeds the Court's jurisdiction, the Court has jurisdiction to entertain the suit, but the decree must be passed by a superior Court. 16 P.R. 1908, Expl. 1926 Lah. 346, Foll. 94 Ind. Cas. 125=8 L.L.J. 58=27 P.L.R. 228.

——Decree—Effect of.

A previous pre-emption decree is only effective so long as it is not rendered abortive by a decree in favour of a person having preferential or equal right of pre-emption. 93 Ind. Cas. 371=A.I.R. 1926 Oudh 350.

——Decree — Limitation for execution. See LIMITATION ACT, ART. 181. 1902 A.W.N. 60=24 A. 300.

——Decree — Basis of claim not to be altered.

If a plaintiff sues for pre-emption alleging a superior title as collateral of the vendor under the Muhammadan law and that right is negatived the Court cannot give him a decree on the ground that he was an agriculturist and the vendee was not. 50 Ind. Cas. 160 (Lah.).

——Decree — Condition of payment into Court—Money raised by mortgage on decreed property itself—If compliance with decree.

Where plaintiff obtained decree for pre-emption conditional on payment into Court of the pre-emption money within a certain period.

Held, it was sufficient compliance with the terms of the decree, if the amount was raised by a simple mortgage of the decreed property itself and paid into Court. 40 Ind. Cas. 35 (All.).

——Decree — Government notification taking away pre-emption right—Effect.

A pre-emption decree obtained by the plaintiff before the issue of a Government notification takes away the right of pre-emption is not affected by such notification, in spite of the decree being under appeal at the time of the notification, but the case is otherwise when no decree has been obtained at the time of the notification. 130 P.R. 1916 =37 Ind. Cas. 227.

——Decree — Successive pre-emptors — Uncertified payment.

Payment to vendee by a superior pre-emptor as against the inferior before the appointed date but certified later does not amount to proper payment into Court, if it does not put the Court in a position to issue a warrant of possession in favour of the decree-holder till the appointed date. 73 P.R. 1916=121 P.W.R. 1916=137 P.L.R. 1916= 35 Ind. Cas. 363.

——Decree — Money paid into Court — Paid out by Court to wrong person—Effect.

The fact that a wrong person withdraws the pre-emption money paid into Court will not affect the decree that the pre-emptor has got. 62 P.W.R. 1914=158 P.L.R. 1914=25 Ind. Cas. 717.

——Decree — Price overstated in the deed—Suit by vendor's sons — Pre-emptor if can assert real consideration.

Where sale consideration was overstated in the deed and the pre-emptor got a pre-emption decree on payment of market value and where the sons of the original vendors sued for possession.

Held, that the pre-emptor was not debarred from ascertaining the real market price and contending that this was for necessity and he cannot be considered as **particeps criminis** with the vendee simply because, he is, by his pre-emption decree, identified in interest in many respects with the vendee. 83 P.R. 1911=216 P.W.R. 1911=13 Ind. Cas. 796.

——Decree — Deposit of money in court—Attachment.

The respondent obtained a pre-emption decree and was put in possession of property after payment. While the appeal was pending the magistrate recovered money in payment of fine due from the appellant who was convicted of a criminal offence. The pre-emption decree was a reversed in appeal.

Held, the appellants were entitled to possession of property contrary to the Lower Court's order. Further, the Judge's action was highly improper in interfering with money before the disposal of the suit. 11 Ind. Cas. 227 (Oudh).

——Decree — Othi mortgage—Right when arises.

Where before the Othi mortgagee had waived his right of pre-emption, the mortgagor had created a second othi being a discharge of a previous kanom, mortgage held by the second mortgagee, the second othi is a complete transaction and so the right of pre-emption could be exercised by the first othidar, and that as second othidar was not bound to surrender the lands held by him under Kanom, unless he was put in possession of the suit lands, he could not be directed to make a conveyance but only a declaratory decree should be granted. (1911) 1 M.W.N. 263=9 M.L.T. 495=9 Ind. Cas. 1010.

10. Fraud.

——Fraud — Fraud not carried into effect—Vendor and vendee not estopped from showing real nature of transaction.

A party is estopped from setting up his fraud only when the fraud has been actually carried into effect. Where it is found by the Court that the sale-deed in question was a **benami** or a fictitious transaction and it was not intended to transfer any title to the vendee and there is nothing to show that any of the creditors of the vendor was defrauded, the vendor and the vendee are not estopped from showing the real nature of the transaction. A.I.R. 1942 Oudh 206=1941 O.W.N. 1377=1942 A.W.R. (C.C.) 15=17 Luck. 555=198 Ind. Cas. 150.

——Fraud — Vendee, in order to prevent pre-emptor from becoming co-sharer paying higher price.

The fact that the parties were anxious to pre-

vent the pre-emptors from becoming co-sharers in the village and therefore, the vendees agreed to pay a higher amount than they would have done otherwise, will, by itself not constitute a fraud. The sale-deed would not be vitiated by the mere fact that the price is above the market value. It would not justify the Court to reduce the sale consideration. A.I.R. 1938 All. 204=1938 A.W.R. 60=1938 A.L.J. 128=175 Ind. Cas. 140.

——Fraud—Limitation—Limitation Act, S. 18.

Where when a land is sold, the transaction is fraudulently described as one conferring occupancy rights on the vendee in order to defeat the rights of pre-emption, and if the person having such right of pre-emption is not aware of the fraud, the limitation for pre-emption begins to run from the date on which the pre-emptor comes to know of the fraud. A.I.R. 1937 Lah. 97=I.L.R. (1937) Lah. 202=39 P.L.R. 889=172 Ind. Cas. 104.

——Fraud — Limitation — Suit by pre-emptor against another claiming his superior right and that decree obtained by other was by fraud—Art. 120, Limitation Act, applies.

Where a pre-emptor institutes a suit against another pre-emptor claiming his superior right of pre-emption and that the decree obtained by such other pre-emptor is based on fraud, the article applicable is Art. 120, Limitation Act. A.I.R. 1936 Lah. 503=164 Ind. Cas. 366.

——Fraud—Limitation—Suit for pre-emption.

Where a sale is disguised as a mortgage in order to avoid pre-emption, a suit for pre-emption can be brought within one year from the date on which the fraud is discovered. A.I.R. 1934 Lah. 878=36 P.L.R. 114=16 Lah. 408=155 Ind. Cas. 654.

——Fraud—What amounts to.

If a vendor or a vendee wishes that a sale should not be nullified by a pre-emption suit, it is necessary for him to inform the pre-emptor before the transaction and get his refusal but a mere omission to inform the pre-emptor or the bare fact of concealing the sale transaction from him cannot amount to a fraud, but where there is an active concealment of the transaction coupled with an intention to deceive the pre-emptor, there would undoubtedly be a fraud. 115 Ind. Cas. 798=1929 A.L.J. 342=A.I.R. 1929 All. 213.

——Fraud—Inclusion of property without title.

A vendor is not entitled fraudulently to insert property, to which he has no title, in the sale-deed for the purpose of inflating the price or otherwise fraudulently to defeat pre-emption, and therefore the plaintiff in a pre-emption suit in such a case is entitled to challenge the title to such inserted property. 37 All. 529, Rel. on. 100 Ind. Cas. 456=A.I.R. 1927 All. 374.

——Fraud—Inflation of price.

A person acquiescing in sale at a certain price is not estopped from claiming pre-emption if it is found out that the price at which he acquiesced was fraudulently inflated. In such a case his refusal to purchase amounts to refusal to purchase at that inflated price. 97 Ind. Cas. 340=A.I.R. 1926 All. 722.

——Fraud—Mortgage — Mortgage money fraudulently under-stated—Claim of pre-emptor decreed at a lower figure — Suit by mortgagees against mortgagor to recover the difference—Estoppel.

(1902) A.W.N. 149=24 All. 514.

11. Joint vendees.

——Joint vendees—Vendee with equal right of pre-emption associating with stranger in joint purchase—Effect — Pending suit, vendee purchasing stranger's share—Effect.

Where a vendee having an equal right of pre-emption associates with himself in a joint purchase, a stranger, he loses his right of pre-emption and cannot be allowed to retain even his own share of the purchase; but if the vendee, during the pendency of the suit removes the defect by purchasing the stranger's share at any stage before the final adjudication of the case, the pre-emptor cannot succeed irrespective of the fact that the subsequent acquisition takes place after the limitation had expired. A.I.R. 1941 Lah. 444=43 P.L.R. 566=I.L.R. (1942) Lah. 190=197 Ind. Cas. 263 (F.B.).

——Joint vendees — Sale to three persons — Sale-deed specifying shares of each—Right of pre-emptor, whether defeated.

Where a sale is effected to three persons and the shares of each are specified in the sale-deed itself, the transaction of sale is, for purposes of pre-emption, indivisible in spite of the fact that the fractional share of each of the purchasers is specified in the deed. A.I.R. 1935 Lah. 529=16 Lah. 921=37 P.L.R. 873=160 Ind. Cas. 826.

——Joint vendees — Purchaser with equal rights with pre-emptor associating in purchase with person with inferior rights.

If a purchaser having an equal right of pre-emption associates with himself in the purchase, a person with rights inferior to those of the pre-emptor, he is not entitled to resist the claim of such pre-emptor to enforce his rights even as to his share of the purchase. A.I.R. 1934 Lah. 878=36 P.L.R. 114=16 Lah. 408=155 Ind. Cas. 654.

——Joint vendees—Several vendees—Money paid in lump—Transaction, if single—Suit—Omission of one of the joint vendees—Suit for partial pre-emption.

The right of pre-emption is not a right of pre-purchase either from the vendor or the vendee, but is one of substitution for the vendee in the original sale. For purposes of pre-emption, a sale transaction is regarded as indivisible in those cases where the purchase-money is paid in one lump sum without any specification of the amount paid by the various vendees, and the mere fact that the shares to be taken by the vendees respectively, are specified in the sale-deed does not alter the nature of the transaction, it being at most an arrangement among the purchasers inter se, which does not affect the vendor. In such cases, the various vendees, taken together, are regarded as one single legal entity, and the omission of any one of them from the record is fatal to the suit. A.I.R. 1934 Lah. 429=35 P.L.R. 513=153 Ind. Cas. 128.

——Joint vendees—Purchase by person with superior right jointly with stranger—Right of person with inferior right to pre-empt — Purchase from stranger before suit, effect of.

Where a person with a superior right to pre-empt makes a purchase jointly with a stranger, he cannot resist a claim for pre-emption by a person with an inferior right, and the purchase by him of the stranger's interest prior to the suit for pre-emption cannot deprive the latter of his right to pre-empt the original sale. A.I.R. 1933 Lah. 117=34 P.L.R. 125=141 Ind. Cas. 187.

——Joint vendees—Shares and prices not specified —Right to pre-emption not affected.

In case of sale of certain plots there was neither a specification of the shares to be taken by the vendees in the property nor a specification of the amounts to be paid by them. The deed specified only the area sold to each of the vendees, but made no mention of the price to be paid by him. All these plots were not of the same quality; and some of the vendees were strangers.

Held: that the price to be paid by each of the vendees was not a matter of mere calculation and must not be deemed to be proportionate to the area to be taken by him. Therefore the proprietors having associated strangers with them in the purchase could not defeat the rights of the plaintiffs to pre-empt them. 112 Ind. Cas. 704=A.I.R. 1928 Lah. 784.

——Joint vendees—Co-sharer and stranger—Rights of pre-emptor.

The pre-emptor when he institutes a suit for pre-emption can proceed only upon the terms of the sale-deed. If the sale-deed has been executed in favour of two persons, one of whom is a co-sharer and the other a stranger and there is no specification of the interests of each of the vendees then the sale-deed as it stands collectively in favour of the joint vendees is a transaction in respect of which the pre-emptor has a right of pre-emption, for the Oudh Laws Act affords no protection to such joint vendees. If the pre-emptor acting on the faith of the terms of the sale-deed as they stand institutes a suit his rights cannot be defeated by any evidence subsequently led at the trial of the suit to prove the contract subsisting between the vendees **inter se** regarding their interests in the property or in the absence of evidence to that effect by any presumption which might then arise. If the shares of the vendees are specified in the sale-deed then the pre-emptor can get a decree only against such of the vendees as are strangers; but if the sale-deed does not contain any specification of the shares acquired by each of the vendees then the vendee who is a co-sharer loses his preferential right and the whole property is liable to pre-emption. 111 Ind. Cas. 631=5 O.W.N. 646=3 Luck. 674=A.I.R. 1928 Oudh 384.

——Joint vendees—Purchaser joining one having inferior rights—Right to pre-empt—Not affected.

If a purchaser having an equal right of pre-emption associates with himself in the purchase a person with rights inferior to those of a pre-emptor, he is not entitled to resist the claim of such pre-emptor to enforce his rights even as to his share of the purchase. 48 P.R. 1907, Foll. Persons who by clothing their transaction in a particular form, have induced a pre-emptor to come forward and claim pre-emption in respect of the transaction as a whole cannot be allowed to turn round thereafter and claim to show that their real intention was something quite different. 5 P.R. 1914, Foll. Where the purchase money for a sale is paid by the various vendees in a lump sum without specification of the amounts paid by the various vendees, the transaction must be regarded as indivisable, though the shares to be taken by the various vendees may have been specified in the deed. 66 Ind. Cas. 466 (Lah.)

——Joint vendees.

In a purchase by several vendees, each purchased a separate specified and divided share. One of the vendees died and his representatives were not brought on record within the prescribed period.

Held, that the suit for pre-emption for his share abated; but that it did not abate in respect of the shares purchased by other vendees. 8 A.L.J. 1135=12 Ind. Cas. 738.

——Joint vendees—Suit against vendees one of whom was wrong person—Correct vendee brought on record after limitation—Effect on suit.

Where in a pre-emption suit against two joint purchasers one of them was first wrongfully named as vendee and the correct person was then brought on record but after limitation—held that as the sale in favour of the vendees was a joint one, the suit is barred in toto. 8 A.L.J. 814=11 Ind. Cas. 938.

——Joint vendees—Right to — Vendee joining stranger—Whether can resist.

A vendee associating himself with a stranger co-vendee in the purchase, loses his right to resist a pre-emptor's claim. 60 P.R. 1914=128 P.L.R. 1914=83 P.W.R. 1914=23 Ind. Cas. 151.

——Joint vendees — Indivisible transaction—Purchase money expressed as a lump sum.

Where a sale deed specifies the shares to be taken by the several vendees, but the purchase money is expressed to be paid in a lump sum without specification, the sale transaction must be held to be indivisible. It would however be otherwise if the amounts to be paid by the several vendees were also specified. 19 A. 148 (F.B.) not followed. 256 P.L.R. 1913=165 P.W.R. 1913=6 P.R. 1914=20 Ind. Cas. 31.

——Joint vendees—Price and share of each vendee specified in deed of sale—Divisible transaction —Suit barred against one vendee.

Where in a sale to several persons, the share of each vendee in the property sold, as well as the price paid by each was specified in the sale deed, the sale is a divisible transaction. The right of pre-emption in such cases can be exercised separately in respect of each separate portion of the property purchased by each vendee. Therefore, if a pre-emption suit becomes time barred in respect of one portion of the property, it is not on that account barred with respect to the other. 6 P.R. 1909=7 P.W.R. 1909=23 P.L.R. 1909 =1 Ind. Cas. 91.

——Joint vendees — Sale in favour of several vendees—Divisible transaction — Specification of shares of vendees.

In case of sale of property to several persons

when the share of each vendor in the property sold is specified in the sale-deed, the actual property to which the right of pre-emption is attached is ear-marked, the sale is divisible and the pre-emptor is not bound to assert his claim in respect of the whole of the property sold. Certain land was sold to different persons by one sale-deed. The shares of vendees were specified. The plaintiff's suit for pre-emption was dismissed in respect of the share of one set of vendees and decreed in respect of the remaining share. The plaintiff did not appeal. The unsuccessful vendees appealed and urged that the plaintiff not having appealed against the decree so far as it dismissed his claim, the plaintiff was not entitled to claim the remaining share sold to them.

Held, that the contention was not valid. 23 P. L.R. 1909=6 P.R. 1909=1 Ind. Cas. 91.

12. Limitation.

——Limitation. See also LIMITATION ACT, ART. 10.

——Limitation—Appeal.

A executed a sale-deed of certain zamindari share in favour of **B**. On the same date **A** executed perpetual lease with respect to certain **sir** plots appertaining to the share sold in favour of **C** who was the son of **B**...The plaintiff instituted a suit for pre-emption which was decreed subject to payment of pre-emption within certain time. The plaintiff appealed after the expiry of the time allowed for payment of pre-emption money alleging that lease formed part of sale transaction and urging that time allowed for payment of the pre-emption money was inadequate:

Held, that the appeal could not be dismissed merely on the ground that it was filed after the expiry of the period fixed for payment of pre-emption money. A.I.R. 1940 All. 511=1941 O. W.N. 278=1941 A.W.R. 21=192 Ind. Cas. 101.

——Limitation Act, Arts. 10 and 120—Mistake in sale deed—Compromise decree.

A claim for pre-emption is a claim in respect of a sale and is governed by Art. 10 of the Indian Limitation Act, even where the sale-deed does not correctly describe the property sold. A right of pre-emptioi does not arise upon a transfer effected by virtue of a decree, though the decree is passed upon a compromise. 25 A. 334, Foll. (1904) 1 A.L.J. 247.

13. Lis pendens.

——Lis pendens—Right of—Vendee re-transferring property to person having superior right—Such transferee, if and when can plead his right in bar of pre-emption suit.

Where before the institution of a suit for pre-emption a vendee in a sale sought to be pre-empted has re-transferred the property purchased by him to another person having a right of pre-emption either equal or superior to that of the plaintiff who sues to pre-empt the sale, the transferee can resist the suit on the strength of his own pre-emptive right regardless altogether of the consideration whether the transfer in his favour was made in recognition of his superior pre-emptive right or could otherwise be regarded as having been made in recognition of such right. It is immaterial in such a case whether the transfer took the form of a sale, a gift or an exchange. So long as the transferee can be shown to have acquired the full title of the vendee under the sale sought to be pre-empted he can resist the suit on all pleas which have been open to him had the sale in the first instance been made in his favour. If, however, the re-transfer took place after the institution of the suit, the transferee can plead his own equal or superior pre-emptive right in bar of the suit only if the transfer in his favour can be held to have been made in recognised of such right. In such a case the transfer in order to clothe the transferee with a right to resist the plaintiff's suit on the strength of his own qualification must take the form of sale and must have been made at a time when his right to enforce his pre-emptive right by means of an action was still subsisting. It is settled law that unless a transfer *pendente lite* can be held to be a transfer in recognition of a subsisting pre-emptive right, the rule of *lis pendens* applies and the transferee takes the property subject to the result of the suit during the pendency whereof it took place. 11 Lah. 258 (F.B.) and 1946 Lah. 142, foll. 67 Ind. Cas. 304, Expl. 51 P.L.R. 39=A.I.R. 1949 E. P. 193 (F.B.).

——Lis pendens—Suit for—Doctrine of lis pendens—Applicability of—Pending suit vendee transferring property sought to be pre-empted to A having superior right of pre-emption—Right to enforce pre-emption barred at time of transfer—Doctrine of lis pendens applies—A is not entitled to be impleaded as party to suit so as to defeat plaintiff's right of pre-emption.

The doctrine of *lis pendens* applies to pre-emption suits. Where during the pendency of a suit for pre-emption and before the expiry of limitation for instituting a suit for pre-emption the vendee transfers the property sought to be pre-empted in favour of *A* in recognition of his right of pre-emption and in recognition of his right to enforce that right by means of legal action the transfer by the vendee to *A* cannot be regarded as voluntary so as to attract the rule of *lis pendens*. In such a case, *A* must be regarded as having simply been substituted for the vendee in the original bargain of sale and he can defend the suit on all pleas which he could have taken had the sale been initially in his own favour. But where at the time of transfer to *A*, limitation for instituting a suit for pre-emption had expired and *A* had lost the use of the coercive machinery of law for compelling the vendee to surrender the property in recognition of his right of pre-emption the transfer in favour of *A* by the vendee must be regarded as a voluntary transfer of such title as the vendee himself had acquired under the original sale so as to attract the principle of *lis pendens*. In such a case the transfer has not the effect of substituting the subsequent transferee *A* in place of the vendee in the original bargain. He cannot be regarded as anything other than a representative-in-interest of the original vendee, having no right to defend the suit except on the 'pleas that were open to such vendee himself and hence cannot plead his own equal or superior right of pre-emption and defeat the plaintiff's right to pre-empt.

Therefore a sale by a vendee in favour of a superior pre-emptor during the pendency of a suit for pre-emption but after the expiry of the period of limitation for a suit for pre-emption does not entitle the subsequent transferee to be impleaded as a party to the suit so as to be able to defeat the right of pre-emption claimed by the plaintiff. The fact that the subsequent transferee has, as a result of the sale in his favour, obtained possession of the property in suit is immaterial A.I.R. 1946 Lah. 142 =48 Pun.L.R. 28 (F.B.)=I.L.R. (1946) Lah. 467=225 Ind. Cas. 602 (F.B.).

——Lis pendens—Conveyance pendente lite.

The acquisitions based on the transfer *pendente lite* can arm the vendee with an effective weapon to destroy the pre-emptor's superior claim. A.I.R. 1941 Lah. 433= 43 P.L.R. 581=I.L.R. (1942) Lah. 155=197 Ind. Cas 227 (F.B.).

——Lis pendens—Effect of rule.

The effect of the rule of *lis pendens* is only to bind the transferee if he happens to be a third person with any decree that is made in the suit, even if he is no party to it. The effect of this rule is not to annul the conveyance but only to render it subservient to the rights of the parties in the litigation. A.I.R. 1941 Lah. 433=43 P.L.R. 581=I.L.R. (1942) Lah. 155=197 Ind. Cas. 227 (F.B.).

——Lis pendens.

The doctrine of *lis pendens* does not apply where the vendee, during the pendency of a suit, improves his status by acquiring a status which would defeat the pre-emptor. (1938) 40 P.L.R. 1035.

——Lis pendens—Acquisition of properties by vendees by exchanges during pendency of appeal—Joint decree—Death of one vendee during appeal—Non-impleading of heirs —Appeal, if abates—Competency of vendees to resist claim for pre-emption.

During the pendency of an appeal in a pre-emption suit, the vendees acquired properties by means of several exchanges and pleaded that they had become co-sharers on the same footing as the plaintiffs and the first Court passed a joint decree for pre-emption against all the defendants on payment of one sum. During appeal, one of the vendees died and his heirs were not brought on the record in time. The appeal was allowed and the whole suit dismissed :

Held, that there was no fatal defect which could have resulted in a complete abatement of the appeal in the lower Court.

Held, also that the properties acquired by the vendees on the strength of which they claimed the status of equal co-sharers having been acquired from persons who had full power to transfer the same, the vendees had acquired an indefeasible interest sufficient to enable them to resist a claim for pre-emption. A.I.R. 1933 All. 733=1933 A.L.J. 1049=146 Ind. Cas. 511 (2).

——Lis pendens—Applicability and limits.

(Per *Full Bench.*)—No double the rule of *lis pendens* applies to pre-emption suits but it does not affect the validity of the sale effected by the vendee during the pendency of the pre-emption suit to a person possessing a right of pre-emption equal to that of the pre-emptor. 31 P.L.R. 342=11 Lah. 258=A.I.R. 1930 Lah. 356 (F.B.).

——Lis pendens—Applicability and limits.

The pre-emptor need not necessarily bring a suit for pre-emption, but may acquire the property direct from the vendee by a private sale.

The plaintiff in a pre-emption suit got his plaint amended and impleaded the subsequent purchaser of the suit property who had purchased it from the vendee after the institution of the plaintiff's suit but before the expiry of the period of limitation for pre-emption. The trial Court found that the purchaser had a preferential right of pre-emption.

Held : that although the doctrine of *lis pendens* governs vendees in pre-emption suit, still the purchaser here having the preferential right of pre-emption is entitled to retain the property purchased by him. 118 Ind. Cas. 43=1929 A.L.J. 537=A.I.R. 1929 All. 440.

——Lis pendens—Accrual of right before suit.

The doctrine of *lis pendens* is applied to things coming into existence during the pendency of the suit and not where there is an esisting right prior to the suit. In a case where the right of pre-emption had accrued before the declaratory suit was instituted and pre-emptors had also obtained their decree for pre-emption long prior to the declaratory suit being instituted the doctrine of *lis pendens* had no application. A.I.R. 1929 Lah. 589.

——Lis pendens—Sale to one without right.

A had a preferential right of pre-emption over *B* in respect of a certain property which had been sold. *A* took no steps to assert his right. On the last day of limitation *B* instituted a suit for pre-emption—During the pendency of the suit the vendor sold the property to *A*.

Held, that *A* had no right of pre-emption left in him on the date of the sale to him and that that sale could not affect *B's* right to take the property. 61 Ind. Cas. 34=19 A.L.J. 143=A.I.R. 1921 All. 105.

——Lis pendens—Applicability.

Where subsequent to the institution of a pre-emption suit the vendee transfers the property in dispute to a third person but the transfer is not made in recognition of the superior right of pre-emption of the transferee the doctrine of *lis pendens* applies, and the transferee cannot plead his superior right of pre-emption in answer to the plaintiff's claim. 67 Ind. Cas. 304=75 P.L.R 1922=A.I.R. 1921 Lah. 363.

——Lis pendens—Resale to vendor—After suit.

Where after suit, the vendee resold property to the vendor who had ceased to be a co-sharer by the time, *Held* that the plaintiff was entitled to a decree despite the resale. 16 A.L.J. 505=46 Ind. Cas. 76.

——Lis pendens—Resale to vendor after suit—Effect of—T.P. Act, S. 52.

A suit for pre-emption is not affected by a resale of the property in question to the vendor after the institution of the suit. 11 Ind. Cas. 645 (All.).

——Lis pendens—Proprietor vendee—Joining with non-proprietor—Sale indivisible.

A proprietor vendee joining with himself non-proprietors in the purchase is in no better position than that held by the latter and cannot resist the claim even in regard to his own share, where the sale is indivisible and the deed does not specify the amounts to be paid by the several vendees. A resale by a non-proprietor to a proprietor having taken place after the institution of the suit, the rule of *lis pendens* applied and the re-sale by non-proprietor of his right after the institution of the suit cannot affect the plaintiff's claim, notwithstanding the fact that it (re-sale) took place before summonses were served on the defendants. 1 Lah. L.J. 209.

——Lis pendens—Transfer of Property Act, S. 52.

A house belonging to a Hindu lady was sold by her husband in her absence. A third person brought a pre-emption suit impleading the husband and his vendee. During the pendency of this suit, the lady obtained a decree cancelling the sale and possession of the house from the husband and his vendees. Thereupon she was impleaded as a defendant in the pre-emption suit, in which the house was proved to belong to the lady and her husband had no authority to sell it even in her behalf. Both of them acknowledged her to be the real owner without any rights of them in the house.

Held, the pre-emption suit must fail, (2) that the doctrine of *lis pendens* did not apply to the decree obtained by the lady against her husband and his vendee. 131 P.L.R. 1912=101 P.W.R. 1912=16 Ind. Cas. 122.

——Lis pendens—T.P. Act, S. 52.

The doctrine of *lis pendens* in S. 52 of the T.P. Act applies to an exchange effected during the pendency of a suit, in favour of a person who has a superior right of pre-emption, but whose superior rights have been extinguished on the date by lapse of time. 30 P.R. 1911=187 P.L.R. 1911=10 Ind. Cas. 1007.

——Lis pendens—Sale by vendee to person having equal right with pre-emptor after institution of suit by latter.

Where during the continuance of a suit for pre-emption, the vendee sells the property to a person who possesses equal right of pre-emption, the doctrine of *Lis pendens* does not apply, if the right of the subsequent vendee subsists at the date of sale and is not time barred for

no new-right is creased by the sale. 175 P.W.R. 1911=74 P.L.R. 1911=10 Ind. Cas. 842.

——Lis pendens—Resale to a co-sharer after institution of a suit for pre-emption—Transfer of Property Act, S. 52—Lis pendens.

After the filing of a suit for pre-emption but before service of summons on the defendants, the defendant vendee resold the property claimed to a second vendee who had equal rights as a co-sharer with the plaintiff. This second vendee was added by the court as a party defendant, but the plaint was not amended and the plaintiff did not seek to pre-empt the sale made in his favour.

Held, that the doctrine of *lis pendens* applied, and the plaintiff was entitled to a decree. 1908 A.W.N. 221=5 A.L.J. 477=30 A. 467.

14 Loss of right.

See also PRE-EMPTION—LIS PENDENS.

——Loss of right—Effect on suit for pre-emption of vendee becoming co-sharer before decision of suit.

When before a pre-emption suit is finally decided by the Court of first instance, the vendee becomes a co-sharer with an indefeasible title, the pre-emption suit has to be dismissed. 1947 A.W.R. (H.C.) 369=1947 A.L.W. 529=A.I.R. 1948 All. 192=1947 R.D. 372.

——Loss of right—Claim on ground of vicinage—Plea of acquisition of title to adjoining property under same sale deed—Validity to negative claim to pre-emption.

A vendee in a suit brought against him to enforce a right of pre-emption on the ground of vicinage, in respect of one of the properties purchased by him, can successfully resist the suit on the strength of his title to an adjoining property conveyed to him by means of the sale deed. It is well-settled that a vendee can improve his possession at any time between the date of the sale and the date of the institution of the pre-emption suit. By necessary implication, he can equally avail himself of an acquisition made by him simultaneously with the purchase of the property which is the subject-matter of the pre-emption suit. I.L.R. (1947) Lah. 166=48 P.L.R. 442=226 Ind. Cas. 220=A.I.R. 1946 Lah. 345 (F.B.).

——Loss of right—Right of—Vendee selling back to vendor—Pre-emptor's right whether defeated.

In cases of resale of the property by vendee to the vendor the pre-emptor's right will be defeated only if the vendor possessed a superior or equal right to that of the pre-emptor. If the right of the vendor is inferior to that of the pre-emptor the latter must succeed. 1947 M.L.R. 65 (Civ.).

——Loss of right—Landlord acquiring right of occupancy-tenant—Occupancy right is extinguished—Landlord cannot pre-empt as occupancy-tenant.

Where the landlord acquires the interest of his occupancy-tenant whether under S. 53, Punjab Tenancy Act or otherwise, the occupancy right is extinguished by merger so as to preclude the landlord from pre-empting as an occupancy-tenant. A.I.R. 1941 Lah. 433=43 P.L.R. 581=I.L.R. (1942) Lah. 155=197 Ind. Cas. 227 (F.B.).

——Loss of right—Stranger purchaser of interest of co-sharer—Partition suit—Subsequent suit for pre-emption by other co-sharer—Pre-emption suit decreed—Effect.

Where, after a suit for partition by the stranger-purchaser of the interest of a co-sharer, the other co-sharer institutes a pre-emption suit, which is decreed after a preliminary decree in the partition is passed, the preliminary decree in the partition suit does not defeat the right of the pre-emptor co-sharer but on the contrary, it is the stranger-purchaser who loses his right to partition as a result of the pre-emption decree, all that the pre-emptor is required to do is to see that no final decree is passed in that suit after he has obtained a decree in his suit for pre-emption. A.I.R. 1940 Pat. 699=21 P.L.T. 710=7 B.R. 358=192 Ind. Cas. 248.

——Loss of right—Decree not directing plaintiff to deposit defendant's costs—Plaintiff depositing within time pre-emption money after deducting costs but without giving credit for defendant's costs—His right, if lost.

In a pre-emption suit, the plaintiff is not to be deprived of the fruits of his victory on the grounds of equity only because he has failed to act in a way which the Court would consider reasonable and equitable, though not directed so to act by the terms of the decree. It is one thing to hold that the plaintiff is entitled to deduct from the sum to be deposited under the pre-emption decree, the amount of his costs on the ground that such a course is reasonable and equitable; it is an entirely different matter to hold that a plaintiff who has succeeded in a pre-emption suit and is willing and able to deposit what the Court directs him to deposit is to fail in the end of the day because he has not added to the amount directed to be deposited the sum awarded to the defendant in name of costs, when the decree in the suit has not so directed. Such a result cannot be justified on grounds of equity. A.I.R. 1939 All. 228=1939 A.L.J. 48=1939 A.W.R. 80=I.L.R. (1939) All. 261=181 Ind. Cas. 497. [A.I.R. 1937 All. 756=172 Ind. Cas. 765, Reversed].

——Loss of right—Purchase simultaneous with purchase of house in dispute, if can defeat pre-emptor's title.

If the vendee can defeat *X's* claim (by buying property prior or subsequent to the institution of the suit) he can defeat it by buying such other property simultaneously with the property in dispute. A.I.R. 1939 Lah. 77=I.L.R. (1939) Lah. 164=41 P.L.R. 348=183 Ind. Cas. 721.

——Loss of right—Purchaser of property transferring it by exchange before pre-emption suit, to another having equal right to pre-empt—Pre-emptor's suit, whether can succeed.

Where the purchaser of property transfers it before the institution of a suit for pre-emption to another person having an equal or superior right to the pre-emptor in recognition of that person's right to pre-empt, then the pre-emptor cannot succeed. A.I.R. 1939 Pesh. 3=179 Ind. Cas. 145.

——Loss of right—Transfer of property by vendee, prior to suit to person having right equal to pre-emptor—Pre-emptor, if can oust him—Sale not taking place in exercise of pre-emptive right of subsequent vendee—Principle, if applies.

If, before the institution of a pre-emption suit, the original vendee transfers the property to a person claiming a right, equal or superior to that of the pre-emptor, the pre-emptor cannot legally oust him. The applicability of the principle is not confined to those cases only where the re-sale takes place in exercise of the pre-emptive right of the subsequent vendee. There is no distinction between cases where the re-sale takes place in exercise of a pre-emptive right and those where the re-sale takes place without an assertion of his right by the subsequent vendee, because the effect in both cases is the same, that us the purchase of the land in suit by a person possessing a right equal or superior to that of the pre-emptor and, in these circumstances, the fact that the purchase takes place in assertion of the right or otherwise is immaterial. A.I.R. 1938 Lah. 242=40 P.L.R. 97=177 Ind. Cas. 674.

——Loss of right—Vendee acquiring another plot during pendency of suit and acquiring equal status with pre-emptor.

Where, during the pendency of a pre-emption suit, the vendee acquires another plot of land from the Government thus acquiring a status equal to that of the pre-emptor before the date of the decree, the pre-emptor's

right of pre-emption is barred. A.I.R. 1937 Lah. 182=39 P.L.R. 121=172 Ind. Cas. 398.

——Loss of right—Plaintiff's suit dismissed—Appeal—Plaintiff gifting away entire property after dismissal of suit—Whether can prosecute appeal.

Where the plaintiff in a suit for pre-emption, loses that right, after the gift of property by him, by virtue of which he had the right of pre-emption, at any time after the institution of the suit and before a decree for pre-emption is passed in his favour, he is put out of Court and no relief can be granted to him. The same principle applies to a case where the plaintiff gifts away the property after the dismissal of the pre-emption suit in the lower Court but before the date of appeal. In such a case, the appellant has no *locus standi* to prosecute the appeal. 171 Ind. Cas. 891=1937 O.W.N. 1217.

——Loss of right.

The pre-emptor's right for pre-emption continues to exist even on the resale of property by the vendee to the vendor. (1936) 38 P.L.R. 224.

——Loss of right—Right of pre-emption, if can be defeated by legitimate means.

Pre-emption can be defeated by any legitimate means. There is nothing to debar the parties from resorting to any legitimate method by which they can avoid the operation of the law of pre-emption. A.I.R. 1935 Pesh. 191=160 Ind. Cas. 75.

——Loss of right before decree of trial Court—Right to pre-empt.

The law of pre-emption is a highly technical one and the plaintiff, before he can succeed, must show that this right existed not only before he went into the Court but also while the case was in the course of active prosecution before the judge and in fact upto the time when the Court passed the decree. A.I.R. 1933 Lah. 481=14 Lah. 421=34 P.L.R. 101=141 Ind. Cas. 535.

——Loss of right—Re-purchase by vendor before suit for pre-emption—Whether defects right of pre-emption.

If the original vendor sells away only a fraction of his rights of co-sharership in the land to a stranger purchaser and subsequently re-purchases the property thus conveyed before the suit for pre-emption is instituted, he can successfully set up the re-conveyance as an effectual defence to a suit for pre-emption by another co-sharer. A.I.R. 1933 Nag. 134=29 N.L.R. 235=144 Ind. Cas. 876.

——Loss or right—Vendee acquiring share during pendency of suit for pre-emption—Claim for pre-emption, whether defeated—Crucial date.

Under the law as it stood before the passing of the Agra Pre-emption Act of 1922, the vendee's acquisition by gift of a share in the village pending a co-sharer's suit for pre-emption would defeat that co-sharer's claim for pre-emption. The decisive date as regards the right of the co-sharer to pre-empt is the date of the decree. A.I.R. 1932 P.C. 57=9 O.W.N. 127=1932 A.L.J. 190=35 L.W. 343=62 M.L.J. 514=55 C.L.J. 276=59 I.A. 138=54 All. 189=136 Ind. Cas. 402 (P.C.).

——Loss of right—Joint pre-emptors—Estoppel of some, whether extinguishes right of others.

The mere fact that a co-pre-emptor is found to have acquiesced in a sale before the suit and is consequently, estopped from pre-empting does not disqualify the other pre-emptor who has not acquiesced in the same way inasmuch as estoppel under S. 115, Evidence Act, merely operates as a bar to the suit and does not necessarily extinguish the right. A.I.R. 1931 All. 216=1931 A.L.J. 203=131 Ind. Cas. 681.

——Loss of right—Decree—Transfer of property—Right not lost.

If a pre-emptor obtains a decree and transfers not the decree but the property which is the subject-matter of pre-emption the right of pre-emption is not lost and the decree can be executed though execution will not be allowed to the transferee. 7 All. 107 and A.I.R. 1922 Lah. 300, Foll. 114 Ind. Cas. 809=6 O.W.N. 49=A.I.R. 1930 Oudh 195.

——Loss of right—Consenting to a transfer.

By consenting to a transfer a person disqualifies himself from pre-empting and loses his right of pre-emption altogether. He is them estopped not only as against the vendor and the vendee but also against a rival pre-emptor. 117 Ind. Cas. 345=1929 A.L.J. 935=A.I.R. 1929 All. 589.

——Loss of right—Pre-emptor party to suit to challenging sale—Confirmation—Right lost.

Certain occupancy tenants in a village sold their occupancy rights to the appellant *R*. The plaintiffs claimed to pre-empt the sale. The sale was by deed, dated 25th August, 1917, and the conveyance was registered on the 27th August. Shortly after the purchase he sold one-half to *B*, *P* and *M*. The suit to pre-empt the sale to *R* was brought on 7th October 1919. The vendees began to build shops on the land so purchased. Then, on 9th September, 1918, a suit was filed on behalf of all the landlords of the village numbering 216, among whom the plaintiffs were included, against the appellant *R* and his co-sharers. That suit was decreed by the Assistant Collector in January, 1919, but was dismissed in appeal. A further appeal was then made to the Commissioner and then a compromise among all the parties was effected, by which the sale to *R*, *B* and *M* was recognized and mutation allowed to be effected. The revenue officer sanctioned the sale in favour of the appellant *R*. The Commissioner passed a decree in terms of the compromise on 2nd June, 1919.

Held: that the occupancy rights consolidated, or rather merged in the ownership rights; that these belonged to the appellants, and that as the respondents were themselves parties to the suit in the course of which the compromise arrangement was come to be followed by the decree and mutation proceedings and, therefore, whether the case be viewed under the heading of *res judicata* or of estoppel, or of no title and interest to sue, the result would be the same, namely, that the plaintiffs' claim to pre-empt cannot be entertained, apart from the question of limitation. 110 Ind. Cas. 1=55 I.A. 266=48 C.L.J. 158=33 C.W.N. 90=30 P.L.R. 1=10 Lah. 75=A.I.R. 1928 P.C. 190 (P.C.).

——Loss of right.

If a plaintiff who has a right of pre-emption associates with himself persons who have no such right, he becomes disentitled from claiming pre-emption: 5 All. 197; 19 All. 324; 34 All. 542; and A.I.R. 1923 All. 256, Foll. 98 Ind. Cas. 1007=48 All. 810=24 A.L.J. 1021=A.I.R. 1927 All. 168.

——Loss of right.

It is fatal for a plaintiff in a pre-emption suit to associate with him in that suit any person who is not entitled to pre-emption. (1883) 5 All. 197, Foll. 87 Ind. Cas. 55=47 All. 460=23 A.L.J. 198=A.I.R. 1925 All. 355.

——Loss of right—Addition of stranger—Right when not lost.

It is well settled that if a person entitled to claim pre-emption joins with himself as co-plaintiff a person who has no such right, he forfeits his own pre-emptive right and the suit must be dismissed as against both; but not where co-sharer has joined as a plaintiff one who, although otherwise qualified, had not himself performed the preliminary ceremonies of talabi-mowasibat and talab-i-ish-had: 31 All. 623 (F.B.) and (1893) A.W.N. 25, Foll. 90 Ind. Cas. 806=7 P.L.T. 233=5 Pat. 96=1925 P.H.C.C. 265=A.I.R. 1925 Pat. 743.

——Loss of right—Association of stranger—Part of the property.

Where plaintiffs associated with them strangers to the

property in respect of their claim to a portion of the property.

Held: the claim in respect of the whole property fails as suit for partial pre-emption cannot be allowed. 77 Ind. Cas. 144=A.I.R. 1924 All. 81.

——Loss of right.

When a vendee in recognition of a pre-emptor's right conveys his bargain to the pre-emptor, he is not really effecting a fresh sale, but is merely substituting the pre-emptor for himself as vendee. Such a re-sale or reconveyance does not give rise to pre-emption. 75 Ind. Cas. 848=A.I.R. 1924 Lah. 651.

——Loss of right—Decree—Transfer of property—Right not lost.

The holder of a decree enforcing a right of pre-emption who subsequently to the date of the decree sells the property to a stranger does not by such conduct debar himself from obtaining possession of the property in execution of the decree. 75 Ind. Cas. 844=A.I.R. 1924 Lah. 615.

——Loss of right.

When a pre-emptor joins with a co-sharer inferior in degree he forfeits the right of pre-emption. 71 Ind. Cas. 562=21 A.L.J. 184=4 L.R.A. Civ. 132=A.I.R. 1923 All. 256.

——Loss of right—Joining stranger.

A plaintiff who has in himself a right to claim pre-emption may lose that right by joining in a suit along with a person who is a stranger to the property and has no such right. 77 Ind. Cas. 933=4 L.R. All. Civ. 55=A.I.R. 1923 All. 161.

——Loss of right—Purchase by one of several pre-emptors from vendee.

Where *A*, one of several pre-emptors brought a property from the vendee and subsequently resold it to him and thereafter another pre-emptor *B*, sued the vendee for pre-emption.

Held, that on *A's* purchase from the vendee, in enforcement of his right of pre-emption, the sale in favour of the vendee, ceased to exist and *B* had no cause of action thereafter to sue for pre-emption. 83 Ind. Cas. 751=A.I.R. 1923 Lah. 259.

——Loss of right—Right because of ownership—Loss of ownership.

Where the vendee of a house, through the fact of his being the owner of another house, has on the date of the sale in his favour, in respect of the former house, a right of pre-emption equal to that of the person seeking to enforce pre-emption, he does not forfeit his right through having parted with the latter house under a decree later on. 59 Ind. Cas. 744=3 L.L.J. 205=33 P.L.R. 1921=A.I.R. 1921 Lah. 30.

——Loss of right—Mortgage by vendee—Right if lost.

A vendee of property, subject to the right of pre-emption, cannot defeat or hamper the right of pre-emption by creating a mortgage on it and if he does create such a mortgage, and the pre-emptor has paid the whole of the price of the sale to the vendee, the mortgagee cannot enforce the mortgage against the property in the hands of the pre-emptor. Where however the sale and the mortgage are part of the same transaction, the pre-emptor would take the property subject to the mortgage.

Held, in the present case the two were distinct and different transactions and that the pre-emptor was entitled to the property free from the mortgage. 26 N.L.R. 383=130 Ind. Cas. 150=A.I.R. 1931 Nag. 42.

——Loss of right—Denial of vendor's title by pre-emptor.

Though the plaintiff in a pre-emption suit, has at some time prior to the suit, denied the vendor's title he is not estopped from maintaining the suit. 60 Ind. Cas. 706=23 O.C. 393.

——Loss of right—Right to—Denial of venders' title in previous mutation proceedings.

The fact that the plaintiff had in mutation proceeding previous to the suit for pre-emption suit, denied the title of the vender to a part of the property sold, does not deprive him of his right of pre-emption. 22 O.C. 144=6 O.L.J. 318=1 U.P.L.R. (J.C.) 64=52 Ind. Cas. 621.

——Loss of right to—Stranger purchaser—Suit by persons having different rights inter se.

In a suit for pre-emption against a stranger vendee the right as against him is not lost by the plaintiffs joining with themselves persons who have different rights *inter se* but superior to that of the vendee. 41 All. 423=17 A.L.J. 391=51 Ind. Cas. 153.

——Loss of right—Resale to vendor.

Once a sale is affected, the right of pre-emption accruing in respect thereof cannot be defeated by a relsale to the vendor. 11 P.R. 1919=3 P.L.R. 1919=49 Ind. Cas. 159.

——Loss of right—Champerty or maintenance.

The mere fact that a pre-emptor is suing not only for his own benefit but also for the benefit of persons not entitled to pre-empt but who assist the actual plaintiff does not disentitle the plaintiff from exercising his right of pre-emption. 111 P.W.R. 1913=48 Ind. Cas. 137.

——Loss of right—Vendee becoming co-sharer in village before institution of suit—Effect.

Where the vendee becomes a co-sharer in the village before the institution of a suit for pre-emption, by reason of a second sale in his favour which is not pre-empted, the suit for pre-emption must be dismissed. 40 All. 572=16 A.L.J. 627=46 Ind. Cas. 976.

——Loss of right—Wajib-ul-arz—Mortgage by Conditional sale—Foreclosure, if sale.

A person whose right to pre-empt a mortgage by conditional sale arse in the date of the mortgage, cannot after failure to enforce it, revive it on the foreclosure of the property. 40 All. 626=16 A.L.J. 561=46 Ind. Cas. 900.

——Loss of right—Right to pre-empt lost after decree—Effect.

The loss of the property, qualifying a person to exercise the right of pre-emption after the decree, does not take away his right under the decree unless the loss can be referred back to an antecedent date. 46 Ind. Cas. 339, Foll. 5 O.L.J. 233=46 Ind. Cas. 353.

——Loss of right—Pre-emptor acquiring right by imperfect partition.

Plaintiff became a co-sharer by means of an imperfect partition of a village made in recent years. The wajib-ul-arz gave the right to a *Hissadari kaibi*. *Held*, if the plaintiff could prove that he came within the custom at the time of sale he was entitled to the benefit of the custom and the fact that he was not within the custom prior to partition will not prevent him from subsequently acquiring the right. 8 Ind. Cas. 867, diss. 40 All. 617=16 A.L.J. 509=46 Ind. Cas. 125.

——Loss of right—Resale to vendor—Resale to co-sharer.

When property subject to a right of pre-emption in favour of co-sharer is sold to a stranger but is resold again to the co-sharer before a suit for pre-emption is brought, the suit cannot be maintained unless the person instituting the suit can establish his right as against the co-sharer if the former has a superior right to that of the latter. A purchaser may use a title acquired by him subsequent to the cause of action as a defence against a suit for pre-emption instituted after the acquisition of the title. 29 All. 125, Rel. 4 O.L.J. 459=20 O.C. 160=41 Ind. Cas. 9.

——Loss of right—Resale to vendor—Before suit.

A resale to vendor even before a suit for pre-emption

does not defeat the right of pre-emption. 99 P.W.R. 1917=24 P.R. 1918=40 Ind. Cas. 767.

——Loss of right—Resale to vendor—Does not defeat right.

A relinquishment or a release to the vendor does not defeat the right of a pre-emption that has already accrued. 91 Ind. Cas. 532, Diss. 19 O.C. 183=3 O.L.J. 720=37 Ind. Cas. 181.

——Loss of right—Resale to vendor—If defeats third person's rights.

A person who has a claim of pre-emption is not to be debarred from claiming it, by another person selling the property and then repurchasing it before the suit for pre-emption. 19 O.C. 190 (Note)=37 Ind. Cas. 172.

——Loss of right—Right not exercised in some cases, effect of—Estoppel.

The fact that a man did not in some cases exercise his right of pre-emption does not prove the non-existence of custom of pre-emption and in a subsequent suit for pre-emption by him, that fact does not create any estoppel. 3 O.L.J. 7=33 Ind. Cas. 775.

——Loss of right—Lost by pre-emptor joining in a purchase with a person having an inferior title.

A person having a preferential right of pre-emption joining in a purchase with a person having an inferior right, loses his right of pre-emption, though the shares in the sale deed are specified; if the proportion of price paid by each vendee is not stated, the transaction is regarded as indivisible and the person having the preferential right loses the right of pre-emption as regards a part. 20 Ind. Cas. 31, Foll. A person's right of pre-emption is not lost by sale of his land subsequent to a decree for pre-emption. 11 Ind. Cas. 708, foll. 186 P.W.R. 1915=31 Ind. Cas. 635.

——Loss of right—Conveyance taken after period prescribed by law for pre-emption—Effect.

A right of pre-emption cannot be defeated by a person, who fails to exercise his right of pre-emption within the period prescribed by law, by taking a conveyance of the property after the time for a suit for pre-emption has expired. 1 O.L.J. 187=17 O.C. 150=24 Ind. Cas. 32.

——Loss of right—Presumption as to right of—Oudh Laws Act, S. 7.

The presumption as to a right of pre-emption is, in the absence of a custom or contract to the contrary, a statutory one created by S. 7 of the Oudh Laws Act and an entry in a Wajib-ul-arz to the effect that every co-sharer is entitled to sell his share to whomsoever he pleased is sufficient to exclude the right of pre-emption. 1 O.L.J. 152=17 O.C. 105=23 Ind. Cas. 943.

——Loss of right—Sale by vendee after one year to a person with right superior to plaintiffs.

Where pening a suit for pre-emption by *A* the vendee sold the property to *B* who had a superior right to that of *A* one year after the date of the first sale and *B* did not take steps for more than one year to enforce his rights *held* that he was in no better position than he would have been if the property had been expressly offered to him and he had refused to buy it, and that therefore, the plaintiff's right is inviolate. 36 All. 60=12 A.L.J. 9=22 Ind. Cas. 266.

——Loss of right—Suit jointly with the person having no right—Plaintiff subsequently born.

A plaintiff having a right of pre-emption, does not forfeit his right by suing jointly with one having no such right. A person not born at the date of a sale cannot claim a right of pre-emption in respect of that sale, except, perhaps, where he was *en ventre sa mere* at the date. 1 P.L.R. 1914=218 P.W.R. 1913=20 Ind. Cas. 272.

——Loss of right—Laches—Vendees liabilitiy—Pre-emptior's right.

The purchaser of property subject to the right of pre-emption, takes a title defeasible if a claim to pre-emption is made within the time limited by law. If the vendee or the transferee from him chooses to run the risk of dealing with the property upon the assumption that no claim to pre-emption will be made they do so with their eyes open. A pre-emptor can delay his suit for pre-emption up to the very last moment. The only risk is that of his losing his right if the interval another, with equal or superior rights, has by the exercise of greater diligence forestalled him in securing the bargain. 182 P.L.R. 1913=132 P.W.R. 1913=19 Ind. Cas. 649.

——Loss of right—Resale to pre-emptor himself—Effect.

Where a vendee admitting a pre-emptor's right before the expiry of limitation period, transfers to him some portion of the property retaining the rest for himself, a suit by a co-sharer of the vendee to pre-empt the re-transferred property to the pre-emptor is not maintainable. 16 Ind. Cas. 409 (All.).

——Loss of right—Defence—Not available if suit barred—Mortgage—Redemption.

A mortgaged his estate to *B*, a co-sharer in 1897 and in 1906 sold his equity of redemption to *C*. *B* allowed his rights to pre-empt the sale of 1906 to become time-barred *C* then sued *B* for redemption. *Held*, that C was entitled to redeem the mortgage and *B* could not plead in defence that he had a right of pre-emption. 16 Ind. Cas. 219 (All.).

——Loss of right—Partition after decree.

A pre-emptor having a right on the date of sale and on the date of decree, does not lose it even if a partition is effected before a final decree after the appellate decision. 15 Ind. Cas. 865 (All.).

——Loss of right—Resale to vendor—Effect.

Resale by vendee of property to original vendor before the institution of a suit for pre-emption defeats such claim for pre-emption. 14 O.C. 156=11 Ind. Cas. 532.

——Loss of right—Estoppel.

A pre-emptor cannot claim pre-emption when the vendee purchases the same at the pre-emptor's request. 205 P.L.R. 1910=8 Ind. Cas. 780.

——Loss of right—Superior diligence.

If two persons have equal right of pre-emption, and if one of them brings his suit a week later than the other, the right of the other is not defeated owing to the superior diligence of the first. 7 P.R. 1910=14 P.W.R. 1910=49 P.L.R. 1910=5 Ind. Cas. 249.

——Loss of right—Pre-emptor—Qualifications—Pre-emption, based on custom or Mahomedan Law—Analogy.

A person having a right of pre-emption does not forfeit it by associating with a person as plaintiff who though a member of the co-parcenary body, has no right of pre-emption.

Per *Richards* and *Tudball*, *JJ.* (*Banerjee*, *J.*, diss.).—A successor by right of inheritance of a person who had the right of pre-emption at the date of the sale but did not then enforce it can enforce that right.

Per *Richards*, *C.J.*—Principles of the Mahomedan Law should not be applied in pre-emption cases arising out of custom.

Per *Banerjee*, *J.*—A person, who had no right of pre-emption at the date of the sale cannot acquire that right by reason of his subsequently inheriting the property of the person who has the right but did not seek to enforce it. 7 A. 535 (F.B.), Foll.

Per *Tudball*, *J.*—In cases where right to pre-empt is based on custom "a stranger" means who has no share in the *mahal* concerned. A member of the co-parcenary body who has an indefeasible right to the share he holds is not a stranger merely because he has not a right to pre-empt. 31 All. 623=6 A.L.J. 887=6 M.L.T. 352=3 Ind. Cas. 820.

——Loss of right—Vendee mortgaging the purchased property to the vendor.

Held, that the vendee's subsequent mortgage, neither could defeat right of pre-emption nor force the pre-emptor to take the property subject to mortgage. The vendor by not defending the suit lost an opportunity to obtain the amount paid in Court. 32 All. 45=6 A.L.J. 966=3 Ind. Cas. 782.

——Loss of right—Plaintiff dead—Representatives can carry on suit based on custom—Rule of Mahomedan Law—Pre-emptor's right—Subsisting on date of decree—Second purchase by vendee—No suit for pre-emption—Vendee's title absolute—Burden of proof. (1908) 5 A.L.J. 752.

——Loss of right—Refusal to purchase—Property offered to pre-emptor before completion of agreement with vendee.

In order to debar a person entitled to pre-empt a sale from exercising his right, an opportunity must be given to him to purchase when a definite agreement to purchase at a fixed price has been entered into with a stranger : it is not enough to offer the property to a person entitled to pre-empt before an agreement to sell has been entered into with a third party. 27 A. 670, Foll. 1908 A.W.N. 93=5 A.L.J. 331.

——Loss of right—Sale of property to a stranger—Resale to a co-sharer before a suit for pre-emption is brought.

Where property in respect of which a right of pre-emption exists in favour of a co-sharer is sold to a stranger, but, before a suit for pre-emption is brought, passes back into the hands of a co-sharer, a suit for pre-emption cannot be maintained, and this rule is not affected by the fact that the co-sharer in whom the property sold to a stranger re-vests was a party to its sale to a stranger. 1906 A.W.N. 313=3 A.L.J. 794=29 A. 125.

——Loss of right—Effect of Partition.

The plaintiff pre-emptor must show that he had a subsisting right to pre-empt not only on the date when his suit was brought but also on the date of decree of the first Court. If owing to the effect of a partition coming into force after institution of his suit, the plaintiff pre-emptor ceased to be a co-sharer of the sub-division of the tenure in which the property was situate, the plaintiff's suit must be dismissed. 20 A. 100 ; 21 A. 374 ; 21 A. 441 ; 25 A. 421 ; 26 A. 489, Foll. 12 O.C. 229=3 Ind. Cas. 546.

——Loss of right—Record of contract—In Wazib-ul-arz.

Rights of pre-emption based upon a contract recorded in Wajib-ul-arz is not necessarily lost by the mere fact of partition having taken place in the village. 2 Ind. Cas. 996 (All.).

——Loss of right—Wajib-ul-arz—Partition of village.

Partition after *wajib-ul-arz* would materially affect the right of pre-emption. Rights in respect of a *thok* prior to partition are destroyed by the *thok* being destroyed. 21 All. 1 (F.B.), Foll. 1 Ind. Cas. 504 (All.).

——Loss of right—Vendee acquiring the rights of sharer before suit.

Where before the institution of a suit for pre-emption the vendee becomes a sharer in the manzas no suit for pre-emption can afterwards be maintained. 20 A. 100, Foll. 1903 A.W.N. 83=25 A. 421.

——Loss of right—Decree—Subsequent mortgage—Forfeiture of right.

A person who has obtained a decree for pre-emption does not lose the benefit of the decree by raising money on mortgage of the property for paying the judgment-debtor and executing the decree. 1901 A.W.N. 183=24 A. 119.

15. Mahomadan Law.

(a) Applicability.
(b) Demand.
(c) Difference in caste.
(d) Easement.
(e) Formalities.
(f) Right of vicinage.
(g) Right when arises.
(h) Right when extinguished.

(a). Applicability.

——Mahomadan Law—Applicability by Courts.

Although the Courts are not bound to decide cases strictly according to the rules of Mahommedan Law in matters of pre-emption, where there is nothing in the rule laid down by the Mahommedan jurists which is contrary to the principles of justice, equity and good conscience, those rules should be given effect to. 98 Ind. Cas. 220=54 Cal. 266=44 C.L.J. 194=31 C.W.N. 14=A.I.R. 1926 Cal. 1153 (S.B.).

——Mahomadan Law—Applicability to Hindus in Behar.

The Mahommedan Law relating to pre-emption applies also to Hindus in Behar. The right of pre-emption applies in the case of the co-sharers in the vended property known as *shafi-i-sharik*, sharers in the appendages or appurtenances of the vended property, *shafi-i-kalit*, and neighbouring proprietors holding contiguous property known as *shafi-i-jar*. 90 Ind. Cas. 806=7 P.L.T. 233=5 Pat. 96=1925 P.H.C.C. 265=A.I.R. 1925 Pat. 743.

——Mahomadan Law—Applicability—Zemindari village—Imperfect partition of mahal—Separate Pattis.

The *wajib-ul-arz* recorded a custom of pre-emption but set out none of its incidents. Admittedly the *rules of* Mahommeadan Law applied. *Held*, that plaintiff as owner of one of the pattis was neither a *zhafi-i-sharik* nor a *Shafi-i-khalit* under the Mahomadan Law. In respect of the other *pattis* and no right of pre-emption to a *Shafi-i-jar* existed in respect of this class of property. 42 All. 477=18 A.L.J. 518=56 Ind. Cas. 174.

——Mahomadan Law—Applicability—Zemindari property.

If there is a custom of pre-emption prevailing in a village it is not possible that there should be at the same time a right under the Mahommedan Law. On the other hand, if there is no custom of pre-emption, and there was at one time an arrangement between the co-sharers which has come to an end with the settlement, there is no reason why the co-sharers should not at the end of the settlement be entitled to reassert their rights under the Mahommedan Law, provided that they had such rights before the contract. The Mahommedan Law of pre-emption extends to large estates including Zemindari property. 17 A.L.J. 687=49 Ind. Cas. 976.

——Mahomadan Law—Applicability—Hindus of Godhra.

The Hindus of Godhra are governed by Mohamadan Law of pre-emption. 18 Bom.L.R. 693=35 Ind. Cas. 871.

——Mahomadan Law—Applicability—Sale—Application of Mahomadan Law of sale.

It is against equity, justice and good conscience to apply to a pre-emption case, the Mahomadan Law of sale which is not now in force and to attach to a contract of sale an incident which Mahomadan Lawyers intended to attach only to an actual sale. 20 C.W.N. 1048=1 Pat. L.J. 174=34 Ind. Cas. 210.

——Mahomadan Law—Applicability—Khandesh District.

The Mahomadan rule of pre-emption is not operative in the District of Kandesh, nor can it be accepted in that district as a rule of justice, equity and good consci-

ence. 40 Bom. 358=18 Bom.L.R. 81=32 Ind. Cas. 933.

——Mahomadan Law—Applicability—Custom—Wajib-ul-arz.

A *Wajib-ul-arz* provided that a right of pre-emption existed among the owners of the khalsa separately and among the owners of the *milak* separately but gave no incidents of the custom.

Held, that the right was co-extensive with that given by Mahomadan Law. 37 All. 472=13 A.L.J. 704=29 Ind. Cas. 993.

——Mahomadan Law—Applicability—Bihar Hindus—Joint liability of vendor and pre-empor for Government revenue, Bengal Court of Wards Act (IX of 1879), S. 40—Right of Manager to perform preliminary ceremonies.

The Mahomadan Law of pre-emption is enforceable by and between Hindus in the province of Bihar, including the district of Champaran. B. L. R. F.B. R. 35, Appr. A manager appointed by the Court of Wards of the Estate of a distinguished proprietor is competent under S. 40 of the Bengal Court of Wards Act (IX of 1879) and also independently thereof to observe the formalities which by the Mahomadan Law are essential preliminaries to the claim of pre-emption. The validity of his action does not depend on the subsequent adoption of it by the Court of Wards. The fact that the vendor and pre-emptor were jointly liable for the payment of the Government revenue assessed on the villages comprised in the Mahal is sufficient to found a claim to pre-empt. 39 Cal. 915=39 I.A. 101=16 C.W.N. 553=11 M.L.T. 361=(1912) M.W.N. 486=15 C.L.J. 483=9 A.L.J. 525=14 Bom.L.R. 436=23 M.L.J. 28=15 Ind. Cas. 659 (P.C.).

——Mahomadan Law—Applicability.

In the absence of any custom different from or not co-extensive with the Mahomadan Law of pre-emption, that law must be applied to Hindus. 6 B.H.C.R. Ap. 263; 28 A. 590, rel. 5 N.L.R. 136=3 Ind. Cas. 923.

——Muhamadan Law—Applicability—Wazib-ul-arz—Suit on—Parties found to have equal rights—Importing incidents of. 7 Ind. Cas. 263=7 A.L.J. 660.

——Mahomadan Law — Applicability — Wajib-ul-arz silent as to nature of custom—No allegation as to nature of custom in plaint—No pre-emption with respect to mortgage—Performance of preliminaries. 1905 A.W.N. 190=2 A.L.J. 482=28 A. 60.

——Mahomadan Law—Applicability—Pre-emption among Hindus—How far requirements of Mahomadan Law applicable—Statement of claim—Meaning and not form of the statement to be compared.

Held, that "in the absence of allegation or proof as to any custom different from or not co-extensive with the Mahomadan law of pre-emption, that law must be applied" between Hindus, Further, were the words used were "I have a claim for pre-emption on this house. If any one else purchases it, I shall be put to inconvenience. Go at this very moment and take the money from Shoshi Bhushan Sircar and tell Ram Charan and Chakauri Devi to return house by taking the money"

Held, that this was a sufficient claim, the concluding portion evincing a desire on the part of the plaintiff to avail herself of her right. If she had merely stated that she had a claim that would not have been sufficient. (1906) A.W.N. 144=3 A.L.J. 338=28 A. 590.

——Mahomadan Law—Applicability—Hindus in Gujarat how far subject to all the restrictions imposed by Mahomadan Law—Onus of proof.

Prima facie the right of pre-emption as it obtains among Hindus in Gujarat is subject to the same restrictions and rules which attach to Hak Shafi under Mahomadan Law. If a plaintiff alleges the contrary, he must prove it. (1902) 4 Bom.L.R. 811.

(b). Demand.

——Mahomadan Law—Demand—Form—Readines to pay the price though misinformed about the price—Validity of demand.

The demands in regard to pre-emption have to be performed according to the rules of Mahomadan Law and according to this law if a person performing a demand states that he is willing to pay the price the demand is valid, even if he did not know that he had been misinformed about the correct amount of the sale consideration. 1950 A.W.R. 282=1950 A.L.J. 237.

——Mahomadan Law—Demand—Essentials of ceremonies — Talab-i-ishtishad — **Specification of details of property sought to be pre-empted—Necessity—Rule—Procedure.**

According to the Mahomadan Law of Pre-emption which applies to Hindus by the custom and usage of the Province of Bihar, it is essential to the performance of ceremonies connected with the right of pre-emption, that the pre-emptor, while performing the ceremony of *Talab-i-ishtishad*, should specify the property in respect of which he proclaims pre-emption. Simply stating that he has demanded pre-emption of whatever properties have been purchased by the defendant cannot amount to a sufficient compliance with the requirements of the law. The plaintiff has to prove that the words used by him at the time of making the second demand of *Talab-i-ishtishad* were sufficient to draw the attention of the witnesses to the specific property in respect of which he was demanding his right of pre-emption. 30 P.L.T. 163.

——Mahomadan Law—Demand—Proof of.

According to the Muhammadan Law it is quite sufficient if the Court believes the statements of the plaintiff that a demand was made and it is not necessary that witnesses should actually be called on Court to verify plaintiff's statement. Demand in respect of two transfers made at one and the same time is perfectly valid and sufficient. 4 L.R. (Civ.) 115=A.I.R. 1923 All. 487.

——Mahomadan Law—Demand.

In the absence of other circumstances a mere statement such as "I have a right to pre-emption and how will the vendees take it" does not amount to a valid first demand according to the strict Mahomadan Law. 18 A.L.J. 1037=58 Ind. Cas. 777.

——Mahomadan Law—Demand — Co-sharers — Joint liability to Government revenue.

When the liability to pay Government revenue is joint, the joint liability, for purposes of pre-emption does not cease in the case of any co-sharer until his particular share has been partitioned by the revenue authorities. Under the Mahomadan Law not only is it necessary that the *talab-i-ishtishad* should be made in the presence of witnesses, but that they should bear testimony that the demand has been duly made. 51 Ind. Cas. 40 (Pat.).

——Mahomadan Law—Demand—Delay in second demand—Zamindari.

The vendee is the person most concerned in the making of the second demand; hence this demand may be delayed for any reasonable time, in order to have it made in the vendee's presence, though the pre-emptor could do it in the presence of vendor or on the land itself. Law of pre-emption applies to Zamindari property and is not limited to houses, gardens and small plots of land. 17 A.L.J. 445=41 All. 428=50 Ind. Cas. 92.

——Mahomadan Law—Demand.

Second demand (*tala'-i-istishad*) by the pre-emptor is absolutely necessary for pre-emption under Mahomadan Law. 39 All. 133=14 A.L.J. 1141=35 Ind. Cas. 911.

——Mahomadan Law—Demand—Letter—Talab-i-ishtishad.

A Mahomedan pre-emptor cannot validly make the talab-i-ishtishad by letter whn he is in a position to do so in person. 38 All. 201=14 A.L.J. 148=33 Ind. Cas. 349.

——Mahomadan Law—Demand—Right to pre-emption—Demand—Sale in lieu of dower debt.

A pre-emptor need not necessarily make a second Talab or demand if at the time of *Talab muvasibat*, he had an opportunity of invoking witnesses in the presence of seller or purchaser or in the premises to arrest the immediate demand. Even when property is sold by a husband to his wife in lieu of her dower, a suit by a person for pre-emption can be maintained if he is entitled to a preferential right to purchase. 37 All. 522=13 A.L.J. 714=29 Ind. Cas. 495.

——Mahomadan Law—Demand—Talab-i-ishtishad—Demand before vendor who was not is possession—Validity of demand.

A Talab-i-ishtishad in the presence of witnesses before the vendor alone who was not in possession of the property sold at the time of the demand, is not a valid demand. It should be made on the premises sold or before the seller or the purchaser, whichever of them is in possession. 10 A.L.J. 92=18 Ind. Cas. 485.

——Mahomadan Law—Demand—Talab-i-muvasibat—Mera huq shufa hai, whether valid demand.

The pre-emptor immediately after a sale said three times *mera huq shufa hai* to certain persons who were present at the spot and asked them to bear witness. Then, without any delay, he took the price and offered it to the vendee and claimed the property informing him that he had already made his demand.

Held that the words amounted to a valid demand. 34 All. 53=8 A.L.J. 1144=11 Ind. Cas. 737.

——Mahomadan Law—Demand—Second demand on the plaintiff's own chabutra situated in the village sold, if valid.

A second demand with witnesses made on the pre-emptor's own *chabutra* situated on land common both to the pre-emptor and the vendor in the village sold, is a valid demand under the Mahomedan Law of pre-emption. 34 All. 1=8 A.L.J. 950=11 Ind. Cas. 319.

——Mahomadan Law—Demand—Talab-i-muvasibat.

It is not a proper *Talab-i-Muvasibat* under the Mahomadan Law if the pre-emptor said only "I am a pre-emptor and my right extends to the land", such a claim must be made in the proper form whether in express terms or by implication. A mere expression or declaration of his right does not of itself go to show his determination to enforce it. 8 A.L.J. 270=10 Ind. Cas. 770.

[*But see* 6 A.L.J. 15=1 Ind. Cas. 85].

——Mahomadan Law—Demand—Prompt assertion.

Under Mahomndan Law, the right of pre-emption must be asserted with the utmost promptitude. 8 Bur. L.T. 239=10 Bur.L.T. 113=32 Ind. Cas. 488.

——Mahomadan Law—Demand—Talab-i-Muvasibat.

The words "*Mera Shufa*" repeated twice do not by themselves constitute a valid *Talab-i-muvasibat* under the Mahomadan Law. 10 Ind. Cas. 143 (All.).

——Mahomadan Law—Demand—Mention of price, if necessary.

For *Talabai Muvasibat*, an expression by the pre-emptor in clear and explicit terms that he demands to make the purchase is necessary and not that he should at the time of the performance of the ceremony make any mention of the price. Under the Mahomadan Law a pre-emptor does not lose his right for pre-emption by failing to state, while making the immediate demand for pre-emption that he was willing to pay the price named in the sale deed or such a sum as a Court may award. 32 Ind. Cas. 893 (Cal.).

——Mahomadan Law—Demand—Talab-i-Istishad.

A pre-emptor making the *Talab-i-Ishtishad* or formal demand must expressly refer to the *Talab-i-Muvaisbat* (immediate claim) having been duly made. The comission to refer is fatal. 10 Ind. Cas. 352 (Cal.).

[*See also* 2 Ind. Cas. 207 (Cal.).]

——Mahomadan Law—Demand.

In every case, the pre-emptor should at the time of *Talab-i-ishtishad*, declare before witnesses that he asserted his right when he first heard of the sale. The exact words used by the witnesses should be taken down in vernacular as the question depends on entirely on the form of words that is to be used at the *talab-i-ishtishad*. 6 Ind. Cas. 137 (Cal.).

——Mahomadan Law—Demand—Talabs Registration, petition to stay is not compliance of law.

A petition to the Registrar asking for stay of registration is not a sufficient compliance with the Mahomedan Law in the matter of the performance of the two talabs. The two ceremonies of talab-i-muvasibat and talab-i-ishtishad can be combined but it is essential that the atter should expressly refer to the former as having been duly made. 20 C.W.N. 1048=1 Pat.L.J. 174=34 Ind. Cas. 210.

——Mahomadan Law—Demand—*Talab-i-ishtishad*—Reference to the provisions *Talab-i-ishtishad* necessary. 23 A. 499; 17 C. 553, foll. 1893 A. 499; 17 C. 553, foll 1904A.W.N. 201=1 A.L.J. 569=27 A. 160.

——Mahomadan Law—First demand—Talab-i-muvasibat—Power of general attorney to make first demand—Pleadings—Proof that person is general attorney—Practice.

Where the plaintiff's in a pre-emption suit alleged that the first demand or *Talab-i-muvasibat* was made for him by his general attorney and the defendant did not deny that the person in question was the general attorney of the plaintiff, but in fact no mukhtiaranama or copy of it was filed, the original being filed in another appeal then pending before the lower appellate Court.

Held that, looking to the pleadings, the lower appellate Court, if it had any doubt on the point, should either have examined the other record or at least have given the plaintiff an opportunity of filing the mukhtiarnama or a copy:

Held, further that the first demand or *talab-i-muvasibat* can be made by a general attorney. 1906 A.W.N. 177=3 A.L.J. 798=28 A. 691.

——Mahomadan Law — Demand — *talab-i-ishtishad*—*Talab-i-muvasibat* — Whether reference to former demand was in fact made. 1902 A.W.N. 147.

(c). Difference in caste.

——Mahomadan Law—Difference in caste—Vendee a Hindu.

A Mahomadan pre-emptor is entitled to pre-emption under the Mahomadan Law of pre-emption even though the vendee is a Hindu. 69 Ind. Cas. 666=1 Pat. 578=4 P.L.T. 277=A.I.R. 1922 Pat. 601.

——Mahomadan Law—Difference in caste—Sale by Shia—Suit by Sunni.

Where a Shia sell his property to a Hindu a Sunni cannot claim a right to pre-empt under the Shia Law of pre-emption. 35 All. 488=12 A.L.J. 813=25 Ind. Cas. 445.

——Mahomadan Law—Difference in caste of vendee.

Where a vendee is in the same position as the pre-emptor, a *Sunni* who loses his right on the ground that he is a sharer in the appendages the pre-emptor cannot

oust the vendee whether he is Shiah, Sunni or Hindu. The mere fact that two houses open on the same public lane or have a common drain, does not give owner of one a right of pre-emption over the other. Where a property consisting of two enclosures communicating with each other by a door and entered in the tax-register as one house, is sold as one house, *held* that the property sold was really one house. 9 A.L.J. 769=16 Ind. Cas. 109.

(d). Easement.

——Mahomadan Law—Easement—Right of shafi-i-khalit.

Where there is an *ahar* of considerable extent in the plaintiff's patti and the vendors have a right of taking water for the irrigation of their own land from this *ahar*, and the proprietors of the two pattis have joint rights over the *ahar*, and the owners of the vended patti have a right of easement over the *ahars* and water courses situated in the plaintiff's patti the owner of the servient tenement has the right of *shafi-i-khalit*. 90 Ind. Cas. 806=7 P.L.T. 233=5 Pat. 96=1925 P.H.C.C. 265= A.I.R. 1925 Pat. 743.

——Mahomadan Law—Easement—Sharer in appendages.

Sunni sharer in appendage has no pre-emption right, if the vendee is also a sharer in appendage though the latter is Shia, Sunni or Hindu. A property having two enclosures connected by a door constitute only one house. Where two houses face the same public lane, or both discharge water in the same public lane there is no right of pre-emption. 9 A.L.J. 769=16 Ind. Cas. 109.

——Mahomadan Law—Easement—Period of enjoyment of appendage.

No period is prescribed which would give a person the right to enjoy immunities or appendages. A right to discharge water in the property sold gives a right of pre-emption as shafi-i-khalit; shafi-i-khalit means a partner in the immunities and appendages such as right to water and roads. 31 All. 519=6 A.L.J. 690=2 Ind. Cas. 458.

——Mohamadan Law—Easement—Right of dominant owner in Mahomadan Law. *See* MAHOMEDAN LAW —PRE-EMPTION. 1905 A.W.N. 217=2 A.L.J. 619= 28 A. 127.

(e). Formalities.

——Mahomadan Law—Formalities.

The *Talabi muwasibat* or first demand need not be made in any particular form. It is sufficient if words used clearly imply the claim, *e.g.*, "I am a pre-emptor." "I have a claim." At the time of making the *Talab-i-Ishtishad* or the second demand, it is necessary to make a reference to the first demand, although no witnesses are invoked to bear witness to it. 6 A.L.J. 15=1 Ind. Cas. 85.

——Mahomadan Law—Formalities—Performance of ceremonies—Delay.

The right of pre-emption being one based on Muhammadan Law, the performance of certain ceremonies prescribed by that law immediately after hearing about the sale is absolutely necessary to create that right. Delay in performing the ceremonies is fatal to that right. (1918) P.H.C.C. 3=4 Pat.L.W. 345=45 Ind. Cas. 255.

——Mahomadan Law — Formalities—Conditions precedent.

The right of pre-emption cannot be exercised unless the pre-emptor has performed the ceremony of *talabin muwasiabat* immediately on hearing of the sale. 20 C.W.N. 1048=1 Pat.L.J. 174=34 Ind. Cas. 210.

——Mahomadan Law—Formalities—Persons having equal rights.

Assertion of a right of pre-emption before the completion of the sale is ineffectual. A pre-emptor under the Mahomedan Law must comply with the following formalities, (1) Assertion of right immediately after knowing of the sale. (2) Demand of the seller or buye in the presence of witnesses. (3) Referring to the assertion of right already made. All persons having equal rights of pre-emption can divide the property equally per capita. 6 S.L.R. 107=17 Ind. Cas. 39.

——Mahomadan Law—Formalities—Talabi-i-ishtishad—Talab-i-muvasibhat, performance of—Witness to Talab-i-muvasibhat what they are required to bear testimony to.

To found a valid claim for pre-emption, it is necessary that the pre-emptor should perform the *Talab-i-muvasibhat* (immediate claim) and *esab-i-muasibhat* (affirmation with witness.) For the due performance of the latter it is not essential that the witnesses should be invoked to bear testimony to the fact of the *Talab-i-muasibhat* having been performed but it is necessary and sufficient if the witnesses are invoked to bear testimony to the fact of declaration that the *Talab-i-muwasibhat* has been already performed. (1907) 6 C.L.J. 40.

(f). Right of vicinage.

——Mahomadan Law—Right of vicinage—One plot intervening right to pre-empt—Principle of pre-emption.

Plots 833, 834 and 836 which belonged to defendant No. 2, were sold to defendant No. 1. The plaintiff was the owner of plot No. 837 which adjoined a portion of No. 836.

Held, that the subject-matter of sale was a compact parcel of land adjoining the land of the plaintiff.

Held, further that the subject-matter of sale being the entire parcel of land made up of three plots, and this parcel adjoining the plaintiff's land, the plaintiff was entitled to pre-empt by right of vicinage, the entire subject-matter and not only a part. 7 A.L.J. 641=6 Ind. Cas. 358.

(g). Right, when arises.

——Mahomadan Law—Right, when arises—Separate sales of—Parts of house.

The mere fact that all the three portions sold were at one time parts of the single house is not sufficient to enable the plaintiff to claim pre-emption in respect of any particular portion, if the latter is not independently subject to that right when the pre-emption was claimed on the ground of contiguity alone. 73 Ind. Cas. 1013= A.I.R. 1924 Lah. 163.

——Mahomadan Law—Right, when arises.

A suit to pre-empt on the ground of possession of other property is open only to persons who at the time of the sale have an established title in that property. 73 Ind. Cas. 318=4 Lah. 137=A.I.R. 1923 Lah. 451.

——Mahomadan Law—Right—When arises.

A right of pre-emption arises under Muhammadan Law where there has been an oral agreement to sell land followed by payment of price and delivery of possession to the purchaser. Section 54 of the T.P. Act does not apply to a sale under Muhammadan Law and no registered sale-deed is required. 16 All. 344, followed. 64 Ind. Cas. 913=46 Bom. 302=23 Bom.L.R. 1079= A.I.R. 1922 Bom. 124.

——Mahomadan Law—Right, when arises—Shias—Co-sharers.

Among *Shiahs* there is no right of pre-emption where the property sold are owned by two or more co-sharers. 16 A.L.J. 507=48 Ind. Cas. 82.

(h). Right when extinguished.

——Mahomadan Law—Right, when extinguished.

The right of pre-emption under the Mahomadan Law, does not survive on the death of a person to his heirs and representatives who are neither executors nor administrators under the Probate and Administration Act. 36 Bom. 144=13 Bom.L.R. 1040=12 Ind. Cas. 720.

——Mahomadan Law—Right, when extinguished—Partition after sale but before decree—Effect on suit.

The plaintiff sued for pre-emption, basing his claim upon the Mahomedan Law after the suit, but before the decree the property was partitioned and the plaintiff and the vendors became owner of different *mahals*.

Held, that the plaintiff's right being based on the fact that he was partner of the vendor and the grounds of his right having been extinguished before the decree, the right came to an end. (1910) 7 A.L.J. 715=6 Ind. Cas. 426=32 A. 567.

——Mahomadan Law—Right, when extinguished.

The right to pre-empt gives no vested interest in the property but is merely a right of acquiring the property of which he might avail himself or not as he pleased. Until an offer is made to a person entitled to pre-empt and he refuses to buy, the right of pre-emption continues to exist so long as the enforcement of it is not barred by limitation law. The case will be different in the case of Mahomadans in which case the Mahomadan Law obliges a pre-emptor to exercise his right forthwith. 1903 A.W.N. 196=26 A. 61 (F.B.).

16. Nature of right.

——Nature of right—Pre-emptor taking a conveyance of part of the property sold—Effect on the right of other pre-emptors.

The right of pre-emption is not a right of repurchase either from the vendor or the vendee, involving a new contract of sale, but simply a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he derived his title. It follows as a consequence that ordinarily the pre-emptor must take over the whole and not only a part of the property which he is entitled to pre-empt. But if he takes a conveyance of a part only, he cannot thereby deprive the other pre-emptors of their right to pre-empt the whole bargain. 50 P.L.R. 65=A.I.R. 1948 E.P. 19.

——Nature of right.

A right of pre-emption is a very weak right as it interferes with the freedom of contract. Therefore, it will be enforced only if it is clearly established. 1947 M.L.R. 65 (Civ.).

——Nature of right.

The right of pre-emption is not a right of repurchase either from the vendor or from the vendee, involving any new contract of sale but it is simply a right of substitution entitling the pre-emptor by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendors in respect of all the rights and obligations arising from the sale under which he has derived his title. 1945 M.L.R. 100 (Civ.).

——Nature of right—Pre-emption is simply right of substitution.

Pre-emption is not a right of repurchase either from the vendor or from the vendee, involving any new contract of sale; it is simply a right of substitution, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. A.I.R. 1946 Oudh 127=1946 O.W.N. 68=222 Ind. Cas. 536.

——Nature of right—Right to pre-empt is clog on the transfer of agricultural land.

The right to pre-empt is a sort of clog on the transfer of agricultural land. The pre-emptor has a right to be substituted for the original vendee and a right as it were to insist that the transfer should be made to him and not the person who originally purchased the land. A.I.R. 1945 Lah. 104=47 P.L.R. 35.

——Nature of right—Exclusion of stranger.

The object of the law of pre-emption is to make it possible to exclude stranger and to keep the property in the family or community, and suits which are not brought with this object and which will not have this effect should clearly be discouraged. A suit not instituted with this *bona fide* object is not maintainable. A.I.R. 1942 Oudh 19=1941 O.W.N. 1027=1941 A.W.R. 778=17 Luck. 158=196 Ind. Cas. 175.

——Nature of right.

The right of pre-emption does not exist independently of its exercise so as to invalidate transactions which take place in defiance of it. It is no doubt a right of preferential purchase but so long as it is held in abeyance, it is ineffective altogether. In fact, under O. 20, R. 14, C.P. Code, a claim to pre-emption, if decreed, becomes effective only when the money is paid into Court and the vendee is entitled to the rents and profits so long as the purchase-money is not paid. A.I.R. 1941 Lah. 433=43 P.L.R. 581=I.L.R. (1942) Lah. 155=197 Ind. Cas. 227 (F.B.).

——Nature of right.

The right of pre-emption is a very weak right. It interferes with the freedom of contract and is opposed to a progressive state of society. It can, therefore, be enforced only if it is clearly established. A.I.R. 1938 All. 191=1938 A.L.J. 125=1938 A.W.R. 96=174 Ind. Cas. 897.

——Nature of right—Right of substitution.

Pre-emption is primarily a right of substitution and if an agreement of sale has really taken place and a price has been fixed, the person entitled to pre-emption can claim the benefit of that agreement and can enjoy all conditions of the agreement including the price. It is only where the price has not been fixed in good faith that the Courts should go into the matter and determine the market value or fair consideration, the reason being that, as stated above, the price is usually not fixed in good faith so as to defeat the right of pre-emption. A.I.R. 1935 Nag. 195=159 Ind. Cas. 497.

——Nature of right—Pre-emptor and vendee—Relation between.

Under the law of pre-emption, the pre-emptor is substituted in place of the vendee and *prima facie*, all the rights attaching to the vendee in respect of the property should also pass to the pre-emptor. A.I.R. 1934 All. 461=1934 A.L.J. 74=3 A.W.R. 252=149 Ind. Cas. 1213.

——Nature o f right.

The right of pre-emption is one of substitution rather than of re-purchase. A.I.R. 1934 Lah. 429=35 P.L.R. 513=153 Ind. Cas. 128.

——Nature of right—Pre-emptor's title, if sustainable when original transfer is set aside.

A right of pre-emption is merely one of substitution and not of re-purchase, and when the original transfer is found fictitious and has been set aside, the title of the pre-emptor cannot be sustained. A.I.R. 1934 Lah. 101=15 Lah. 349=37 P.L.R. 8=148 Ind. Cas. 1013.

——Nature of right—Right, whether transferable.

Quaere.—Whether a right of pre-emption can be held to devolve on a stranger to the family who, after the sale that it is sought to pre-empt, obtained the property of the person entitled to pre-empt by purchase or by a decree of the Court. 8 O.W.N. 1028=135 Ind. Cas. 703.

——Nature of right—Rights of pre-emptor.

A pre-emptor is entitled to enforce a covenant running with the title against the vendor. Therefore, the vendor is as much liable to the pre-emptor as to his vendee for breach of warranty of title and suit for damages for defect of title is competent by a pre-emptor against the vendor. A.I.R. 1931 Nag. 166=14 N.L.J. 48=27 N.L.R. 392=136 Ind. Cas. 879.

——Nature of right.

Per *Wazir Hasan, Ag. C.J.*—When property which carries with it the right of pre-emption passes from one person to another the right also passes with it and the new holder of the property acquires the status of a co-sharer which his predecessor, had possessed. Similarly when the property which bears the burden of pre-emption is transferred by any of the various modes of acquisition of the property known to law, gift, purchase, devise or inheritance, the burden is also transferable with it. The last vendee in a chain of successive vendees of a property which bears the burden of pre-emption is, therefore, as liable to deliver the property to the legitimate pre-emptor as is the first vendee. 5 Luck. 12=A.I.R. 1930 Oudh 274.

——Nature of right—Claim for substitution.

Under certain circumstances there is nothing wrong in a person abandoning his claim to be the proprietor of a property in suit for the purposes of the particular case. He can certainly abandon his claim as a proprietor and sue for pre-emption as co-sharer without putting the vendee to the proof of the vendor's title. A claim for pre-emption is one for substitution in the place of vendee and the pre-emptor is entitled to admit that the vendor has title. 118 Ind. Cas. 229=A.I.R. 1929 All. 780.

——Nature of right—Same title as vendee's.

In a pre-emption suit the Court cannot inquire into the title of the vendor for the pre-emptor must take the same risk as the vendee did and must pay the same price. 116 Ind. Cas. 16=1929 A.L.J. 589=A.I.R. 1929 All. 398.

——Nature of right—Substitution for vendees and not representation of them.

The right of pre-emption is one of substitution and it cannot, therefore, be said that the successful pre-emptors are representatives, of, or claim under, the original vendee. They cannot thus be bound by the decree against that vendee. A.I.R. 1929 Lah. 589.

——Nature of right—Right of substitution—Covenants personal cannot be enforced.

The remarks as to the nature of the right of pre-emption to the effect that the right of pre-emption is not a right of repurchase either from the vendor or from the vendee involving any new contract to sell, but it is simply a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of the rights and obligations arising from the sale under which he has derived his title, are to be deemed to be limited in their operation to the property actually conveyed by means of the sale-deed and the covenant to indemnify the vendee either by cash compensation or by delivery of other property of the vendor is not enforceable at the instance of the pre-emptor, because a covenant running with the land is to be distinguished from a personal covenant such as a covenant of indemnity entered into by vendor in favour of the vendee and so though the pre-emptor may be entitled to enforce the covenants running with land, he is not entitled to the same right with regard to covenant of indemnity which is deemed to be a personal covenant. 110 Ind. Cas. 425=9 Lah. 659=30 P.L.R. 32=A.I.R. 1928 Lah. 357.

——Nature of right—Joint family property—Right subject to minor co-parcener's right.

The right of pre-emption is a right of substitution, so that the name of the original vendee has to be considered as deleted from the sale-deed and that of the pre-emptor substituted in his place with effect from the date of his fulfilling the obligation as to payment of the pre-emption price according to the terms of the decree. Therefore a pre-emptor of the property of a joint family must take the property subject to the right of the minor co-parcener to avoid the transaction on the ground of want of legal necessity. 107 Ind. Cas. 516=A.I.R. 1928 Nag. 151.

——Nature of right—Relation back.

When the pre-emptor is substituted in place of the purchaser his right dates back to the date of the sale in favour of the purchaser, and the purchaser is not entitled to recover profits of the property from the time he was put in possession until the pre-emptor was substituted in his place. 98 Ind. Cas. 803=A.I.R. 1927 All. 202.

——Nature of right—Suit to avoid alienation—Pre-emptor, facts to be proved by.

Where the vendee is himself the creditor, the repayment of whose loans is consideration for the alienation, it is not sufficient for him merely to prove that the debts existed. If the sale in such a case is pre-empted, and the pre-emptor has to defend a suit brought to avoid the alienation on the ground that it was unnecessary, the pre-emptor will have to prove more than the mere existence of the debt, just as the vendee would have to do. But where the vendees are not the creditors whose debts were the consideration for the sale, the pre-emptors, who stand in their shoes, are not bound to prove more than the vendees need have proved, namely, that there were debts due which were discharged by the sale. The fact that the pre-emptors happen to be the creditors will not put them in a position less favourable that of the vendees. 54 P.R. 1918, Expl. 96 Ind. Cas. 892=A.I.R. 1926 Lah. 466.

——Nature of right—Right of substitution.

A right of pre-emption is a right of substitution, *i.e.*, a right that the pre-emptor's name may be inserted for that of the vendee in the original sale-deed between the vendee and the vendor. 89 Ind. Cas. 768=A.I.R. 1926 Nag. 171.

——Nature of right—Not a purchase—Date of operation.

The right of pre-emption is a right to the benefit of a contract or a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee, in respect of all the rights and obligation arising from the sale under which he has derived his title. It is in effect, as if in a sale-deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place. So a right of pre-emption is not a mere right of purchase, either from the vendor or from the vendee involving a new contract of sale but it is simply a right of substitution. Hence, a pre-emptive sale takes effect from the date of the sale in favour of the original vendee. 78 Ind. Cas. 738=A.I.R. 1925 Oudh 132.

——Nature of right—Enforceable by treaty or suit.

A claim to a right of pre-emption does not necessarily connote a suit; it may be enforced either by private treaty or by suit.

It implies an assertion of a right which may be asserted before a transfer is effected or after it is effected. It may be asserted out of Court or, if the vendee refuses to reconvey the property, by a suit. The right arises from a sale if the order of preference laid down by the *wajib-ul-arz* is disregrded by the vendor. 82 Ind. Cas. 526=46 All. 674=5 L.R.A. (Civ.) 469=A.I.R. 1924 All. 753.

——Nature of right—Personal covenants between vendor and vendee—Pre-emptor—How far bound.

B sold certain lands to *A* for Rs. 650 and executed a deed of sale which was duly registered. On the same day an agreement was executed by *A* in favour of *B* under which he undertook to reconvey the said lands to *B* if he repaid him the sum of Rs. 650 within a period of 10 years. This document was drawn up on eight-annas stamped paper but was not registered.

One *G* brought a suit for possession of the lands so sold claiming to be entitled to pre-empt and was granted

a decree. Then *B* brought a suit against *G* and *A* asking for a decree for specific performance of the agreement to reconvey entered into by the original vendee *A*, urging that it was binding on the pre-emptor. *Held*, that no doubt the pre-emptor stands in the shoes of the vendee and is bound by all the conditions and obligations by which the vendee is bound. However these conditions and obligations must be found in the deed of sale and cannot be looked for in any subsequent document which does not create any interest in the lands sold. *Held*, further that the sale was a complete transaction in itself and that any subsequent agreement though entered into immediately after the execution of the sale-deed cannot be read into the conveyance so as to vary its terms and in fact conditions or obligations which would be binding on the pre-emptor. 72 Ind. Cas. 484=221.

——Nature of right—Runs with the land.

The right of pre-emption is an incident to the ownership of one land and a burden on the ownership of another land. On general principles the incident and the burden respectively will follow such lands. 70 Ind. Cas. 53=25 O.C. 319=9 O.L.J. 456=A.I.R. 1922 Oudh 289.

——Nature of right—Proof of vendor's title—Whole property not inculded.

A pre-emptor is not entitled in a pre-emption suit to put the vendor on proof of his title to the property which he purports to sell. The principle of pre-emption is substitution. A pre-emptor is bound to take the title which the vendee was ready to take. 37 All. 529=13 A.L.J. 711=29 Ind. Cas. 1000.

——Nature of right—Substitution for vendee.

A pre-emptor has got the right to be substituted for the vendee subject to the rights and liabilities created by the sale deed. 30 A. 130, Foll. 14 Ind. Cas. 266 (All.).

——Nature of right—Inferior and superior pre-emptors.

Though a decree is passed in favour of an inferior pre-emptor, the superior pre-emptor can maintain a suit for pre-emption. The right of pre-emption is a right to be substituted for the original purchaser and is not a right of re-purchase. 32 All. 340=7 A.L.J. 259=5 Ind. Cas. 527.

——Nature of right—Right of substitution—Vendee's right to mortgage for sale consideration—Enforcement of mortgage—Pre-emptor's right to take property as it stood at the date of sale.

A purchased certain property and mortgaged a portion of it to the vendor. *K* instituted a suit for pre-emption making vendor and vendee parties and paid the whole of the pre-emption money which was taken away by the vendee. In a suit for sale upon the mortgage :

Held, that the mortgage could not be enforced as the mortgagor's right to the property was subject to the pre-emptor's right of pre-emption.

Held, further, that the right of pre-emption is not a right of re-purchase but a right to be substituted for the vendee as he stood at the date of sale.

Held also that the vendee's right as a purchaser is subject to the pre-emptor's right of pre-emption and that the vendee cannot defeat the pre-emptive right by subsequently mortgaging the property so as to force him to take the property subject to the mortgage. 3 Ind. Cas. 782=6 A.L.J. 966=32 A. 45.

——Nature of right—Right to—Test of—Vendee subsequently becoming co-sharer.

Where a vendee who is a stranger at the time when a pre-emption suit was brought against him becomes a co-sharer by purchase during its pendency this will not affect the pre-emptor's right since the crucial date is the date of the institution of the suit. 31 All. 530=6 A.L.J. 699=3 Ind. Cas. 42.

——Nature of right—Definition—Property purchased by vendees subject to an unregistered mortgage—Pre-emptor bound to take the property subject to the mortgage.

A right of pre-emption is not a right of re-purchase but is simply a right entitling the pre-emptor to be substituted for the vendee as purchaser and to stand in his shoes in respect of all the rights and obligation arising from the sale under which he derived his title. A person who chooses to pre-empt therefore must take upon himself the burden of the obligation subject to which the sale was made as well as the benefits accruing therefrom. Property the subject of a suit for pre-emption was purchased by the vendees subject to an unregistered mortgage for Rs. 99.

Held, that the pre-emptor must take the property subject to this unregistered mortgage irrespective of the question whether he had notice of it or not. 1908 A.W.N. 42=5 A.L.J. 112=30 A. 130.

——Nature of right—Personal right.

Under Mahomadan Law the right is a personal right and does not descend to the heirs 38 Bom. 183=15 Bom. L.R. 1136=22 Ind. Cas. 289.

——Nature of right—Extent.

Per *Clark*, *C.J.*—If the plaintiff pre-emptor possesses no right of pre-emption at the time of the decree, or if the vendee has transferred his rights in the meantime to one against whom there is no right of pre-emption, the right of pre-emption is lost.

Per *Robertson*, *J.*—The right is one of substitution and the plaintiff must show a superior right to defendant at the time of suit.

Per *Kensington*, *J.*—The right of pre-emption being a restriction on the owner's power of free disposition, should not be decreed unless it is conclusively established by the claimant. It is not a *Jus in re aliena* but only a *Jus ad rem*. The claimant's right in the property does not begin before payment of the decretal amount.

The object of recognising this right of pre-emption is to retain the property in the hands of those who are more entitled to keep it and to avoid strangers. It is a 'transient right'.

Per *Shah Din*, *J.*—Equality with the pre-emptor means equality as regards the right of purchasing the property in question. If after the sale the vendee acquires other property whether before or after suit, he cannot by such acquisition get a right of equality with the pre-emptor. 91 P.R. 1909=161 P.W.R. 1909=148 P.L.R. 1909=4 Ind. Cas. 337 (F.B.).

——Nature of right—Village communities.

The law of pre-emption as applicable to village communities was intended to protect the village against the intrusion of strangers who might otherwise obtain a footing in it, contrary to the wishes of the community who were bound to each other by ties of descent and would resent an intruder. This principle obviously does not apply when the village is of but a recent foundation and is composed of individuals whose sole connection *inter se* is that each has been selected by Government as a person, to whom a grant of land might fitly be made. 21 P.R. 1915=31 P.L.R. 1916=26 Ind. Cas. 433.

——Nature of right—Right in land.

The right of pre-emption is not a right in the land, but only a right to acquire land ; the right in land is not acquired till the money is paid in accordance with the decree of the Court recognising the right. 218 P.L.R. 1914=136 P.W.R. 1914=24 Ind. Cas. 913.

——Nature of right—Transferee from vendee.

A right of pre-emption exists only in respect of a particular sale and the only parties against whom a cause of action arises are the parties to the sale. A subsequent transferee from the vendee is not affected. 28 P.W.R. 1913=61 P.L.R. 1913=31 P.R. 1913=18 Ind. Cas. 70.

——Nature of right.

Per *Chevis*, *J.*—The right of pre-emption does not come into an existence till a sale takes place.

Per *Shah Din.*—It is a privilege of the first refusal and as such exists in a determinate person antecedently to an actual sale. The primary object is to 'forbid alienation' by hampering the owner's power of disposition by imposing difficult conditions over him. The right exists even before the actual sale. When the primary right of the pre-emptor is infringed by a sale, his secondary right of redress arises.

Per *Rattigan, J.*—The right of pre-emption comes into existence only after a sale has taken place. It is a right of substitution. 90 P.R. 1909=159 P.W.R. 1909=147 P.L.R. 1909=4 Ind. Cas.179 (F.B.).

——Nature of right.

The right of the pre-emptor is not a right of re-purchase from the vendee or from the vendor : but is one of substitution, entitling the pre-emptor by reason of legal incident to the subject-matter of sale, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale. 7 All. 755, Foll. 5 N.L.R. 136=3 Ind. Cas. 923.

——Nature of right.

Per *Evans, A.J.C.*:—The right of pre-emption is a very weak right and one of a special character. The exercise of the right is opposed to public interest. No Court should therefore extend the right unless it is absolutely clear that it has been secured by Statute in favour of the pre-emptor. 12 O.C. 1=1 Ind. Cas. 7 (F.B.).

——Nature of right—Loss of right of pre-emption after original decree—Effect.

The right to enforce pre-emption must exist both at the time of the sale and on the date of suit. If it is lost after sale or after suit but before decree the plaintiff is put out of Court. But nothing which may happen subsequent to the decree can affect the right under the decree unless the happening has the effect of invalidating the antecedent title held on the date of sale or date of suit. An appellate court need not go beyond considering whether the right of pre-emption claimed by the plaintiff existed on the date of the sale or foreclosure and retained its enforceable character till the date of the suit and till a decree for pre-emption was obtained which was the subject of appeal. 5 O.L.J. 215=46 Ind. Cas. 339.

——Nature of right.

The right of pre-emption is not a right of the repurchase from the vendee but a right of substitution. 9 Ind. Cas. 58 (Oudh).

——Nature of right.

A right of pre-emption is understood as being a right to the benefit of a contract or a right of substitution entitling the pre-emptor by reason of a legal incident to which the sale itself was subject to stand in the shoes of the vendee under which he has derived his title. "It is in effect as if in a sale deed, the vendee's name were rubbed out and the pre-emptor's name inserted in its place." Therefore where there is no completed contract of sale to stranger, but there was only a notice of sale to the pre-emptor and the lending of the amount the owner is not liable to be compelled to sell his lands to the pre-emptor. 13 O.C. 219=7 Ind. Cas. 295.

17. Nature of transaction.

——Nature of transaction—Right to pre-empt a sale under which vendee was to fight out a litigation.

Where a portion of the mortgaged property is sold with a condition that the vendee should fight out a litigation and recover the entire mortgaged property from the mortgagee, the transaction is not a pre-emptible sale ; because the pre-emptor cannot undertake the liability of the vendee. 1950 A.L.J. 467=A.I.R. 1950 A. 632.

——Nature of transaction—Sale by husband to wife in lieu of kharch-i-pandan.

Where a husband is alleged to have sold to his wife certain property in lieu of *kharch-i-pandan* for a particular sum, the transaction is not a sale as the price could not be definitely ascertained and so no right of pre-emption can arise in respect of such a transaction.

The transaction is not an exchange either because the right to *kharch-i-pandan* is in the nature of a personal allowance and hence not transferable. I.L.R. (1949) All. 400=1948 A.L.W. 290=1948 A.L.J. 527=A.I.R. 1949 A. 204.

——Nature of transaction—Possession under indemnity clause.

The making good of the loss under an indemnity clause can never amount to a sale and neither is the indemnity clause itself an agreement to sell. Hence a person has no right whatsoever to pre-empt the property recovered under the indemnity clause. A.I.R. 1944 Lah. 427=46 P.L.R. 301=218 Ind. Cas. 53.

——Nature of transaction—Transaction, whether sale or exchange—Intention of parties—Relevancy of.

If *A* and *B* each have a piece of land and they decide to exchange those pieces of land, it is not material to the real nature of the transaction where *B* intends to transfer the land which he takes in exchange after the exchange or whether he has contracted to do so before the exchange takes place. Hence, where, after the exchange, *A* sells the land he got in exchange, to a third person, the transaction cannot be characterised as sale even if *A* had entered into the contract of sale before the exchange took place. Accordingly, no question of pre-emption can arise in such a case. A.I.R. 1944 Pesh. 15=212 Ind. Cas. 306.

——Nature of transaction—Lease or sale.

The sale-deed which was the subject-matter of the suit was executed by defendants 4 and 5 in favour of defendants 1 to 3, in respect of one-half of a *pukhtadari thok*. The plaintiff instituted a suit for pre-emption claiming to have a preferential right to purchase on the ground that he has become a co-sharer in the *thok* sold under certain document. The document purported to be a lease of *hirt* land. The plaintiff contended that the Court must go behind the deed and find out what was the real nature of the transaction between the parties. There was no plea that this document was a cloak to defeat pre-emption or that a fraud had been committed upon other co-sharers or members of the village community :

Held, that the transaction was a lease and not a sale and the plaintiff did not become co-sharer.

Held, also that it was not open to the plaintiff to go behind this deed and lead evidence to show that it was a sale. The plaintiff could not plead fraud in order to take advantage as a pre-emptor. A.I.R. 1942 Oudh 55=1941 O.W.N. 1122=1941 A.W.R. (C.C.) 936=1941 R.D. 907=17 Luck. 281=196 Ind. Cas. 617.

——Nature of transaction—Whether mortgage or sale was for benefit of person other than ostensible mortgagee or vendee is a question of fact—Onus—Held, on facts that it could not be inferred that mortgage was benami.

Every case has got its own peculiar features and it is a question of fact whether in a particular case the mortgage or sale was for the benefit of a person other than the ostensible mortgagee-vendee.

The onus of proving that the mortgage was for the benefit of the vendees, is on the pre-emptor when *prima facie* it is established that the mortgage was in favour of the ostensible mortgagee and the sale was in favour of the ostensible vendees.

On 16th February, 1937, the mortgagor mortgaged his land for Rs. 500 to *A* for ten years. On 28th April, 1937, he sold that land to *B*, a brother of *A* and *K*, their

cousin, jointly for Rs. 1,300 out of which Rs. 500 were to be paid to *A* after ten years, the period of the mortgage, Rs. 183 to the vendor's creditor, Rs. 37 as earnest money and Rs. 580 before Sub-Registrar. In the suit by the pre-emptor, the trial Judge found that there was no proof that the mortgage and the sale were in favour of the same persons, that the sum of Rs. 1,300 was the purchase-money and granted a decree to the plaintiff for possession of the equity of redemption on payment of Rs. 800, directing that the sum of Rs. 500 should be paid to the mortgagee after the expiry of the period of ten years :

Held, that the decree passed was correct. The fact that the property of the mortgagee and the vendees, who were related to each other was joint, did not necessarily lead to the conclusion that the land in suit had also been jointly bought by them. There was nothing curious in the witnesses being the same in two transactions relating to land in a small village. The interval of two months and twelve days alos did not indicate anything. The argument that no one would advance Rs. 800 and wait for ten years to get possession of the land purchased by him was of no avail. These facts could not be considered to be conclusive for inferring that the transaction of mortgage was *benami*. A.I.R 1942 Pesh. 89=204 Ind. Cas. 579.

——Nature of transaction—Mortgage with possession and sale of same property—Onus to show real mortgagees—Merger.

Every case of pre-emption has its own merits and generally speaking in the case of a mortgage with possession and sale of the same property there is nothing to debar a pre-emptor from showing that the real mortgagees were the vendees themselves and that the mortgage had, therefore, merged into the sale. The onus, however, lies heavily on him. If the real mortgagees were the vendees and the name of the apparent mortgagees had been used *benami* to defeat pre-emption, the principle of merger will come into play and the mortgage will be taken to have been extinguished with the result that on pre-emption, the pre-emptor would be entitled to get immediate possession of the land. On the other hand, if the vendees were not the mortgagees, the pre-emptor can get possession only after the expiry of the period of mortgage :

Held, that the facts were not sufficient to prove that the vendees were the real mortgagees. A.I.R. 1942 Pesh. 77=203 Ind. Cas. 415.

——Nature of transaction—Decree for specific performance of contract to execute perpetual lease—Execution of such decree—Court executing deed on behalf of legal representative of deceased judgment-debtor—Property conveyed, if liable to pre-emption.

Where, in execution of a decree for specific performance of contract to execute a deed of perpetual lease, the Court executes the deed, it does so, not as a vendor, but for and on behalf of the judgment-debtor with the result that the property conveyed by the deed is open to pre-emption. The person who commits breach of a contract for specific performance of his successor-in-interest in the event of his death is the real executant of the deed which he should have executed had he not broken the contract, and the Court, in executing the deed on his behalf after decreeing specific performance of contract against him, acts as the machinery of law for enforcing execution of the deed. An auction-sale held in execution of a decree is altogether different in its nature and incidents from a sale-deed which is executed by a Court in pursuance of a decree for specific performance of contract in a suit brought at the instance of a party who has suffered by the violation thereof. In such a case, the Court does what the defendant was under a legal obligation to do and the execution of the deed is only an outcome of the decision of the Court giving effect to the agreement to transfer arrived at between the plaintiff and the defendant which is broken by the defendant. A.I.R. 1941 Oudh 611=1941 O.W.N. 1021=1941 R.D. 782=17 Luck. 164=1941 A.W.R. (Rev.) 760=195 Ind. Cas. 880.

——Nature of transaction—Perpetual lease of under-proprietary tenure—Right of re-entry not reserved—Rent nominal—Rights conferred on lessee heritable and transferable—Lessee to pay under-proprietary rent direct to superior proprietor—Transaction is sale and subject to right of pre-emption. A.I.R. 1941 Oudh 12=1940 O.W.N. 918=1940 R.D. 462=1940 A.W.R. (C.C.) 443 =190 Ind. Cas. 782.

——Nature of transaction—Pre-emption suit decreed—During execution proceedings by pre-emptor for possession, pre-emptor and vendee entering into compromise under which vendee paying certain amount to pre-emptor before Court which ordering execution to be filed in full satisfaction—Compromise, held out and out sale.

A pre-emption suit was decreed on payment of Rs. 1,800. This sum was deposited in Court and was taken out by the vendee. The pre-emptor subsequently applied for execution of this decree by being put in possession. But during these proceedings, the pre-emptor and the vendee entered into a compromise whereby the vendee paid Rs. 2,000 to the pre-emptor to cover the cost of the land and the expenses incurred by him in the litigation and the pre-emptor agreed that the suit should be considered as dismissed, Rs. 2,000 was paid in the presence of the Court and the Court passed an order that the execution should be filed in full satisfaction :

Held, that the question whether a sale was a sale of land or not must depend on the circumstances of each particular case, and that there was an out and out sale of land by virtue of the compromise inasmuch as the land had vested in the pre-emptor by virtue of the decree when he deposited Rs. 1,800 in Court and he was at the time of the compromise, the absolute owner of the property of which he could get possession by execution. A.I.R. 1941 Pesh. 26=194 Ind. Cas. 93.

——Nature of transaction—Consideration of question.

When considering the question of whether there is a sale of a doubtful right, no definite rule can be laid down for determining in what cases such a right must be held to be doubtful. The mere circumstances that a person is out of possession is not enough to make a right doubtful. A.I.R. 1939 Oudh 233=1939 O.W.N. 736= 1939 R.D. 555=14 Luck. 678=1939 A.W.R. 111= 183 Ind. Cas. 604.

——Nature of transaction—Pre-emptor, if can prove by evidence real nature of transaction—S. 92, Evidence Act, if applies.

The right of a plaintiff to pre-empt a transaction of sale cannot be defeated by mere collusion between the vendor and the vendee and by giving to a transaction of sale the guise of a mortgage or that of a gift. The determination of the question whether or not a particular transfer gives rise to a right of pre-emption depends on the real nature of the transfer and not on the form in which the transfer may be couched. It is always open to a plaintiff in a pre-emption suit to prove by evidence the real nature of the transaction sought to be pre-empted. Section 92, Evidence Act, has no application to such a case for the simple reason that the plaintiff in a pre-emption suit is not a party to the document which embodies the transaction sought to be pre-empted. A.I.R. 1938 All. 519=1938 A.W.R. 493=1938 A.L.J. 668= 177 Ind. Cas. 468.

——Nature of transaction—Transaction found to be exchange—Pre-emption, if can be claimed.

Where it is found that the two sale transactions which appear as independent transactions is only one transaction of exchange, a suit for pre-emption does not lie. A.I.R. 1938 All. 229=1938 A.L.J. 52=1938 A.W.R. 86=175 Ind. Cas. 618.

——Nature of transaction—Vendor and vendee, if can plead fictitious nature of sale.

The mere fact of the institution of a suit for pre-emption by a person believing the sale to be genuine cannot estop the vendor and the vendee from pleading and proving the real nature of the transaction though the Court, in determining the question of costs, must necessarily take into consideration the fact that the blame for the institution of the suit must rest on the shoulders of the vendor and the vendee as they were parties to a fictitious transaction. A.I.R. 1938 All. 191=1938 A.L.J. 125=1938 R.D. 96=174 Ind. Cas. 897.

——Nature of transaction—Benami.

On a sale of land by one **S**, to **K** the plaintiff filed a pre-emption suit. Only three days before the filing of the suit, **M**, the son of **S** had given notice of pre-emption to **K** and **K** had sold the land to **M**. **M** was a student studying in a college and had no means of his own whereby he could purchase the land:

Held, that the sale by **K** to **M** was **benami** A. I.R. 1938 Lah. 510=40 P.L.R. 133=177 Ind. Cas. 561 (1).

——Nature of transaction — Instrument of sale containing stipulation by parties—Whether changes character of transaction.

There is hardly any instrument of sale which does not contain some stipulations by the parties; and if addition of a covenant by the transferee would change its real character, it could be difficult to find a transaction which could be held to be a sale. A covenant by the purchaser giving the vendor a right of pre-emption does not convert the sale into some other transfer, even though the transferee would, in the absence of such a covenant have paid a larger price for the property. A.I.R. 1936 P.C. 204=2 B.R. 653=63 C.L.J. 376=40 C.W.N. 1130=1936 M.W.N. 791=38 Bom.L.R. 760=71 M.L.J. 347=1936 A.L.J. 915=44 L.W. 452=59 Mad. 910=63 I. A. 304=1936 A.W.R. 816=163 Ind. Cas. 4 (P.C.).

——Nature of transaction—Transfer in consideration of finances to carry on litigation held was sale and liable to pre-emption.

Held, that the transfer in pursuance of the agreement between the parties, that in exchange with help and finances to carry on the litigation, the vendors would transfer, in the event of success, a portion of land in favour of the vendees, was a sale and the consideration was the money which the vendees had already spent and the time and trouble which they had expended and were going to devote for the benefit of the vendor in order to bring the litigation which he had launched to a successful termination. The transaction, therefore, was subjected to right of pre-emption. A.I.R. 1936 Lah. 612=165 Ind. Cas. 66.

——Nature of transaction — Intention of parties —Law as it stands at present in Oudh.

Per **Full Bench**.—The ruling reported in Ajodhya v. Sheo Shankar [A.I.R. (Vol. 15) 1928 Oudh 25=100 I.C. 193] impliedly overrules the rulings reported in Zulfan Khan v. Sant Bakhsh Singh, [A.I.R. (Vol. 9) 1922 Oudh 81=65 I. C. 97], Ram Bali Singh v. Jagdat Singh; [A.I. R. (Vol. 12) 1925 Oudh 624=89 I.C. 421], Sant Bux Singh v. Bhawani Prasad, [A.I.R. (Vol. 11) 1924 Oudh 426=84 I.C. 667] and Ram Suchit v. Sheo Sewak Singh, [A.I.R. (Vol. 7) 1920 Oudh 109=56 I.C. 629] and in so far as it enjoins one to take the deed in question at its face value, it does not lay down a correct proposition of law; and the ruling reported in Mohammad Ishaq v. Fahim-un-nissa, [A.I.R. (Vol. 15) 1928 Oudh 472=113 I.C. 263] to a certain extent impliedly dissents from the ruling in Ajodhya v. Sheo Shankar, [A.I.R. (Vol. 15) 1928 Oudh 25=100 I.C. 193] and lays down that the Court must look to the real nature of the transaction for the purpose of determining whether it could be subject to the right of pre-emption or not, and this view of the law is in consonance with that enunciated in the late Court of the Judicial Commissioner of Oudh and in the view of the law that at present prevails in Oudh.

Per **Nanavutty** and **Thomas, JJ.**—(Division Bench.) The document purported to be a **patta istimrari** or perpetual lease of certain plots of land. The premium **(nazrana)** fixed thereunder was Rs. 2500 and the deed provided that the lessee was to pay a sum of Rs. 7-8-0 per annum as rent together with Re. 1-8 as **malikana** dues. The rights transferred by the deed were heritable and transferable and the transferor had relinquished all rights to the property transferred and there as no right of re-entry. The **nazrana** money was applied towards the payment of previous mortgage debts due to the transferee from the transferor:

Held, that the transaction evidenced by the deed was a sale of under-proprietary rights, which gave rise to the right of pre-emption. A.I.R. 1935 Oudh 217=11 O.W.N. 1494=18 R.D. 677 =10 Luck. 392=153 Ind. Cas. 334 (F.B.).

[Overrules A.I.R. 1928 Oudh 25=2 Luck. 416 =100 Ind. Cas. 193.]

——Nature of transaction — Transaction alleged to be shankalapnama by chela to his guru — Usufructuary mortgage on the same date of property of vendee to be redeemed at future date—Shankalapnama, whether in reality a sale—Property, if liable to be pre-empted.

Where parties have really entered into a sale transaction but have disguised it under the mask or cloak of a different transaction, the Court must look to the real nature of the transaction for the purpose of determining whether it could be subject to the right of pre-emption or not.

Where the price of the property was not paid by the vendee but was promised to be paid at some future date and as security for the promise so made two usufructuary mortgages of certain property of his were effected in favour of the vendor's cousin, as **benamidar** in lieu of Rs. 600, the sale consideration and the transaction was called **shankalapnama** by the vendor to the vendee who was alleged to be vendor's **guru:**

Held, that the transaction in question was really one of sale though disguised in the form of a different transaction and the property in dispute was liable to be pre-empted. A.I.R. 1935 Oudh

27=11 O.W.N. 1378=10 Luck. 289=152 Ind. Cas. 666.

——Nature of transaction — Exchange, when can be treated as sale.

Sale is the exchange of property for a price. An exchange would be treated as an exchange except where it is shown by the pre-emptor that there are circumstances pointing to its being, in fact, a sale. The Courts have got the jurisdiction to go into these circumstances and to treat it as a sale, if there be evidence forthcoming to justify the conclusion that the land has been purchased for money. But as long as there is nothing to show that a consideration in each case has passed for the land which is the **sine qua non** for making a transaction a sale, an exchange of plots of land would be deemed an exchange and would not be liable to pre-emption. A.I.R. 1935 Pesh. 191 =160 Ind. Cas. 75.

——Nature of transaction—Transfer of land worth Rs. 300 for land worth Rs. 18, cash of Rs. 142 and re-payment of debt of Rs. 140—Transaction, whether a sale—Collateral of vendor, if can pre-empt.

Where a vendor transfers his land for Rs. 300 and in return, gets from the vendee a land worth Rs. 18, cash of Rs. 142 and re-payment of debt of Rs. 140, the transaction is a sale of the land for Rs. 142 and not an exchange and a collateral of the vendor is entitled to pre-emption. A.I.R. 1934 Lah. 823=154 Ind. Cas. 643.

——Nature of transaction — Sale by sonless proprietor — Suit by collaterals — Compromise —Alienees selling property to reversioners — No payment in cash — Reversioners mortgaging property to their vendors—Transaction, whether a sale.

Some sonless proprietors sold plots of land, but on their collateral's suit for declaration that the sale should not affect their reversionary right, a compromise was arrived at, by which the aliences executed sale-deeds in favour of reversioners who instead of paying in cash, mortgaged the plots to their vendors. The collaterals of the alienees brought suits for pre-emption:

Held, that there was no reason for holding that the transactions sought to be pre-empted were nothing but sales. A.I.R. 1934 Lah. 208=154 Ind. Cas. 475.

——Nature of transaction — Execution of sale-deed by Court under decree for specific performance — Right of pre-emption, whether exists—Decree against subsequent transferee—Fresh suit by transferee for pre-emption — Res judicata—Constructive estoppel.

Where **A,** after entering into an agreement to sell certain properties to **B,** sold them to **C,** who was aware of the prior agreement and **B** obtained a decree for specific performance of the agreement in terms of an award, and in pursuance of the decree which directed **C** to execute a sale-deed, a sale-deed was executed by the Court on behalf of **C:**

Held, (i) that the sale-deed executed by the Court in pursuance of the decree for specific performance was a sale for purposes of pre-emption; (ii) that the right to pre-empt accrued due only on the date when the Court executed the sale-deed and the question of the right of pre-emption was not **res judicata;** (iii) that there was no constructivv estoppel against **C** as the transfer was really one by **A** and not by **C** and the award had left the question of right to pre-empt open. A.I.R. 1932 All. 694=139 Ind. Cas. 714.

——Nature of transaction — Deed — Mortgage or sale—Test — Intention of parties — Onus—Onerous conditions.

The Court must decide as to the real nature of the transaction upon all the available material, including the terms of the document itself, the onus in the first instance being on the plaintiff to establish his case, and the true question being as to the real intention of the parties when entering into the transaction. If it is established beyond reasonable doubt that the parties intended a permanent transfer, the Court will find the transaction to be one of sale, though the deed is in the form of a mortgage. If there is a reasonable doubt, the plaintiff's case will fail on the ground that he has not succeeded in showing that the deed does not embody the true contract between the parties.

The conditions of a mortgage might be intentionally onerous without giving rise to any irresistible presumption that the transfer was intended to be permanent.

[Their Lordships held on the facts that the transaction in question was a mortgage and not a sale.] A.I.R. 1931 Lah. 258=12 Lah. 488=32 P.L.R. 749=130 Ind. Cas. 526.

——Nature of transaction—Sale disguised as gift —Evidence to show real nature—Admissibility — Disguise and device distinguished.

While it is not forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale, there is a marked distinction between a device and a disguise. Where the parties have really entered into a sale transaction but have disguised it under the mask or cloak of a different transaction, the Court must look to the real nature of the transaction for the purpose of determining whether it would be subject to the right of pre-emption or not.

Where there is no other evidence of the intention of the parties other than the document itself, the question resolves itself into one of construction, pure and simple. But if evidence is forthcoming to show the real nature of the transaction, it cannot be ignored.

[Their Lordships held on the facts that a transaction which purported to be a gift was really a sale.] A.I.R. 1931 Oudh 424=8 O.W.N. 1113 =134 Ind. Cas. 1092.

18. Notice.

——Notice—Purchaser, if can go back upon statements in notice.

In pre-emption cases, the purchaser should be allowed to go back upon the statements made in the notice of transfer.

The purchaser had mentioned in the notice of transfer certain persons as the landlords of the holding. Applications for pre-emption were made with these persons only as parties on the record. The purchaser turned round and said that other persons over and above the persons named as landlords in the notice were also landlords:

Held, that the applications were not maintainable

by reason of the provisions of S. 188 of the Bengal Tenancy Act. 162 Ind. Cas. 938=39 C.W.N. 673=61 C.L.J. 497=62 Cal. 939.

——Notice—Several plaintiffs—Absence of demand by one plaintiff—Right of others to pre-empt.

In a suit for pre-emption by several plaintiffs, the mere fact that one of the plaintiffs was disqualified from pre-empting because he had not made demands would not make the suit by the other plaintiffs defective. A.I.R. 1932 All. 138 =1931 A.L.J. 1083=134 Ind. Cas. 462.

——Notice—Contents of offer.

The offer to a person entitled to pre-empt in order to prevent his exercising that right must be an offer specifying the person to whom and the price at which it was proposed to sell the property: 22 O.C. 323, Foll. 93 Ind. Cas. 640=1 Luck. 68=29 O.C. 327=13 O.L.J. 212=3 O.W.N. 356=A.I.R. 1927 Oudh 86.

——Notice—Starting point for limitation.

Plaintiffs brought a suit for pre-emption within a year from the date of the mutation in question but more than a year after the date of the alleged oral sale. The defendant-vendee had been in possession before the sale in the capacity of a tenant.

Held: that limitation must run from the date of the mutation. (A.I.R. 1922 Lah. 210; 88 P.L.R. 1915, Foll.). The question is really one of notice and as the potential pre-emptor received no notice whatever until the date of mutation, the limitation must be held to run from that date. 76 Ind. Cas. 202=A.I.R. 1923 Lah. 654.

——Notice—Failure to bid at auction sale—Effect.

Where the auction sale was widely notified and the pre-emptor having knowledge did not choose to bid at the sale, **held** that his failure to bid was tantamount to a refusal to purchase it, and therefore it was not incumbent upon the official assignee to offer the property to the pre-emptor at the price which had been obtained from the purchaser. 27 All. 670, not Foll. 42 All. 402=18 A.L.J. 413=58 Ind. Cas. 93.

——Notice—Custom — Sale of property to strangers.

A sale of property by a co-sharer to strangers, when the other co-sharers intimate their inability to purchase owing to want of means or some other ground, is good and does not violate the custom requiring a co-sharer to inform the other co-sharers of his intention to sell, but on a co-sharer expressing his readiness to buy at a price, the vendor must state the price and must not sell to strangers for lesser price. 39 All. 127=14 A.L.J. 1138=37 Ind. Cas. 511.

——Notice—Right of co-sharer to refuse to purchase — Definite agreement with stranger to be communicated to pre-emptor—Duties of receiver —Sale by receiver—Pre-emption.

In order to debar a party entitled to pre-empt a sale from exercising his right of pre-emption, an opportunity to purchase must be given when a definite agreement to purchase at a fixed price has been entered into with a stranger. It is not enough to offer property to a person entitled to pre-empt before an agreement to purchase has been entered into with a third party. S.A. No. 901 of 1901 (unreported) foll. 1905 A.W.N. 149=27 A. 670 =2 A.L.J. 390.

——Notice—Offer—Necessity for.

A formal offer to the pre-emptor is not necessary when it is obvious from the attendant circumstances, that the pre-emptor is neither willing nor able to pay the purchase money. 22 O.C. 323= 54 Ind. Cas. 520.

——Notice.

A notice stating inaccurate area is not defective if all concerned know what the vendors propose to sell. 14 O.C. 332=12 Ind. Cas. 321.

19. Partial pre-emption.

See also PRE-EMPTION — SUBJECT-MATTER.

——Partial pre-emption—Portion of plot converted into public passage and plot divided into two —Plot must be treated as compact one for purposes of pre-emption.

The conversion of a portion of a plot of land into a passage does not vest it in the public and does not affect the proprietary right and therefore the whole plot in spite of its division into two portions by the passage must be regarded as one compact piece for purposes of pre-emption:

When two plots of land forming one compact piece of land were sold as one integer the plaintiff pre-emptor must pre-empt the whole area. It is not open to the plaintiff to dis-integrate that integer by claiming pre-emption with respect to one and not with respect to the other plot. A.I.R. 1946 All. 133=I. L. R. (1945) All. 888=1945 All. L.J. 407.

——Partial pre-emption—Offer to pay entire sale price.

Pre-emption of part of the property sold can be allowed where the pre-emptor offers to pay entire sale consideration for that part of the property only to which he has a right of pre-emption. A.I.R. 1941 Oudh 18=1940 A.W.R. (C.C.) 385 =1940 O.W.N. 828=190 Ind. Cas. 348.

——Partial pre-emption — Partial pre-emption on payment of full considetation can be allowed—But such position cannot be taken for first time in appeal under Oudh Courts Act (IV of 1925), S. 12 (2).

A pre-emptor having a right to pre-empt only a part of the property sold can be allowed to do it by paying the full price paid for the whole of the property. But when the point was not taken before the Single Judge and is not referred in the grounds of appeal, he cannot be allowed to take up this position for the first time in appeal under S. 12 (2), Oudh Courts Act. A.I.R. 1942 Oudh 117=1941 O.W.N. 1306=1941 A.W.R. 388=17 Luck. 435=198 Ind. Cas. 241.

——Partial pre-emption—Part of property, when can be claimed.

No provision is made in the Oudh Laws Act for tendering part of the price or for pre-empting part of the property sold. Where the plaintiff pre-emptor does not want an apportionment of the sale price but offers to pay the entire sale consideration for that part of the property only to which he has a right of pre-emption, the claim for pre-emption of part of the property in such a case is maintainable. In other words, if a pre-emptor wishes to pre-empt part of the property, he can only do so on payment of the amount paid for the whole of the property. A.I.R. 1942 Oudh 113=

1941 O.W.N. 1276=1941 A.W.R. 385=17 Luck. 412=197 Ind. Cas. 715.

——**Partial pre-emption—Suits for pre-emption by co-sharers in respective pattis.**

A vendor sold three plots of land to the vendee. These three plots lay in different **pattis** and each of the three plaintiffs who brought suits alleged that he was a co-sharer in one or other of these three **pattis** and sought to pre-empt that portion of the property which lay in his **patti**. The vendee was not a co-sharer in the **pattis**, but was a co-sharer in the **mahal** alone, and on this ground, the plaintiffs in the three suits alleged that they were entitled to preference as against the vendee:

Held, that the suits could not be dismissed on the ground of partial pre-emption. The plaintiffs had no right of pre-emption against the vendee in respect of the shares in **pattis** other than their own and they could not sue for that portion of the property which did not lie in their own **patti** because, in respect of that, they were in the some position as the vendee. A.I.R. 1939 All. 226=1939 A.L.J. 157=1939 R.D. 107 (2)=1939 A.W.R. 99=I.L.R. (1939) All. 282=181 Ind. Cas. 805.

——**Partial pre-emption—How far can be allowed.**

A pre-emptor cannot be allowed to pick and choose and pre-empt only as much property as he considers convenient to get. In that sense, partial pre-emption cannot be allowed. But the mere fact that the vendee has included in the sale-deed some property as to which the pre-emptor has no right of pre-emption at all, would not deprive the pre-emptor of his right to pre-empt that property as to which he has a right. A.I.R. 1936 All. 732=1936 A.L.J. 456=58 All. 873=1936 A.W.R. 492=161 Ind. Cas. 753.

——**Partial pre-emption—Right of pre-emptor extending over entire property.**

A pre-emptor, whose right extends over the entire property sold, must take over the bargain in its entirety and has no right to pre-empt a part of the property sold on payment of a proportionate part of the price,

Where a person sells one-half to a collateral and the other half to strangers and no terms are specified in the deed as regards individual payment of the money, another collateral who sues to pre-empt one-half sold to strangers is not entitled to treat the transaction as divisible. A.I.R. 1935 Lah. 635=37 P.L.R. 131=160 Ind. Cas. 576 (1).

——**Partial pre-emption — Sale by vendee to two pre-emptors—Suit by rival pre-emptor—Sub-vendees, whether entitled to resist suit—Rule against partial pre-emption—Waiver.**

Where the vendee sells the property to two pre-emptors the right of one of whom is superior to that of the other, the sale does not involve a breaking up of the bargain so as to offend against the rule that a pre-emptor cannot pre-empt a part only of the property and the sub-vendees cannot be regarded as having waived their right of pre-emption as against a rival pre-emptor. A.I.R. 1933 Lah. 774=34 P.L.R. 826=14 Lah. 810=145 Ind. Cas. 629.

——**Partial pre-emption—Lands belonging to vendor, third parties and pre-emptor included in sale by vendor — Effect on right to pre-empt — Pre-emptor, if must include whole transaction.**

The right of pre-emption is in essence one of substitution and not of re-purchase, the pre-emptor being bound to take the place of the vendor in the original contract.

Where lands belonging to the vendor, to third parties, and to the pre-emptor have all been included in a sale by the vendor, the would-be pre-emptor must follow the general rule that pre-emption must include the whole transaction except that he may exclude his own lands, this exception being based on the impossible position that the pre-emptor would be forced to adopt as regards his own title if forced to pre-empt the whole. A.I.R. 1933 Pesh. 74=145 Ind. Cas. 739.

——**Partial pre-emption.**

A person seeking pre-emption must sue to pre-empt all the property included in the conveyance of which he claims the benefit in respect of which his right of pre-emption exists, whether right is a superior one giving him preferential right of purchase or only an equal right to be exercised by the drawing of lots.

A sold property lying partly in **patti X** and partly in **patti Y**. **B**, who was a co-sharer in **patti X** but not in **patti Y** sued to pre-empt the portion of the property sold lying in **patti X**. He made no claim to pre-empt the other portion:

Held, that the suit was not maintainable. A.I.R. 1931 Oudh 52=7 O.W.N. 1098=129 Ind. Cas. 321.

——**Partial pre-emption.**

Purchaser cannot be required to submit to a partial pre-emption nor is he entitled to demand it. 114 Ind. Cas. 601=51 All. 267=1929 M.W.N. 220=56 I.A. 80=33 C.W.N. 318=29 M.L.W. 423=1929 A.L.J. 85=49 C.L.J. 141=A.I.R. 1929 P.C. 58=56 M.L.J. 304 (P.C.).

——**Partial pre-emption—Alternative prayer.**

Where pre-emptor claims partial pre-emption alleging vendor's want of title to the rest, and in the alternative offers to pre-empt the whole property if Court holds that the vendor had title to the whole, is putting forth such alternative cases is not fatal. 116 Ind. Cas. 16=1929 A.L.J. 589=A.I.R. 1929 All. 398.

——**Partial pre-emption.**

A sued **B**, one of two vendees **B** and **C**, for pre-emption and got possession of the whole property sold. **C** then sued for recovery of his half share making **B** also a defendant and got possession. **A** then sued **B** for recovering half the price paid by him.

Held, that **A's** suit, not being one for pre-empting a sale in part, did not infringe the rule of law against partial pre-emption. 117 Ind. Cas. 229=A.I.R. 1929 Lah. 294.

——**Partial pre-emption—Two properties—Effect of—Sale of—One capable of being pre-empted.**

If two properties are sold under a sale-deed, one of which is capable of pre-emption and the other is not and the property capable of pre-emption is pre-empted, the vendee cannot lose his rights in the property which was not capable of pre-emption. That property must be deemed to remain vested in the vendee. It is immaterial whether the plaintiff did pay the whole or only a part of the total sale consideration. It would be

open to the plaintiff to ask the Court to apportion the consideration and reduce the amount in view of the fact that part of the property sold was not being pre-empted, but if for some reason or other a pre-emptor omits to do so, and submits to a decree for pre-emption of a part of the property on payment of the whole amount, that would not destroy the rights of the vendee in the property which had not and could not have been pre-empted. 88 Ind. Cas. 298=A.I.R. 1925 All. 765.

——Partial pre-emption — Allowable if vendee breaks integrity of property.

The principle of denying the right of pre-emption except as to the whole of the property sold is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. But where the vendee has himself broken up the property sold by parting with a portion of it he has no grievance when the plaintiff pre-emptors sue him for the remainder. This is not a case where the plaintiff is seeking to the pick and choose part of the property in the possession of the vendee. The vendee himself having parted with a portion of the property does not suffer in any way whatsoever by plaintiffs not suing for the whole. 8 A. 642, Foll. 80 Ind. Cas. 960=5 Lah. 80=A.I.R. 1924 Lah. 431.

——Partial pre-emption—Suit relating to part of property sold—Maintainability.

A person seeking pre emption must sue to pre-empt all the property included in the conveyance of which he claims the benefit in respect of which his right of pre-emption exists whether such right is a superior one giving him a preferential right of purchase or only an equal right to be exercised by the drawing of lots. Thus a suit will not lie in respect of one of two parties. Case-law discussed. 7 O.W.N. 1098=129 Ind. Cas. 321=A. I. R. 1931 Oudh 52.

——Partial pre-emption—Whole must be claimed.

It is the duty of the pre emptor to claim pre-emption in respect of the whole of that part of the property sold as to which he has a right. If the vendee has included properties in which the plaintiff has no right to pre-empt, the pre emptor is entitled to exclude them, but he must nevertheless claim pre-emption in respect of the whole of that part with regard to which he has a right. If the plaintiff has omitted to sue for pre emption in respect of any portion of that part over which he has right, his whole claim must fail. 70 Ind. Cas. 132=45 All. 72=20 A.L.J. 810=A. I. R. 1923 All. 48.

——Partial pre-emption.

Partial pre-emption is forbidden by law. Suit for pre emption of only a portion of the land sold is not maintainable although the remaining portion may be covered by a house. 61 Ind. Cas. 30=19 A.L.J. 107=A.I.R. 1921 All. 201.

——Partial pre-emption.

A pre emptor is not entitled to pre-empt a part only of the property sold. 40 Ind. Cas. 40 (All.).

——Partial pre-emption—Subject-matter—Sale of a portion.

A suit for pre-emption of a portion of the property sold is not maintainable. 18 Bom. L. R. 693=35 Ind. Cas. 871.

——Partial pre-emption— Subject-matter—Portion of property sold—Suit for—Maintainability of.

A suit to pre-empt only a portion of property sold cannot be maintained even though the pre-emptor offers to pay full consideration money for that portion. 3 O.L.J. 7=33 Ind. Cas. 775.

——Partial pre-emption.

A suit for pre-emption is not maintainable where the pre-emptor does not seek to pre-empt the entire property. 37 All. 529=13 A.L.J. 711=29 Ind. Cas. 1000.

——Partial pre-emption—Sale of two properties under one sale-deed—Specification of price—Claim to pre-empt only one property.

Where two properties were sold under one sale-deed which separately specified the price of each of the properties conveyed, it was held, that the transaction really amounted to a distinct and separate sale of each of the two properties and a person entitled to claim pre-emption of both the properties could maintain a claim for pre-emption of either of the two properties. (1905) 2 A.L.J. 199.

20. Price.

See also PRE-EMPTION — PROPER VALUE.

——Price—Property sold in lieu of mortgage thereon—Market-value.

Where the mortgagee's personal remedy for the amount on the mortgage which was larger than the market value of a certain property was time barred and he purchased the property for the mortgage debt and a further sum of Rs. 100 in cash, held that the real sale consideration was the market value and nothing more. 18 A.L.J. 974=2 U.P.L.R. (All.) 373=59 Ind. Cas. 679.

——Price — Exorbitant — Onus — Estoppel — Refusal of offer.

If abnormal price is alleged to have been recited in the sale to defeat pre-emption, the vendee must prove actual payment of consideration and must explain the reason of such abnormal price. The refusal of the pre-emptor, when property was offered to him before sale according to a wazib-ul-arz clause, operates as an estoppel. 17 A.L.J. 290=50 Ind. Cas. 126.

——Price—Onus—Recitals—Value of.

In pre-emption suits the consideration in the sale deed must prima facie be taken as true, and the onus of showing that it was actually given can be shifted to the vendee only where the plaintiff shows that the price is very excessive.

Where the property is fully worth the amount recited, the vendee is not bound to prove all the details of consideration. 16 A.L.J. 533=46 Ind. Cas. 97.

——Price—Fictitious.

A pre-emptor in a pre-emption suit can show that the price stated in the sale deed was far above the market value, in spite of the fact that the money stated in the deed was paid before the Sub-Registrar and it is open to the vendee to show why he was ready to pay the price stated. 36 All. 464=12 A.L.J. 692=25 Ind. Cas. 403.

——Price—Relinquishment of ex-proprietary rights—Pre-emptor not bound to pay.

A Zemindari was sold, and for a certain con-

sideration the vendor relinquished his Sir rights to the vendor; **held,** that the pre-emptor was not bound to pay the consideration for relinquisnment. 24 Ind. Cas. 630 (All.).

——Price—Vendee selling property to another.

The purchaser from the vendee takes the property subject to tre right of pre-emption and the pre-emptor is bound to pre-empt only the first sale making the subsequent purchaser a party to the suit so as to bind him by the proceedings, The price payable by the pre-emptor is that paid by the first vendee to the vendor. 35 All. 385= 11 A.L.J. 527=20 Ind. Cas. 424.

——Price — Pre-emptor's duty — Vendee's rights.

When a vendee, disregarding the covenant in a sale-deed voluntarily pays off the prior mortgage debt on the property, the pre-emptor is not bound to recoup the same. 19 Ind. Cas. 647 (All.).

——Price—Onus—Fictitious price.

The onus in a pre-emption suit is on the plaintiff to show that the consideration set forth in the sale deed is fictitious. He should prove either the actual contract price or the market value of the property. 14 Ind. Cas. 158 (All.).

——Price—Unreasonable—Effect.

The refusal by pre-emptor to purchase at the price offered under the belief that the price was unreasonable, does not result in the loss of the pre-emption right. 33 All. 637=8 A.L.J. 700 =10 Ind. Cas. 626.

——Price — Principle of settlement — Custom recorded—Reasonable or otherwise.

A **wajib-ul-arz** recorded that in case there was a dispute between the vendor and the pre-emptor regarding the price, it will be settled on the basis of Rs. 200 a biswas.

Held, that the custom was not reasonable and could not be enforced.

Held, also that there being no dispute as to the price between the vendor and the pre emptor, the provisions of the **wajib-ul-arz** did not apply. 7 A.L.J. 504=6 Ind. Cas. 118.

——Price — Portion not legally payable—Encumbered Estates Act.

When the consideration for sale is a debt due to the purchaser by seller, the consideration becomes fictitious if the debt is extinguished under the Encumbered Estates Act of 1903. 7 A.L.J. 77=5 Ind. Cas. 520.

——Price — Price stated in sale-deed alleged to be fictitious—Burden of proof.

When a plaintiff pre-emptor comes into Court alleging that the price entered in the sale deed is fictitious, it rests on him to give some **prima facie** evidence that this is the case. But comparatively slight evidence is sufficient for such purpose, and it will then be for the parties to the sale to show that the price alleged to have been paid was actually paid. 28 A. 617, not foll. (1907) A.W. N. 202=4 A.L.J. 531=29 A. 618.

——Price—Power given by wajib-ul arz to appoint arbitrator to settle price—Wajib ul-arz unenforceable.

Where the terms of the **wajib-ul-arz** were that when there was a dispute with respect to the price of a property, the matter should be referred to arbitration, and if the parties did not refer it, the Collector should have power to appoint an arbitrator.

Held, that the clause was incapable of enforcement and the **wajib-ul-arz** did not enable to fix a substitute for the contract entered into between the vendor and the vendee, a different contract with regard to the consideration for the sale. (1906) 3 A.L.J. 479.

——Fancy price—Separate sale deeds in respect of each item—Attempt to defeat pre-emptive right.

If a vendee is willing to pay even a fancy price many times the value of the property, the pre-emptor who wants to take over the property can do so only on payment of that fancy price. The parties are quite at liberty to arrange that the sale should be carried out by separate conveyances and to fix the price of each item at their pleasure, even so as to prevent pre-emption, provided the purchase money as set forth in each conveyance is in each case actually paid. 1906 A.W.N. 155 =3 A.L.J. 305=28 A. 617.

——Price offered by purchaser—Non-offer by pre-emptor how far a mere formality.

The pre-emptor must be ready to pay the same price for property and to give the terms as the purchaser is shown to have given; this is not a mere formality, but an essential, going to the very foot of the right of pre-emption. (1902) 4 Bom. L.R. 811.

——Price — Covenant to sell to co-sharer—Meaning of.

An agreement by which one co-sharer covenants to sell his share to the other willing to buy the same at the "proper sale price" is valid in law. The "proper sale price" means the market price. 10 C.L.J. 626=14 C.W.N. 295=4 Ind. Cas. 743.

——Price — Vendor found to have had little only to part.

A right of pre-emption is a right of substitution and the pre-emptor steps into the shoes of the vendee in respect of all his rights and obligations under the sale. When the vendor is found subsequently to the sale to have owned only part of the land sold, the purchaser, if he acted **bona fide** cannot be compelled to surrender the remnant portion of his purchase to a pre-emptor at a less sum than that which he paid for the entirety of his purchase, if the purchaser selects to abide by his bargain and retain the residue at the amount he paid for the whole. 103 P.R. 1919=53 Ind. Cas. 506.

——Price—Burden of proof—Want of good faith —Market value, when to be allowed.

Where it is clear that the price of the pre-empted property is highly exaggerated the Court is justified in concluding that the price has not been fixed in good faith and in allowing only its market value. 76 P.W.R. 1914=174 P.L.R. 1914=24 Ind. Cas. 880.

——Price—Proof.

In order to prove the payment of consideration of a very large sum without receipt, in the sale of an immoveable property, subject to pre emption the vendor's mere oral testimony and that of the witnesses happening to be the vendee's friends, is not sufficient; but a strong evidence is necessary.

134 P.W.R. 1912=9 P.L.R. 1912 (Supp.)=16 Ind. Cas. 495.

——Price — Pre-emptor if bound to pay more than the amount fixed in a decree.

A pre-emptor is not bound to pay more than the amount fixed in a pre-emption decree as the price at which the sale took place. 55 P.W.R. 1912=91 P.L.R. 1912=13 Ind. Cas. 647.

——Price — Property sold subject to mortgage—Vendee discharging mortgage — Pre-emptor, if can redeem only equity of redemption.

Where property had been sold subject to a mortgage and the vendee pays off the mortgage a pre-emptor must pay the whole of the purchase money paid by the vendee before he can pre-empt the property: he cannot pre-empt only the equity of redemption. 74 P.W.R. 1912=43 P. R. 1912=97 P.L.R. 1912=13 Ind. Cas. 430.

——Price fixed in bad faith—Remedy — Market value to be ascertained.

Where the sale price is not fixed in good faith the market price must be ascertained and taken as the price to be paid by the pre-emptor. 87 P. R. 1911=245 P.W.R. 1911=13 Ind. Cas. 802.

——Price—Duty of pre-emptor—Fraud.

Where the purchaser agreed to pay the seller certain moneys under a compromise decree obtained by fraud, a pre-emptor must pay the price set out in the sale-deed unless he establishes mala fides on the part of the vendor or purchaser. 3 O.L.J. 498=36 Ind. Cas. 739.

——Price — Set off—Money left with vendee to discharge encumbrances.

A pre-emptor cannot in a suit for pre-emption claim in reduction of the purchase money such interest to which he may become entitled by reason of the failure of the vendee to pay him and to the other creditors of the vendor moneys which had been left with him out of the sale consideration for discharging encumbrances on the property sold. 21 O.C. 269=48 Ind. Cas. 744.

——Price—Reality of—Burden of proof.

Where the pre-emptor prima facie proves that the price in the sale deed is fictitious, the burden of proving that it represents the real price is on the vendee. 48 Ind. Cas. 513 (Oudh).

——Price—Liability of pre-emptor to pay actual price.

Pre-emptor must pay the actual price paid by the vendee even though it be much above the market price and it be paid for the purpose of annoying the pre-emptor. 9 Ind. Cas. 58 (Oudh).

21. Priority.

——Priority—Plaintiff and vendee—Co-sharers—Widow of vendor's husband's brother—If has preferential right.

The plaintiff, a Muhammadan sued for pre-emption, on the ground that she was vendor's husband's brother's widow and co-sharer with the vendee and thus had a preferential right; it was held that plaintiff was not entitled to pre-empt as her connection merely by marriage is no relation. 33 Ind. Cas. 801 (All.).

——Priority — Claim by preferential claimant brought after decree by remote claimants—Limitation.

A remote pre-emptor obtained a decree, subsequent to which a preferential claimant brought his suit for pre-emption against defendant who had obtained a decree, more than a year from the date of the sale but within a year of the decree.

Held, the suit was barred by limitation. 13 A. L.J. 383=28 Ind. Cas. 691.

——Priority — Karibi wa khandani—Female related through female.

A Hindu widow who is related to the vendor through a female is not a Karibi wa Khandani' and has no preferential right. 36 All. 451=12 A.L.J. 725=26 Ind. Cas. 494.

——Priority — Death of plaintiff pending suit—Sons brought on record if can take advantage of their father's relationship at date of suit.

Where a suit is filed for pre-emption by a near relation on the ground that he was more nearly related to the vendor than the vendee and he died pending suit and his sons who were brought on record as plaintiffs were with the vendee equally related to the vendor, the sons cannot take advantage of their fatser's relationship at the date of suit and claim the preferential right their father had as a nearer relation. 36 All. 63 =12 A.L.J. 18=22 Ind. Cas. 678.

——Priority — Vendee — Co-sharer by virtue of previous sale.

Priority as between the pre-emptor and the vendee must be decided with relation to the state of things existing at the time of the sale and not at any later period. 90 P.R. 1919=27 P.W.R. 1919=52 Ind. Cas. 557.

——Priority — Heirs of occupancy tenant.

The heirs of an occupancy tenant have a preferential right of pre-emption over the landlord in respect of a sale of the occupancy holding. 11 P.L.R. 1915=256 P.W.R. 1915=27 Ind. Cas. 642.

——Priority — Pre-emptor and vendee equally entitled to pre-empt—Division between vendee and pre-emptor.

Where the pre-emptors and the vendee have equal right of pre-emption the pre-emptor can pre-empt one half and the vendee can retain the other half. 87 P.R. 1911=245 P.W.R. 1911= 13 Ind. Cas. 802.

22. Proper value.

See also PRE-EMPTION — PRICE.

——Proper value—Sale price higher than market price, paid in good faith.

The law of pre-emption is not meant to bar absolutely the sale of landed property to an outsider. It is not unnatural that an outsider who wishes to retain the property should pay slightly more than a person entitled to pre-empt would be willing to offer. The law does not mean that if he does this in good faith, that is, if he actually pays the money with no intention of taking it back again, he should be forced to part with the property at the market price to his loss. A.I.R. 1943 Oudh 274=1943 O.W.N. 165=207 Ind. Cas. 532.

——Proper value — Compensation of improvements—Appreciation in price due to war—Vendee should not get its benefit.

Compensation for improvements is allowed on equitable grounds and it cannot be said that it is

equitable that the vendee should get the benefit of the appreciation in prices due to war, merely because the suit has dragged on for years and years. A.I.R. 1943 Pesh. 76=209 Ind. Cas. 113.

——Proper value — Price — Fixation of.

In fixing the pre-emption price, the safe and reasonable guide is to allow the market price at the time. Convenience is not the criterion. 200 Ind. Cas. 297=1942 N.L.J. 218=I.L.R. (1942) Nag. 315.

——Proper value—Evidence — Determination of market-value.

Where, in a claim for pre-emption, the vendee establishes that the bulk of the amount stated in the sale deed was paid before the Sub-Registrar, it is the best evidence of what has been paid. It is not then necessary for the Court to determine the market price of the property sought to be pre-empted by other evidence. A.I.R. 1941 Pesh. 52=195 Ind. Cas. 26.

——Proper value—Exception to validity of items of consideration which have in fact changed hands if can be taken—Burden of proving reality of consideration.

The right of pre-emption is a right of substitution for the buyer and it is not open to a plaintiff in a pre-emption suit, while claiming to enforce this right of substitution, to take exception to the validity of the items of sale consideration when, as a matter of fact those items of consideration have changed hands.

Where, therefore, the vendor who had executed a mortgage during his minority in favour of the vendees, agrees on attaining majority at the time of the sale to pay off the mortgage debt and the vendees agree to set off that amount out of the total sale consideration entered in the sale deed, the transaction is perfectly legal and its legality cannot be impugned either by the vendor or the pre-emptor.

The fact that the vendee had some influence over the vendor is an additional circumstance tending to cast doubt on the genuineness of the amount of consideration as entered in the sale-deed. That being so, the burden of proving that the ostensible consideration was the real consideration is on the vendee. A.I.R. 1940 All. 12=1939 A.L.J. 935=1939 A.W.R. 741=187 Ind. Cas. 41.

——Proper value — Market price, when to be considered.

The question of market price of the property sold can only arise when it is not possible to ascertain the actual price. A.I.R. 1938 All. 204=1938 A.L.J. 128=1938 A.W.R. 60=175 Ind. Cas. 140.

——Proper value—Set-off.

There is no illegality if the vendee sets off the money actually due to him under mortgages against sale consideration payable to the vendor. A.I.R. 1938 All. 204=1938 A. L. J. 128=1938 A.W.R. 60=175 Ind. Cas. 140.

——Proper value.

Sale-deed would not be vitiated by the mere fact that the price is above the market price. It would not justify the Court to reduce the sale consideration. A.I.R. 1938 All. 204=1938 A. L.J. 128=1938 A.W.R. 60=175 Ind. Cas. 140.

——Proper value—Proof.

The initial burden lies on plaintiff to show that the consideration in the sale-deed is not real. If the evidence does not enable the Court to arrive at a conclusion as to the actual price that changed hands, the Court has to ascertain the market-value. 1938 A.L.J. 975=1939 A.W.R. (H.C.) 632.

——Proper value—Evidence.

In a suit for pre-emption, in the absence of any evidence of the market-value of the property sold, the sum actually paid by the defendant to the vendor must be taken as a good guide in fixing the market-value and must be deemed to be the fair market-value of the property sold. A.I.R. 1937 Oudh 367=1937 O. W. N. 523=168 Ind. Cas. 207.

——Proper value—Part of the sale-consideration found to be fictitious — Market-value, calculation of.

Where it is found that a portion of the sale-consideration is fictitious and neither party has adduced any evidence of the market-value of the property, then the sum actually paid by the defendant to the vendor as the price of the property in suit must be deemed to be the market-value of the property and the plaintiff can pre-empt the sale on payment of that amount. A.I.R. 1937 Oudh 367=1937 O.W.N. 523=168 Ind. Cas. 207.

——Proper value—Suit for—Question of market-value, whether relevant.

In a suit for pre-emption, where the vendee definitely establishes that he has paid the price given in the sale-deeds, he is entitled to the full sum claimed by him. The only point for decision would be whether in fact the payment has been made. It is open to the pre-emptor to prove that a portion has been refunded but he has to prove it affirmatively and not by raising mere suspicions. In the absence of clear proof of refund from the side of the pre-emptor, the mere fact that payment has been established shall per se be enough to entitle the vendee to the price claimed. The question as to what is the market-value and the drawing of an inference adverse to the vendee from the fact that there is a great disparity between the market-value and the price alleged to have been paid are considerations absolutely irrelevant to the enquiry and the Courts should not go into them at all. The vendee may have paid a fancy price to get a footing or may have paid a ridiculously high sum to deter the pre-emptor from snatching the land away from him. It is no business of the Courts to find out why he has paid a large sum if it is found that he has, as a matter of fact, paid it. A.I.R. 1936 Pesh. 12=160 Ind. Cas. 452.

——Proper value—Price in sale-deed fictitious — Duty of Court—Price actually paid—Admissibility of, in fixing market-value.

In a suit for pre-emption, even if no notice has been given of the intended sale, the Court should fix the fair market-value, if the price fixed in the sale-deed is found to be fictitious or not fixed in good faith. A.I.R. 1936 Oudh 100=1935 O. W.N. 1348=159 Ind. Cas. 609.

——Proper value.

A pre-emptor who doubts whether the consideration has been truly expressed in the deed is en-

titled to have the question determined by the Court. A.I.R. 1931 Pat. 72=13 P.L.T. 38=130 Ind. Cas. 165.

——Proper value—Mere opinions—No value.

Mere opinions of the witnesses without mention of grounds on which such opinions are based are of no value in determining the correct market-value of the property. 120 Ind. Cas. 595=A.I.R. 1930 Lah. 321.

——Proper value—Proof of—Shifting of onus.

Very slight evidence would, in a pre-emption suit, where the pre-emptor challenges the bona fides of the price entered in the sale-deed, shift the burden of proof upon the defendant vendee to prove that the price entered in the deed is correct and that the consideration stated therein has actually passed. But such slight proof as is offered by the pre emptor as a prima facie proof of his case must consist of relevant and admissible evidence and must be such that if believed by the Court asked to arrive at the finding would justify it in arriving at a finding as to the fictitious nature of the consideration. 5 All. 184; 9 All. 225; 29 All. 618; 4 O.C. 247 and 14 O.C. 1, Rel. on. 122 Ind. Cas. 770=4 Luck. 396=6 O. W. N. 1334=A.I.R. 1930 Oudh 101.

——Proper value—Price higher than market-value —Presumption fictitious nature.

In a suit brought by a pre emptor challenging the bona fides of the price entered in sale deed, the fact that the price entered in the deed is higher than the market-value would be a very strong piece of circumstantial evidence going to show the fictitious nature of the price entered in the deed. But it, in no case, should be considered as conclusive. 3 O.L.J. 543 and A.I.R. 1927 Oudh 361, Rel. on. 122 Ind. Cas. 770=4 Luck. 396=6 O.W.N. 1334=A.I.R. 1930 Oudh 101.

——Proper value—Fictitiousne s—Onus.

As to the fictitiousness of consideration it is a settled rule of law that a very slight proof will shift the burden on vendees to prove the actual payment of the price entered in the deed. 4 O. C. 247, Foll. 119 Ind. Cas. 459=6 O.W.N. 630 =A.I.R. 1929 Oudh 486.

——Proper value—Fictitious in part — Presumption as to whole.

In a suit for pre-emption if one item of consideration is proved to be fictitious, the entire consideration entered in the sale deed of which this item forms a part must be deemed to be fictitious and the conclusion is that the sale consideration entered in the deed is not bona fide. 119 Ind. Cas. 459=6 O. W. N. 630=A.I.R. 1929 Oudh 486.

——Proper value—Fixing of—Procedure.

In order to determine the market value of the property in dispute in a pre emption suit it is advisable first to determine what amount was actually paid under the sale deed, for that amount is a good guide to help in determining the market value if it cannot otherwise be fully established. 10 O.C. 88, Foll. 119 Ind. Cas. 459=6 O.W.N. 630=A.I.R. 1929 Oudh 486.

——Proper value—Fixing of—Considerations.

Where the Court arrives at a finding that the price fixed in the deed has not been fixed in good faith it is its duty to determine what is the fair market value of the property sold. No doubt in many cases the price actually paid is a very good indication for determining the fair market value of the property sold, and that it is an element which the Courts must consider in determining the market value but the Court must not treat the money actually paid as conclusive evidence of the market value. The market value, however so determined should not exceed the sale price mentioned in the deed. 118 Ind. Cas. 85=6 O.W.N. 264=4 Luck. 643=A.I.R. 1929 Oudh 244.

——Proper value — Onus — Absence of evidence —Procedure.

The burden of proof of the market value of the land pre-empted lies in the first instance upon the plaintiffs. If they fail to discharge it and the defendants produce no evidence upon which the Court can ascertain the true market value the plaintiffs can only obtain a decree for pre-emption upon payment of the sum, if any, admitted by the defendants to be the market value or failing that the sum mentioned in the deed. But they cannot in any case be compelled to pay more than the latter sum. 111 Ind. Cas. 631=5 O.W.N. 646 =3 Luck. 674=A.I.R. 1928 Oudh 384.

——Proper value—Vendee holding decree for sale —Pre-emptor cannot claim to pay only real value.

Where a property is sold for more than its real value to a person holding a decree for sale against that property, any person who wants to pre empt that property must satisfy the decree of the vendees to the same extent as the vendees were prepared to treat the same as satisfied and he will not be entitled to pre-empt the same by paying the real value of the property. 101 Ind. Cas. 518=A.I.R. 1927 All. 540.

——Proper value—Actual sale price paid.

Plaintiffs pre-emptors in pre-emption suits are very apt to imagine that they acquire property at what they are pleased to call the market rate. It would be a mistake if pre-emptors were encouraged in the notion that they can compel vendors to offer for property which is being sold. The true market price of ordinary property is not easily to be ascertained and if it is shown that the money set out in the sale deed has actually changed hands, the plaintiffs pre-emptors must pay that sum if they desire to get that property by pre emption. 49 All. 689=25 A.L.J. 441=A.I.R. 1927 All. 441=102 Ind. Cas. 155.

——Proper value—Question arises when no bona fides exist.

A Court in a pre-emption suit can decide on facts whether the property was sold for a fancy or a fictitious price, and can further determine its market value if it holds that the sale price was fixed in bad faith. But in the absence of actual evidence to show that the price was so fixed, no legal presumption to that effect can arise simply because it is found that the price paid by the vendee, as well as even that offered by the pre-emptor are, in view of the recorded income of the property, such as no reasonable man actuated by business principles would offer. 3 O.L.J. 543, Foll. 104 Ind. Cas. 664=4 O.W.N. 795 =A.I.R. 1927 Oudh 361.

——Proper value—Sum actually paid.

Where one of the items of consideration in the sale deed is found to be fictitious and when there

is no satisfactory evidence of the market value of the land, the sum actually paid may be taken to be the proper value. 92 Ind. Cas. 258=7 L.L. J. 559=26 P.L.R. 835=A.I.R. 1926 Lah. 10.

——**Proper value—Fanciful sale price—No fraud.**

The pre-emptive price, properly speaking, belongs to the vendor, if it has not been already paid by the vendee. The fact that the vendor was cognizant of the sinister motive of the vendee and in fact abetted or whetted it, would make no difference, for one is quite justified in getting the best value he can, provided he does not commit any fraud on any party concerned. 89 Ind. Cas. 768=A.I.R. 1926 Nag. 171.

——**Proper value—Fictitious nature—Onus.**

The burden primarily rests on the pre-emptor to support his allegation by some **prima facie** evidence that the price entered in the sale deed is fictitious or inflated, and that even if the defendant's admission that the consideration was paid privately and not before the Sub-Registrar be treated as evidence in favour of the pre-emptor so as to shift the burden to the defendant to adduce cogent evidence in support of the payment of the price recited in the deed, the defendant could discharge the **onus** so shifted by proof of facts and circumstances showing that the price stated was actually paid. 29 All. 618, Foll. 89 Ind. Cas. 768=A.I.R. 1926 Nag. 171.

——**Proper value—Question when arises.**

When the plaintiff in a suit for pre-emption alleges that the price stated in the sale-deed is fictitious and the allegation is denied, the Court has to determine whether the price stated in the deed is fictitious as alleged, and, if so, what the fair market value of the property is. If the plaintiff succeeds in showing that the price stated in the sale-deed is fictitious, he is not entitled to acquire the property for the price actually paid, but must pay for it a price equivalent to the fair market value. 4 O.C. 158 and 6 O.C. 327, Foll. 98 Ind. Cas. 757 (Oudh).

——**Proper value—Sale in lieu of debts—Calculation of value.**

In cases where property is sold in lieu of old debts, and if the vendor sells to discharge the debts and the debts are wiped out, the consideration for pre-emption is not the nominal value of the debts, **i.e.**, their arithmetical total, but their present or market value. 75 P.R. 1901, Foll. 78 Ind. Cas. 218=A.I.R. 1925 Nag. 194.

——**Proper value — Oudh Laws Act, Ss. 6 to 15 —Payment of incumbrances — Computation of purchase money.**

Where a property subject to a right of pre-emption is sold and after the sale the vendee pays off incumbrances on that property this payment ought to be included in the purchase-money specified in the decree for pre-emption.

The pre-emption decree may be moulded in accordance with the justice of the case.

The general principle is that a plaintiff suing for possession will not obtain an unconditional decree in cases where the party in possession has satisfied an encumbrance subsisting upon the estate at the time he came into possession, which otherwise the plaintiff himself would have to meet. There may be cases in which a Court would hold that the vendee had paid off incumbrance in bad faith or improvidently, and would refuse to add this payment to the money payable under the pre-emption decree: or the interests of third parties may be involved. The general rule does apply to pre-emption decrees like other decrees for possession of property. 74 Ind. Cas. 503=10 O.L.J. 112=A.I.R. 1924 Oudh 1.

——**Proper value.**

Where the part of the consideration was found to be bogus, the High Court on the admission of defendant that market value should have been determined remanded the case for finding the same. A.I.R. 1923 Lah. 308.

——**Proper value—Debt exceeding value of property.**

Where the personal remedy for a mortgage debt is barred by limitation and the mortgage debt exceeds the value of the property, the value of the property for purposes of pre-emption is only the market value of it. 59 Ind. Cas. 679=43 All. 137=18 A.L.J. 974=A.I.R. 1921 All. 290.

——**Proper value — Transferability — Limits.**

A gift of the right to continue the suit for pre-emption pending at that time is not a gift of the right to institute a suit thereafter and is valid in law. It is settled law that a transfer by inheritance of the pre-emptor's property subsequent to the sale which is to be pre-empted, transfers to the heir the right of pre-emption. It is also settled law that a transfer of the pre-emptor's property by sale to a stranger subsequent to the sale to be pre-empted does not transfer the right of pre-emption to the vendee. 70 Ind. Cas. 53=25 O.C. 319=9 O.L.J. 456=A.I.R. 1922 Oudh 289.

23. Rival pre-emptors.

——**Rival pre-emptors—Sale of some properties —Suit to pre-empt one of them on ground of vicinage—Vendee can resist such suit on strength of title to adjoining property sold to him by same sale deed.**

A vendee, in a suit brought to enforce, on the ground of a vicinage, a right of pre-emption in respect one of the properties purchased by him, can successfully resist the suit on the strength of his title to an adjoining property conveyed to him by means of the same sale deed. A.I.R. 1946 Lah. 345=226 Ind. Cas. 220=48 Pun.L.R. 442 =I.L.R. (1947) Lah. 166 (F.B.).

——**Rival pre-emptors.**

Plaintiff in a pre-emption suit cannot, by making a purchase subsequent to the institution of the suit, improve his position. A.I.R. 1933 All. 217=1933 A.L.J. 82=145 Ind. Cas. 396.

——**Rival pre-emptors — Equal rights—Lots to be drawn.**

Where in a case of pre-emption the plaintiff and the vendee are equally entitled to pre empt the property the question as to who is entitled to the property should be decided by drawing lots. 9 O.C. 271, Foll. 91 Ind. Cas. 1020=1 Luck. 29=13 O.L.J. 166=6 O.W.N. 1143=A.I.R. 1927 Oudh 124.

——**Rival pre-emptors — Procedure.**

Where pending a suit for pre emption, the vendee sells the property to one having an equal right to pre-empt, the proper procedure is to

divide the property among the plaintiff and the vendee's vendee. A.I.R. 1923 All. 294, Not Foll. 90 Ind. Cas. 238=48 All. 221=24 A.L.J. 130=A.I.R. 1926 All. 180.

——Rival pre-emptors—Who are not.

A chakdar by reason of his being under-proprietor in the same mahal has not a preferential right, where the property sold is held on a superior proprietary tenure, to the holder of the superior proprietary tenure in another mahal. 93 Ind. Cas. 371=A.I.R. 1926 Oudh 350.

——Rival pre-emptors.

A subsequent transfer by vendee even in favour of a co-sharer of equal degree with the pre-emptor defeats the latter's right. 72 Ind. Cas. 247=4 L.R.A. Civ. 347=A.I.R. 1923 All. 294.

——Rival pre-emptors — Consent to sale by one set—Waiver.

Consent to the sale by one set of rival pre-emptors is a complete waiver and lets in any rival pre-empter who comes forward. 106 P.R. 1916 =36 Ind. Cas. 694.

——Rival pre-emptors—Right of appeal.

Ordinarily the pre emptor whose decree is dead has no concern with a rival pre-emptor except costs. But where other complicated questions injuriously affecting his interests are involved, he can appeal so far as those questions are concerned. 87 P.W.R. 1909=81 P.L.R. 1909=4 Ind. Cas. 629.

——Rival pre-emptors.

In the case of rival pre-emptors the right of acquisition of property is determined by lot under S. 9, Oudh Laws Act. 19 O.C. 185 Note=37 Ind. Cas. 170.

24. Subject-matter.

See also PRE-EMPTION—PARTIAL PRE-EMPTION.

——Subject-matter—Mortgagee right, if immovable property—Sale of mortgagee right—Suit for pre-emption, if maintainable.

Mortgagee rights in land fall within the definition of immovable property and suit for pre-emption with respect to sale of such rights may be maintainable. A.I.R. 1934 Lah. 143=154 Ind. Cas. 695.

——Subject-matter — Object of law—Principle, if applies to sale of ijmali share.

The object of the law of pre-emption is to keep out strangers and any transaction, whether of sale mortgage or lease may be pre-empted if it offends against the local conditions of that law. No such general principle applies to sales under the Revenue Sale Law nor is there any section which gives a right to the Court to go behind the document of incumbrance if the legal effect of it is clear. A.I.R. 1933 Pat. 523=14 P.L.T. 473= 146 Ind. Cas. 963.

——Subject-matter—Part used by public.

Although the public have a right to pass through the plot to be pre-empted, the whole plot remains a compact one for purposes of pre-emption and the plaintiff is entitled to pre-empt the whole of that plot. 7 A.L.J. 641, Foll. 103 Ind. Cas. 897=25 A.L.J. 1034=A.I.R. 1927 All. 504.

——Subject-matter.

The sale of his house by a ryot will not give rise to a right of pre-emption. 93 Ind. Cas. 279 =13 O.L.J. 463=A.I.R. 1926 Oudh 361.

——Subject-matter.

A mere option of re-purchase cannot be said to be immovable property. 78 Ind. Cas. 171=5 L.R.A. Civ. 110=A.I.R. 1924 All. 743.

——Subject-matter — Transfer of sir plots.

The interest of an owner in sir plots is a proprietary interest and the transfer of the sir plots is in fact a transfer of his proprietary interest. 79 Ind. Cas. 645=46 All. 165=22 A. L.J. 5=5 L.R.A. Civ. 5=A.I.R. 1924 All. 447.

——Subject-matter — Interest of pre-emptor decree-holder.

The right, title and interest of pre-emptor decree-holder under a decree for pre-emption, before payment of decretal money is a contingent interest and is an interest in immovable property and suit for pre-emption is therefore maintainable in respect of that right, if it is sold by decree-holder to a third person. 77 Ind. Cas. 618=26 O.C. 295=A.I.R. 1924 Oudh 125.

——Subject-matter—Mokurrari land.

The law of pre-emption was founded on the supposed necessities of a Muhammadan family arising out of their minute sub-division and inter-division of ancestral property. It is therefore purely a creature of the Muhammadan Law and, as the exercise of the right is adverse to public interest, the Courts are not disposed to recognise this right beyond the strict limits of the Muhammadan law or beyond the decision of the Courts. There is no right of pre-emption in mokurrari land. 71 Ind. Cas. 318=1923 P.H.C.C. 22= A.I.R. 1923 Pat. 217.

——Subject-matter.

Where a suit, as brought, is a suit to enforce pre-emption in respect of a claim to what was really a doubtful title, it cannot be entertained. 69 Ind. Cas. 110=9 O.L.J. 317=25 O.C. 258= A.I.R. 1922 Oudh 223.

——Subject-matter.

In a suit for pre-emption relating to haqiat mutfarriqa in a village, the Court found that the haqiat once formed part of the 30 biswas mahal, but circumstances had altered and the said haqiat ceased to be a part of that mahal, held, the provisions of the wajib-ul-arz relating to pre-emption did not apply to the property in suit. 59 Ind. Cas. 366=18 A.L.J. 120=2 U.P.L.R. (All.) 39.

——Subject-matter — Creation of adhlapi tenure.

The creation of the adhlapi tenure does not amount to a sale liable to be pre-empted when no money consideration is to pass at all. 62 Ind. Cas. 932=2 Lah. 199=87 P.L.R. 1921=A.I.R. 1921 Lah. 82.

——Subject-matter — Whole property sold to be included.

Plaintiff in a suit for pre-emption must sue to pre-empt the whole property sold or mortgaged and in respect of the whole transaction. 18 A. L.J. 104=2 U.P.L.R. (All.) 45=57 Ind. Cas. 10.

——Subject-matter — Right to — Haqiat—Mutfarriqa—Application.

In a suit for pre-emption relating to haqiat-Mutfarriqa in a village the court found that the haqiat once formed part of the 30 biswas mahal but circumstances had altered and the said haqiat ceased to be a part of that mahal.

Held, the provisions of the wajib-ul-arz relating to pre-emption did not apply to the property in suit. 18 A.L.J. 120=2 U.P.L.R. (All.) 39=59 Ind. Cas. 366.

——Subject-matter — Whole property must be pre-empted.

Pre-emptor must sue for the whole property sold or mortgaged. Where a gift deed and a mortgage deed are part of one transaction the pre-emptor must pre-empt both properties. 18 A.L.J. 104=2 U.P.L.R. (All.) 45=57 Ind. Cas. 10.

——Subject-matter — Plot of land—Hakiat.

A separate grove separately assessed to land revenue is hakiat and subject to pre-emption if sold. There is no objection to a plot of land being subject of pre-emption when sold. 12 A.L.J. 690=24 Ind. Cas. 609.

——Subject-matter — Basis of right—Zamindari.

A pre-emptor must claim all that he is entitled to even where his right is based partly on Muhamadan Law and partly on village custom. 12 A.L.J. 88=20 Ind. Cas. 367.

——Subject-matter — Khalsa land — Co-sharer in—Muafi land.

A co-sharer in Khalsa land has no right of pre-emption in Muafi land, though there be a custom of pre-emption in Khalsa. 6 Ind. Cas. 167 (All.).

——Subject-matter — Sir holding.

No right of pre-emption arises on a sale of that sir of which a sir-holder is a mere sir-holder and not the full owner of a plot or of a share. 3 Ind. Cas. 461 (All.).

——Subject-matter — Whole property.

When three properties are jointly sold and one of them is subject to a right of pre-emption the right can be claimed as regards that one only and not the remaining. 2 Ind. Cas. 65 (All.).

——Subject-matter — Land included in a Municipal limit whether a part of the town.

Land included in a Municipality for certain reasons, does not necessarily mean that the locality in question is a part of the town. An 'owner' of the estate is one who pays land revenue to the Government, howsoever small the revenue may be. He does not cease to be an owner simply because he has purchased it for building purposes or he has enclosed it with a wall and stocked iron therein. 30 P.L.R. 1918=106 P.W.R. 1918=45 Ind. Cas. 887.

——Subject-matter — Serai.

A building, when not built as a Serai and not unmistakably used as such cannot be held as a Serai. The fact that some rooms were let to permanent tenants and some to chance visitors does not make it a serai. 96 P.R. 1910=192 P.L.R. 1910=8 Ind. Cas. 356.

——Subject-matter — Trees on land—Easements.

In a suit for possession of land by pre-emption the trees standing on the land and all rights of easement appertaining to the land pass with it. 47 Ind. Cas. 654 (Nag.).

——Subject-matter — Sale — Entire property—Distinct interests of vendees.

The rule that a suit for pre-emption must embrace the entire property sold, unless the plaintiff is entitled to claim pre-emption in regard to any portion thereof is inapplicable where the interests of the vendees inter se are distinct or where they have since been separated or divided. 5 O.L.J. 546=47 Ind. Cas. 894.

——Subject-matter — Actionable claim — Described as sale of immoveable property—Estoppel.

The fact that a sale of an actionable claim is falsely described by the vendor, as a sale of immoveable property will not give rise to a right of pre-emption. The doctrine of estoppel does not apply to the case. 20 O.C. 249=4 O.L.J. 540=42 Ind. Cas. 37.

——Subject-matter — Pre-emption of part—Oudh Laws Act (18 of 1876), S. 9—Persons equally entitled to pre-empt.

S. 9 applies not only to cases where persons are equally entitled to pre-empt a property and it is acquired by a stranger or a person of inferior right of pre-emption but also where two or more persons are equally entitled to pre-empt and one of them has acquired it. Pre-emption is allowed only of all the property conveyed and not of part. 35 Cal. 330, Foll. 13 O.C. 260=8 Ind. Cas. 272.

——Subject-matter — Mokurari interest.

The doctrine of pre-emption applies only to the sale of the proprietary interest and, therefore does not apply to the sale of the mukarari interest. 5 Pat.L.J. 740=58 Ind. Cas. 534.

——Subject-matter — Partition into Mahals—Shafi-i-Khalit—Appurtenances.

On partition, property was divided into several mahals, but a well, certain roads, a tank, a number of brahmottar and fakirana holdings, and two occupancy holdings were kept joint between the parties. A separate touzi formed by this partition was sold, and the owner of the mahals into which the parent estate had been divided claimed a right of pre-emption.

Held, that the existence of the touzi holdings did not give him a right of pre-emption and that he had no right of pre-emption as shafi-i-khalit, as the roads, well, tank, etc. were not appurtenances. 15 All. 104 and 32 All. 128, Foll. "Appurtenances" mean facilities or amenities peculiar to the owner of an estate but derived not from the estate itself but by easement from the estate of another. 4 Pat.L.J. 420=52 Ind. Cas. 31.

25. Suit for.

(a) Amendment.
(b) Benami.
(c) Burden of proof.
(d) Cause of action.
(e) Death of plaintiff.
(f) Defence.
(g) Good faith.
(h) Important dates.
(i) Parties.

(j) Right to sue.
(k) Subsequent event.
(l) Unnecessary.
(m) Valuation.
(n) Miscellaneous.

25. (a) Amendment.

——Suit for—Amendment—Frame of suit—Amendment by new ground after limitation—Civil Procedure Code, O. 6, Rr. 2, 7, 17.

In a suit for pre-emption, the right to pre-empt was claimed on the basis of contiguity only. The defendant pleaded that he also had property contiguous to the property sold and upon the defendant so pleading, the plaintiff made a statement that his property also had a common entrance from the lane. The plaintiff applied for amendment of the plaint. The trial Court framed an issue as to whether the amendment should be allowed at the stage and disallowed it on the ground that the new ground of claim was put in after limitation had expired for the suit. In appeal, the learned District Judge accepted the appeal, holding that in a suit for pre-emption all that was necessary in the plaint was that the right of pre-emption should be urged and not the ground on which the right should be claimed and that, therefore, no question arose of the amendment of the plaint:

Held, that a pre-emption suit should state the ground on which the right is claimed and the Court of first instance was not wrong in exercising its discretion in refusing to allow amendment. A.I.R. 1933 Lah. 774=14 L. 807=35 P.L.R. 96=144 Ind. Cas. 822 (D.B.).

——Suit for—Amendment—Striking out stranger's name.

Where a plaintiff having a right to pre-empt joins with himself in a suit for pre-emption a stranger, i.e., a person who has no such right; he thereby forfeits his right to pre-empt and this disability cannot be overcome by amending the plaint by striking out the name of the stranger. 19 All. 324, Foll. 79 Ind. Cas. 220=A.I.R. 1923 All. 187.

——Suit for—Amendment—Error in area.

If a man intentionally sues for less land than is covered by the sale, he loses his right of pre-emption, but in cases where the error is merely accidental and relates only to the description of the property the pre-emptor is always allowed to amend his claim. If, of course, he refused to correct his error, when it was pointed out to him he would be held to have forfeited his claim. If the vendee himself takes no objection to the error, or if raises the objection too late, the right of pre-emption is not forfeited. 13 P.R. 1915, Foll. 67 Ind. Cas. 872 (Lah.).

25. (b) Benami.

——Suit for—Benami—Allegation that pre-emptor is acting benami for another—Onus probandi.

It is a well-recognised rule of evidence that when a suit is resisted on the ground that the pre-emptor seeks to obtain the property for the benefit of some other person and not for himself, the onus probandi of proving that allegation is on the person making it. A.I.R. 1950 Pepsu 27.

——Suit for — Benami — Suit for pre-emption against vendee who is benamidar for person having prior right, if lies.

A suit for pre-emption against a vendee who is a benamidar for a person who has a prior right of pre-emption to the plaintiff does not lie. It is the duty of the Court in such a suit to discover who is the real purchaser, i.e., who takes the proprietary and beneficial interest under the sale. A.I.R. 1940 All. 97=1939 A.L.J. 1150=1939 A.W.R. 810=I. L. R. (1940) All. 91=186 Ind. Cas. 559.

——Suit for—Benami—Ostensible vendee, whether can plead that he was benamidar for co-sharer against whom plaintiff had no right of pre-emption.

It is open to an ostensible vendee to plead in a pre-emption suit that he was a mere benamidar for a co-sharer against whom the plaintiff had no right of pre-emption, and on proof of the fact that the real purchaser was such a co-sharer, the suit for pre-emption must fail. A.I.R. 1939 All. 81=1938 A.L.J. 1065=1938 A.W.R. 732=179 Ind. Cas. 648.

——Suit for—Benami — Limitation — Art. 11 of Limitation Act—Applicability.

Where a pre-emption suit is brought against two sets of defendants on the allegation that the first set of defendants are only benami vendees and that the real vendees are the second set of defendants and that the transaction was entered into with a view to defeat plaintiff's right of pre-emption, it cannot be held that the suit as against the first set of defendant is only a suit for declaration and that the suit is a pre-emption suit only as against the second set of defendant. Art. 11 of the Limitation Act applies to such suits. 63 Ind. Cas. 558=8 O. L. J. 320=A. I. R. 1921 Oudh 252.

——Suit for—Benami — Suit against ostensible purchaser.

B purchased a property in the name of his wife D and H brought a pre-emption suit against D, the ostensible purchaser and did not make B a party to the suit. If the suit had been brought against B, it would have been dismissed as B, was a co-sharer against whom H had no right of pre-emption. **Held,** that the suit, as brought against the ostensible purchaser, is not maintainable. 8 Ind. Cas. 527 (All.).

——Suit for—Benami—Addition of real purchaser as party—Effect.

In a pre-emption suit against a benami purchaser, the adding of a real purchaser as a party does not change the character of the suit. 4 Ind. Cas. 488 (All.).

——Suit for—Benami.

A suit for pre-emption by the plaintiffs who sue not for themselves but for other persons, is not maintainable. 17 P.W.R. 1918=43 Ind. Cas. 177.

25. (c) Burden of proof.

——Suit for — Burden of proof—Witnesses, vendor and vendee.

In a suit for pre-emption, the vendor and vendee are essential witnessess and their testimony

should not be disregarded merely because they are interested parties. 82 P.R. 1919=126 P.L.R. 1920=45 P.W.R. 1919=56 Ind. Cas. 723 (P. C.).

——Suit for—Burden of proof—Existence of right till decree—Necessary.

A plaintiff in a suit for pre-emption must establish not only the pre-emptive right claimed existed at the date of the sale and at the date of the institution of the suit but also that it existed upto and at the date of the decree of the first Court. 44 Cal. 47=20 C.W.N. 1099=24 C.L.J. 140=34 Ind. Cas. 869.

——Suit for—Burden of proof—Conditions of success.

A pre-emptor must succeed by reason of the superiority of his position at the date of sale and his retention of the status on which his suit is based. 26 P. R. 1914=152 P. L. R. 1914=23 Ind. Cas. 908.

——Suit for—Burden of proof.

A deed of sale in favour of a Hindu Lady, gives her full ownership till it is proved by a person contesting its nature, that the sale is **benami** and that the true owner is the lady's husband, who does not claim the property at all. 101 P.W.R. 1912 =131 P.L.R. 1912=16 Ind. Cas. 122.

——Suit for—Burden of proof.

The plaintiff must show that at the date of sale as well as at the date of suit he has a right of pre-emption superior to that of purchaser. 7 P.R. 1910=14 P.W.R. 1910=49 P.L.R. 1910=5 Ind. Cas. 249.

25. (d) Cause of action.

——Suit for—Cause of action—Plaint and replication before framing of issues.

Where, in a suit for pre-emption, although the plaintiff only stated in the plaint in general terms that he had a right of pre-emption, the matter was put beyond doubt in the replication, when the plaintiff clearly stated that he claimed to pre-empt the property by reason of his being a co-sharer in the property sold, and also as the owner of contiguous property and these particulars were supplied at the earliest possible opportunity and before the issues were framed:

Held, that the pleadings taken as a whole made the plaintiff's position quite clear and it could not be said that they did not disclose the plaintiff's alleged cause of action with sufficient clearness or precision. A.I.R. 1936 Lah. 35=38 P.L.R. 755=158 Ind. Cas. 658.

——Suit for—Cause of action—Costs.

Where a suit for pre-emption fails in consequence of a subsequent acquisition of a share in the village by the defendant vendee, it is just to award the plaintiff's costs of the Court of first instance. 103 Ind. Cas. 376=A.I.R. 1927 All. 697.

——Suit for—Cause of action—Second sale-deed in place of wrong first sale-deed.

Where, by a sale-deed, certain land was transferred and subsequently second deed was executed, in which it was stated that the land in first sale-deed was misdescribed, and that for correcting the mistake the second deed was executed,

Held, that the second deed does not give a right for pre-emption. 8 O.C. 288, Foll. 94 Ind. Cas. 378=A.I.R. 1926 Oudh 475.

——Suit for—Cause of action—Sale—What is.

Where one person is in possession of certain property and another person claiming title to it brings a suit and withdraws it on terms, the withdrawal cannot be considered as a sale of property in dispute so as to give a right of pre-emption. 1 U.P.L.R. (J.C.) 11=52 Ind. Cas. 170.

——Suit for—Cause of action—Mortgage by conditional sale—Decree absolute.

Where a **wazib-ul-arz** permitted pre-emption only in case of transfer, the cause of action begins on the date of mortgage and not on the day of the decree absolute as the act of the Court is no transfer. 39 All. 544=15 A. L. J. 514=40 Ind. Cas. 461.

25. (e) Death of plaintiff.

——Suit for—Death of plaintiff—Dismissal of suit on vendee's appeal without legal representative of dead pre-emptor—Abatement as against him.

Two or more co-sharers may simply sue the stranger-purchaser for pre-emption without asking the Court to adjudicate on their rival claims, and may obtain a decree for possession on depositing the pre-emption money in Court. If the vendee files an appeal from such a decree making all the plaintiffs respondents, and one of the respondents dies before the hearing of the appeal and the appeal abates against him, because his legal representatives have not been brought on the record within the time limited by law and the appeal is heard in the absence of the legal representatives of the deceased respondent and the decree of the first Court is reversed and the suit dismissed as against all the plaintiffs, the legal representatives of the deceased respondent against whom the appeal has abated cannot be bound by the appellate decree and are entitled to exercise the right to pre-empt the whole. 114 Ind. Cas. 601=51 All. 267=1929 M.W.N. 220=56 I.A. 80=33 C. W. N. 318=29 M.L.W. 423=1929 A. L. J. 85=47 C.L.J. 141=A.I.R. 1929 P.C. 58=56 M.L.J. 304 (P.C.).

——Suit for—Death of plaintiff — Other plaintiffs not affected adversely.

Three plaintiffs brought a suit for pre-emption, which was dismissed. The plaintiffs preferred an appeal. After the appeal was admitted but before the hearing of the appeal one of the plaintiffs died and his legal representatives were not brought on the record. It was contended by the respondents that the whole appeal abated.

Held, that the fact that one of the plaintiffs, out of several, has died and his legal representatives have not thought it fit to prosecute the case further, cannot affect adversely the right of the other plaintiffs. A.I.R. 1927 All. 543; A.I.R. 1923 All. 211 and A.I.R. 1925 All. 108, Overruled. 115 Ind. Cas. 785=50 All. 792=26 A.L.J. 564=A.I.R. 1928 All. 345 (F.B.).

——Suit for—Death of plaintiff—Continuation by widow.

Where a pre-emptor died after the institution of the suit and before decree, and his widow was brought on the record as the legal representative

of the deceased, **held,** she became a co-sharer by succession to her deceased husband and, even though she was not a co-sharer at the time when the sale-deed was executed or when the suit was filed, she was entitled to continue the suit inasmuch as a right to sue survived. 31 All. 623, Foll. 106 Ind. Cas. 372=25 A.L.J. 1095=A.I.R. 1927 All. 699.

——Suit for—Death of plaintiff—Dismissal of suit by several plaintiffs—Death of one during appeal —Remand — Decree for plaintiffs—The deceased plaintiffs must be deemed to be a stranger and whole suit fails.

A suit for pre-emption was brought by nine persons, and was dismissed by the trial Court. An appeal was filed and during the pendency of the appeal one of the plaintiffs died and his legal representatives were not brought upon the record. The appeal was heard in ignorance of the fact that this plaintiff was dead, and was allowed; and the case was remanded to the Court of first instance for trial on the merits. The facts that one of the plaintiffs was dead was also not brought to the notice of the trial Court, and that Court eventually passed a decree in favour of all the nine plaintiffs. The surviving eight plaintiffs and the legal representatives of the dead plaintiff applied for execution of the decree.

Held, that in consequence of the heirs of the dead plaintiff not being brought on the record in appeal the judgment of the first Court dismissing, as against the nine plaintiffs, was final and negatived the right of the dead plaintiff as a person entitled to pre-empt and, therefore, when the decree after remand was passed in favour of the pre-emptor and a person who had been held as between the parties to this litigation to be a stranger, and a stranger having thus been introduced the whole suit must fail. 102 Ind. Cas. 43=49 All. 756=25 A.L.J. 489=A.I.R. 1927 All. 543.

——Suit for—Death of plaintiff—Dismissal of suit on vendee's appeal — Death of pre-emptor not known—hole appeal abates.

Payment of consideration money by pre-emptors jointly without specification of shares in terms of the decrees of the Court of first instance in the first Court before the appeal was heard, during the pendency of which one of the pre-emptors died, does not affect the rights of the parties where the vendee's appeal was decreed in ignorance of the fact that one of the respondents (pre-emptors) was dead and the suit was dismissed. In such a case the whole appeal abates and the appellate decree dismissing the suit on the merits is a nullity against all the plaintiffs (pre-emptors). 85 Ind. Cas. 66=47 All. 100=22 A.L.J. 994=6 L.R.A. Civ. 39=A.I.R. 1925 All. 108.

25. (f) Defence.

——Suit for—Defence — Vendee's prior title deed a lease—Vendee if can plead in pre-emption suit that it is a sale and not a lease.

Where the vendee's prior title deed is a permanent lease, it is not open to him to plead in the pre-emption suit that it is a sale and not a lease. 1947 O.A. (C.C.) 138=1947 A.W.R. (C.C.) 138=1947 O.W.N. 500=A.I.R. 1948 Oudh 7.

——Suit for—Defences — Status to defend.

In a suit to pre-empt a sale the vendee, who on the date of sale in dispute had an equal status with the pre-emptor derived by reason of his ownership of other immovable property, can defeat the pre-emptor's right, even though, subsequent to the sale, he has lost in another pre-emption suit the property by virtue of the ownership of which he claimed that status. A.I.R. 1925 Lah. 202 held correctly decided. (Case-law considered.) 31 P.L.R. 274=11 Lah. 129=A.I.R. 1930 Lah. 273 (F.B.).

——Suit for — Defence — Collusion with vendee.

Where a person is proved to be entitled to pre-empt, his claim cannot be defeated merely by showing that he has been instigated by the vendees, with whom he is in collusion, to put forward his claim. If there is any fraud in contemplation and is perpetrated and discovered thereafter that would give a separate cause of action to other inferior pre-emptors. A.I.R. 1925 All. 449, Foll. 118 Ind. Cas. 666=1929 A.L.J. 1118.

——Suit for — Defence — Title subsequent to origin of right.

A purchaser may use a title acquired by him subsequently to the origin of the cause of action for a pre-emption suit as a defence against such a suit instituted after acquisition of the said title. 117 Ind. Cas. 454=6 O.W.N. 437=A.I.R. 1929 Oudh 313.

——Suit for — Defence — Limitation — Nature of plea.

Where the right sought is one involving the dispossession of a perfectly lawful purchaser of property, it is not quite accurate to say that a plea that such a suit has not been brought within the proper period of time limited by the Act is a technical plea, if by a technical plea is meant a plea which asserts rights which have no merits for their support. 57 Ind. Cas. 606=48 Cal. 110 =25 C.W.N. 289=13 M.L.W. 49=47 I.A. 255 =18 A.L.J. 1095=22 Bom.L.R. 1370=3 P.W.R. 1921=28 M.L.T. 149=2 U.P.L.R. 124=A.I.R. 1921 P.C. 50=39 M.L.J. 195 (P.C.)

——Suit for — Defence—Successive purchases—By same vendee—Second purchase made before institution of suit for pre-emption based on the first purchase.

Held, that it is not open to a defendant in a suit for pre-emption to set up as a defence to the suit a second purchase of a share in the same village made subsequently to the purchase upon which the suit is based but prior to the institution of the suit. 1907 A.W.N. 110=4 A.L.J. 351.

On appeal from. (1906) A.W.N. 164=3 A.L.J. 426=28 A. 642.

——Suit for — Defence — Pre-emptor—Mortgage by vendee after purchase—Effect of — Semble.

A mortgage by the vendee after purchase is merely a mortgage of a defeasible interest in the property and cannot be entered against the pre-emptor. 1904 A.W.N. 265=27 A. 302.

25. (g) Good faith.

——Suit for—Good faith—Scope of trial—Source of pre-emption money—Power of Court to look into.

It is not the intention of the pre-emption law

that the person figuring as the plaintiff must on the date of the sale or the date of the suit be possessed of ample means wherewith to acquire the property. There is no legal or equitable impediment in the way of his raising a loan for enforcing his right of pre-emption. It would be outside the scope of a proper trial of a pre-emption suit if the Courts look into the source from which the pre-emptor brings the money for payment to the vendee in whose place he wants to be substituted or begin to consider whether he has filed the suit in good faith and a decree would not be vitiated by the mere reason that after it was passed the pre-emptor raised money for payment to the unsuccessful vendee by mortgaging a part of the property that was the subject of the suit. A.I.R. 1950 Pepsu 27.

——Suit for — Good faith.

The intention or motive of the pre-emptor has nothing to do with a suit for pre-emption. A.I.R. 1942 Pesh. 94=204 Ind. Cas. 202.

——Suit for—Good faith — Pre-emptor not in a position to buy.

An inference that the plaintiff's suit for pre-emption was not brought in good faith cannot be drawn though it is found that the plaintiff was indebted and was a minor. 23 O.C. 85=2 U.P. L.R. (J.C.) 105=7 O.L.J. 271=56 Ind. Cas. 691.

——Suit for—Good faith.

A pre-emption suit not instituted **bona fide** with the object of excluding of a stranger is not maintainable. 13 Ind. Cas. 508 (Oudh.)

25. (h) Important dates.

——Suit for—Important dates — Dates of sale, suit and first Court's decree.

Events subsequent to the date of the first Court's decree cannot be taken into consideration in pre-emption suits. Therefore the loss of a status of a co-sharer after the date of the first Court's decree will not entitle plaintiff to the right of pre-emption. Three dates have to be looked to in suits for pre-emption, **viz.**, the date of the sale, the date of the suit and the date of the first Court's decree. 79 Ind. Cas. 217=46 All. 321=22 A.L.J. 234=5 L.R.A. (Civ.) 219=A.I.R. 1924 All. 448.

——Suit for—Important dates — Dates of sale, suit and decree of first Court.

A plaintiff pre-emptor, in order to be able to maintain a suit for pre-emption, must establish his right to pre-empt on three important dates, **viz.**, the date of sale, the date on which the suit is brought and the date on which the case was disposed of by the first Court. The subsequent loss of the share by the plaintiff, **i.e.**, his ceasing to be co-sharer, in no way affects the right he possessed at the time when the decree in his favour ought to have been passed by the first Court. 77 Ind. Cas. 694=45 All. 709=21 A.L.J. 648=4 L.R.A. (Civ.) 353=A.I.R. 1924 All. 82.

25. (i) Parties.

See also C. P. CODE, ORDER 1, R. 10 AND ORDER 20, R. 14.

——Suit for—Parties—Mortgagee of property—If a necessary party when a question of Court-fee is raised.

Where in a suit for pre-emption against the vendor and the vendee, a question as to the market value of the property arises for purposes of the Court-Fees Act, the mortgagee of the property sold is not a necessary party to the suit for pre-emption. The question of Court-fee is an incidental one. The Court could direct the parties to produce evidence and the mortgagee could be called as a witness by the party who wants his evidence. He cannot be made a party to the suit. A.I.R. 1950 Ajmer 11 (1).

——Suit for—Parties—Necessary parties—Vendor if and when a necessary party.

No hard and fast rule can be laid down as to whether a vendor is a necessary party in a suit for pre-emption, for while a vendor may not be a necessary party in some cases, he may be a necessary party in some cases.

In a suit for pre-emption to which both the vendor and the vendee were parties it was pleaded by the vendee alone that the transferred property being protected property under United Provinces Regulation of Agricultural Credit Act, 1940, its transfer without the necessary permission operated only as a mortgage and though his plea was rejected by the trial Court it was accepted by the appellate Court. In a second appeal by the plaintiff though he made both the vendor and vendee parties to the appeal, he subsequently discharged the vendor. On the question whether the appeal could proceed against the vendee alone;

Held, in this case the vendor was a necessary party as the nature of the transaction whether it is a sale or mortgage concerns him vitally. In the one case, he would not have left in him any interest whereas in the other some interest will subsist in him. So the appeal must fail as against the vendee as well. I.L.R. (1950) All. 353.

——Suit for—Parties—Sale by vendee to superior pre-emptor pending suit but after limitation—Right of subsequent transferee to be impleaded as party—Subsequent transferee obtaining possession of property—Effect of.

A sale by a vendee in favour of a superior pre-emptor during the pendency of a suit for pre-emption but after the expiry of the period of limitation does not entitle the subsequent transferee to be impleaded as a party to the suit so as to be able to defeat the right of pre-emption claimed by the plaintiff. The fact that the subsequent transferee has, as a result of the sale in his favour, obtained possession of the property in suit is immaterial. I.L.R. (1946) Lah. 467=225 Ind. Cas. 602=48 P.L.R. 28=A.I.R. 1946 Lah. 142 (F. B.).

——Suit for—Parties — Vendee benamidar—Real purchaser, if necessary party—Duty of plaintiff.

Omission of the plaintiff in a pre-emption suit to implead as defendant to that suit the real purchaser will not entail the dismissal of the suit on the ground of non-joinder of necessary parties. An intending pre-emptor is entitled to assume that the person named in the sale-deed is the real vendee and not a **benamidar** for others and no duty is cast by law on him to institute an enquiry

as to whether the vendee named in the sale-deed is a mere benamidar or is the real purchaser. Benamidar represents the real purchaser for whom he is the benamidar and the real purchaser must be deemed to be party to the suit through the benamidar who is impleaded as a defendant to the suit. A.I.R. 1945 All. 343=(1945) A.L.J. 199 =I.L.R. (1945) All. 503=1945 A.W.R. (H.C.) 190=221 Ind. Cas. 406.

——Suit for—Parties—Cure of defect after limitation.

Where in a pre-emption suit, guardian for one of the vendees who is a minor is appointed after the expiry of limitation for the suit, the defect is not fatal to the suit as a plea of limitation. 30 All. 55 Foll. 102 Ind. Cas. 624=49 All. 869=25 A. L.J. 655=A.I.R. 1927 All. 787.

——Suit for—Parties—Pre-emptor and vendee.

Where in a pre-empton suit, the sale is by a major on behalf of his minor brother and on behalf of himself, the necessary parties are the pre-emptor and the vendee and in such a suit the question of the major's right to sell minor's share does not arise. 100 Ind. Cas. 901=A.I.R. 1927 Lah. 283.

——Suit for—Parties—Second vendee transferring property to another—Second vendee when must be brought on record.

Where, before a suit for pre-emption has been instituted the vendee resells the property to another person, the second vendee must be brought on record within the time prescribed for the suit, otherwise the suit will be barred as against him. 25 P.R. 1903, Rel. on. 84 P.R. 1911=255 P. W.R. 1911=13 Ind. Cas. 792.

——Suit for—Parties—Mortgage effected by vendee.

A pre-emptor is not bound by a mortgage effected by the vendee after the sale and the mortgagee is not a necessary party in a suit by pre-emptor against the vendee though the mortgagee will be bound by a pre-emption decree passed against the vendee. 93 P.R. 1902, Foll. 55 P.W.R. 1912 =91 P.L.R. 1912=13 Ind. Cas. 647.

——Suit to enforce right of pre-emption—Parties.

Held, that in a suit for pre-emption the vendor is not a necessary party. 6 A. 57, Foll. 1903 A.W.N. 239.

25. (j) Right to sue.

——Suit for—Right to sue — Right of a junior member of a joint Hindu family to bring.

There is no reason why a junior member of a joint Hindu family should not be allowed to bring a suit for pre-emption. Even if he admits that the sale consideration would be paid from the coffer of the joint Hindu family and that he was pre-empting the property for the benefit of the joint family would not change the situation nor take away his right to pre-empt. 1950 A.W.R. 282=1950 A.L.J. 237.

——Suit for—Right to sue—Mere allegation that purchaser has right of pre-emption, whether enough.

If the vendee sells the land to a person with a superior or equal right of pre-emption to the plaintiff who has instituted a suit to pre-empt, the plaintiff's suit must be dismissed, but it cannot be laid down that if a person alleges that he has a right of pre-emption and has not, and the vendee sells to him, the right of pre-emption is defeated. A. I.R. 1935 Lah. 595=37 P.L.R. 182=158 Ind. Cas. 905.

——Suit for—Right to sue—Right to bring pre-emption suit is governed by pre-emption Act.

The rights of persons to bring pre-emption suits are governed entirely by the pre-emption Act and not by any question of Hindu Law. A.I.R. 1934 Pesh. 103=153 Ind. Cas. 398.

——Suit for—Right to sue.

Where certain property is sold and a suit for pre-emption is brought by the brother of the vendor, it is absolutely necessary to determine the question whether the two brothers were joint or separate at the time when the sale-deed was executed, for a member of a joint family cannot institute a suit for pre-emption on the sale of joint family property. 42 All. 264, Rel. on. 118 Ind. Cas. 719=1929 A.L.J. 899=A. I. R. 1929 All. 658.

——Suit for—Right to sue—Separate suit by puisne mortgagee after redemption suit—No bar.

A certain property was mortgaged successively to two persons and then sold to the prior mortgagee; the puisne mortgagee sued for redemption of the prior mortgage and succeeded without expressly reserving the right of pre-emption to which he was entitled.

Held, that his subsequent suit for pre-emption was not barred. 103 Ind. Cas. 348=A.I.R. 1928 Lah. 63.

——Suit for—Right to sue.

Where the defendant-vendee was a proprietor in the village on the date of the sale in suit by virtue of the previous sale which had been successfully pre-empted on the date of the second suit but was so pre-empted alter the second sale, the defendant-vendee has equal rights of pre-emption with the plaintiff and the latter's suit must therefore fail. A.I.R. 1923 Lah. 529 and A.I.R. 1925 Lah. 202, Foll.; 25 P.R. 1908, not Foll. 102 Ind. Cas. 890=A.I.R. 1927 Lah. 756.

——Suit for—Right to sue—Plaintiff set up by a stranger—Immaterial.

If the plaintiff has a legal right to pre-empt it is under necessary for the Court to consider from what source he is going to procure the pre-emption money. If subsequent to the litigation he allows any stranger to come in or attempts to transfer the property to such stranger, it would be open to the co-sharers of the village to bring a suit for pre-emption. The mere fact that the suit is instituted at the expense of another person and that the person claiming pre-emption is merely a nominal plaintiff acting on his behalf is immaterial so long as the plaintiff has the legal right to pre-empt. 23 O.C. 85, Foll. 87 Ind. Cas. 298=47 All. 470=23 A.L.J. 283=A.I.R. 1925 All. 449.

——Suit for—Right to sue—Ground of vicinity—Ceasing to be owner.

A sued for pre-emption on the ground that he was the owner of an house adjoining the one sold. It was found that the house alleged to belong to *A* was sold by him to his wife and she had mortgaged it. The house was attached by creditors of *A* and his wife objected to the attachment but the objection and a subsequent suit for declaration were dismissed.

Held, that the judgment dismissing the suit of *A*'s wife, would prove only that the sale was questioned

by *A's* creditors and no more. As between *A* and his wife, sale would still be a good one and *A* would have no right to pre-empt. 6 Cal. 171 and A.I.R. 1921 Lah. 540, Rel. on. 60 Ind. Cas. 271=4 L.L.J. 289=A.I.R. 1921 Lah. 333.

——Suit for—Right to sue.

Where there are joint vendees and the pre-emption suit is barred by limitation as against one of them, it cannot be maintained against the other. 63 Ind. Cas. 558=8 O.L.J. 320=A.I.R. 1921 Oudh 252.

——Suit for—Right to sue—Karabatdar Karibi.

A relation 7 or 8 degrees removed is not a relation and cannot pre-empt as. *Karabatdar Karibi*. 2 U.P.L.R. (All.) 153=58 Ind. Cas. 87.

——Suit for—Right to sue—Sale by vendee to a person entitled to pre-empt.

Where property was sold to a person who in his turn sold it to a person who had the right to pre-empt, a suit is maintainable by a relation of the original vendee who had a right to pre-empt the sale by the vendee. 13 Ind. Cas. 708 (All.).

——Suit for—Right to sue—Decree—In favour of one pre-emptor—Suit by another—Maintainability.

A pre-emption decree in favour of one as co-sharer does not bar a subsequent suit by another not a party to the previous decree claiming by preferential right. 9 Ind. Cas. 561 (All.).

——Suit for—Right to sue—Suit instituted after decrees in favour of other pre-emptors—Plaintiff no party to former suits—Suit maintainable.

Where a suit for pre-emption based upon the plaintiff's superior right of pre-emption is brought within limitation after decrees have been made in favour of other pre-emptors, the plaintiff not being a party to those former suit :

Held, that the suit is maintainable. The right of pre-emption is not a right of re-purchase but a right of substitution for the original vendee. (1910) 5 Ind. Cas. 527=7A.L.J. 259=32 A. 340.

——Suit for—Right to sue—Occupancy rights—Sale of.

An occupancy tenant, has no *locus standi* to challenge the sale of occupancy rights by another occupancy tenant to the landlord and he could not successfully maintain a suit to pre-empt. 95 P.R. 1919=52 Ind. Cas. 525.

——Suit for—Right to sue—Decree—Sale under Court's decree—Punjab Pre-emption Act (1913), S. 3 (5).

Sale, under the Court's decree, for the specific performance of a contract to all is open to pre-emption. S. 3 (5) of the Punjab Pre-emption Act does not bar the suit as the sale is not under a money decree. 111 P.R. 1919=50 Ind. Cas. 241.

——Suit for—Right to sue—Landlord purchaser—Occupancy right—Punjab Tenancy Act, sections 6 and 8.

Plaintiff collaterals of the vendor tenant cannot pre-empt against the landlord vendees the occupancy rights though the said rights came under S. 6 and S. 8 of the Punjab Tenancy Act and not under S. 5. 36 P.R. 1912. Disappr. 116 P.R. 1916=38 Ind. Cas. 712.

——Suit for—Right to sue—Pre-emptor agnate and co-sharer in Khata—Vendee agnate and co-sharer in shamilat.

In a suit for pre-emption where the plaintiff was an agnate and also a co-sharer with the vendor in the khata sold and the vendee was also an agnate but only a co-sharer only in the undivided shamilat of the village and the pre-emption was in both in respect of the *khata* and the *shamilat* appurtaining thereto the vendee could not on the basis of his share in the shamilat assert a right to take the *shamilat* appurtaining to the *khata*. 52 P.L.R. 1914=43 P.R. 1914=142 P.W.R. 1914=22 Ind. Cas. 401.

——Suit for—Right to sue—Agricultural tribes.

The exclusion of persons who are not members of agricultural tribes from suing for pre-emption is an absolute disability and does not depend upon the pleading. 7 P.R. 1910=14 P.W.R. 1910=49 P.L.R. 1910=5 Ind. Cas. 249.

——Suit for—Right to sue—Ex-proprietary tenant.

An ex-proprietary tenant in Oudh is not a member of the village community and cannot pre-empt as such. 1 O.L.J. 405=25 Ind.Cas. 718.

25. (k) Subsequent events.

——Suit for—Subsequent events—Re-sale by vendee to person having equal right with pre-emptor.

A re-sale by the vendee in favour of a person possessing equal rights with the pre-emptor thus leading to a dismissal of the pre-emptor's suit is valid. A.I.R. 1941 Lah. 433=I.L.R. (1942) Lah. 155=43 P.L.R. 581=197 Ind. Cas. 227 (F.B.).

——Suit for—Subsequent events—Deposit—Decree restored in second appeal—Effect.

A holder of a pre-emption decree had deposited pre-emption price within the prescribed period but when the decree was reversed in appeal, he withdrew the deposit. In second appeal the decree of the trial Court was restored :

Held, that the decree-holder should be allowed to deposit the price because the deposit of the pre-emptive price completed the sale in favour of the decree-holder and the title passed to him. If, thereafter, he withdrew the deposit, the vendor would be entitled to claim the price. He could not get back his title which had already passed away from him unless the decree-holder on demand made by the Court declined to pay the pre-emption price. A.I.R. 1939 Nag. 279=1939 N.L.J. 475=186 Ind. Cas. 21.

——Suit for—Subsequent events—Suit for pre-emption—Decree—Decree by vendor for higher amount against vendee—Suit by vendee for excess amount against pre-emptor or vendor—Whether lies.

A sold certain property to *B* which sale was pre-empted by *C* by a suit. In that suit, *B* urged that the sale was for Rs. 700 paid by him in cash while *A* alleged that the sale was for Rs. 700 in cash and Rs. 500 in respect of which a balance had been struck in his favour by *B*. *B* alleged that this balance was fictitious. The trial Court gave a decree for pre-emption on payment of Rs. 700 but gave no definite finding with regard to Rs. 500 except for a remark that the matter should be left for settlement between the parties in a separate suit. Subsequently, on a suit brought by *A*, a decree was granted against *B* for Rs. 500 mentioned in the balance struck. *B* then brought a suit for recovery of the amount decreed against him in favour of *A*, impleading *A* and *C* as defendants :

Held that *B* could not recover the amount from either *A* or *C* and that a fresh suit did not lie for recovery of money from the successful pre-emptor which he (*B*) was made to pay to the vendor subsequent to the decree for pre-emption. A.I.R. 1933 Lah. 257=143 Ind. Cas. 577.

——Suit for—Subsequent events.

Where after the institution of two rival pre-emption suits, one of the plaintiffs gets a transfer of the property from the original vendee and withdraws his suit, and the

plaintiff in the other suit impleads the pre-emptor transferee as a party to his suit.

Held, that he is entitled to pre-empt only one-half the property. 100 Ind. Cas. 666=49 All. 516=25 A.L.J. 479=A.I.R. 1927 All. 336.

——Suit for—Subsequent events—Vendee's acquisition during pendency of suit—Suit cannot be dismissed.

Where the vendee acquired new property during the pendency of the suit for pre-emption under a sale-deed which is still liable to pre-emption on the date when the first Court passes its decree, it is impossible for the trial Court to dismiss the suit on the simple ground that a second sale-deed has been taken,by which the vendee has acquired equal right of pre-emption with the pre-emptor. 96 Ind. Cas. 744=48 All. 689=24 A.L.J. 1003=A.I.R. 1926 All. 749.

——Suit for—Subsequent events--Vendee acquiring interest in village before decree—Claim can be defeated.

No person who claims pre-emption can succeed unless he can show a subsisting right of pre-emption ; and he cannot be deemed to have such a subsisting right until he is in a position to show that on the date on which he seeks to obtain the decree he had a preferential right as against the defendant vendee. If prior to the date of such a decree the defendant vendee acquires an interest in the village or mahal in which the disputed property is situated and becomes a co-sharer entitled to resist the claim of any other person brought against him, no decree can be passed against him for pre-emption. The object of such an acquisition is clearly not to defeat the law of pre-emption but to acquire a preferential right. S. 23 of the Contract Act does not forbid an acquisition of that nature. 86 Ind. Cas. 741=47 All. 424=23 A.L.J. 201=A.I.R. 1925 All. 358.

——Suit for—Subsequent events.

Where a property is sold to a person who transfers it to a superior pre-emptor but where the latter transfer is made after the date of a suit for pre-emption and after the last date on which the transferee can have sued for pre-emption, the second transfer cannot be regarded as a transaction in which the transferee is enforcing his right of pre-emption. 39 P.R. 1911, Foll. 89 Ind. Cas. 170= A.I.R. 1925 Lah. 614.

——Suit for—Subsequent events—Right to continue throughout suit.

The usual method of dealing with suits to enforce a statutory right of pre-emption should be to regard the state of affairs existing when the plaintiff's cause of action arose. 3 Lah. 267, Foll. But there may be circumstances in which a Court may be justified in refusing to enforce such right unless it is maintained intact throughout the progress of the suit. 76 Ind. Cas. 891= A.I.R. 1923 Lah. 339.

——Suit for—Subsequent events—Withdrawal of suit by some—Others can carry on.

A pre-emptor does not lose his right if he joins with him a person who is entitled equally with himself to pre-empt, but who during the litigation whether in the first Court or in the Appellate Court gives up either gratuitously or for a consideration his right to pre-empt. In such a case the remaining plaintiff is entitled to carry on his claim alone. 60 Ind. Cas. 692 (Lah.).

——Suit for—Subsequent events—Gift of share in favour of vendee subsequent to suit.

When during a suit for pre-emption the defendant vendees acquired some property by gift, in the same sub-division, the gift could not be used as a defence, to defeat plaintiff's claim as it took place subsequent to the filing of the suit. 20 O.C. 196=4 O.L.J. 483=41 Ind. Cas. 909.

——Suit for—Subsequent events—Title acquired after cause of action.

The purchaser may use a title acquired by him subsequent to the cause of action as a defence in a suit for pre-emption instituted after he acquired the title. 11 O.C. 290 ; 26 A. 889, Foll. 3 O.L.J. 309=36 Ind. Cas. 55.

——Suit for—Subsequent events—If Court can consider.

In a pre-emption suit the appellate Court may consider any circumstances which have arisen during the pendency of the suit even if they have come into being subsequent to the decree of the Lower Court. 17 O.C. 242=25 Ind. Cas. 694.

———Suit for—Subsequent events—Status of pre-emptor.

Pre-emptor's status, under statutes may be altered by events happening subsequent to the institution of suit. 12 O.C. 229=3 Ind. Cas. 546.

25. (1) Unnecessary.

——Suit for—Unnecessary—Mode—Pre-emption on foreclosure.

A pre-emptor is not bound to exercise his right only by a suit. It is open to him to enforce that right out of Court either by a private sale or an exchange or any other mode of conveyance. He can on a foreclosure obtain a private sale. A.I.R. 1950 All. 647.

——Suit for—Unnecessary.

Pre-emption can be enforced without the intervention of Courts. 75 Ind. Cas. 848=A.I.R. 1924 Lah. 651.

——Suit for—Unnecessary—Private settlement.

A pre-emptor may be willing to pay a higher price in order to avoid the uncertainty, trouble, and expense of litigation, and if he settles privately with the purchaser in this way, instead of bringing a suit, it would not be right to say that he has not exercised his right of pre-emption. 69 Ind. Cas. 409=A.I.R. 1923 Lah. 31.

——Suit for—Unnecessary—If a conveyance is obtained.

Pre-emptor must do one of two things within limitation, either he must institute a suit for pre-emption or he must obtain a conveyance. If he has done neither of these things, the mere facts that he has stated that he possesses the right, that he has approached the vendee, or that they have referred their matter to arbitration or that a decree has been got on an award thereon will not prevent his being barred by limitation.

A pre-emptor who refers his matter to arbitration out of Court and then makes an application under paragraph 20 of Sch. II of C.P. Code is proceeding by suit and not by private conveyance and his suit must be within time. 74 Ind. Cas. 206=9 O.L.J. 546=A.I.R. 1923 Oudh 91.

25. (M.) Valuation.

——Suit for—Valuation—Second appeal.

The pre-emption suit was valued under the Court-fees Act at Rs. 567, being computed on the basis of 30 times the revenue of the land sought to be pre-empted. The judgments of the Courts below were concurrent. The plaintiff claimed pre-emption on payment of Rs. 570 apart from the mortgage money and the suit was actually decreed on payment of Rs. 1,240 apart from the mortgage money :

Held, that a claim to property worth more than Rs. 1,000 was involved and hence a second appeal was competent. A.I.R. 1943 Pesh. 60=208 Ind. Cas. 56.

——Suit for—Valuation—Jurisdiction—Appeal—Pre-emption decree on payment of price and compensation for improvement—Appellate forum must be determined on basis of price.

The value of pre-emption suit which is decreed in payment on price and compensation for improvement does not include the amount of compensation for improvement for purposes of appeal. The appellate forum must be determined on the basis of price made payable. A.I.R. 1941 Pesh. 14=193 Ind. Cas. 385.

——Suit for—Valuation—Court-fee.

In a suit for pre-emption of a house site, plaintiff paid Court-fee only on its market value although the sale-deed specified the prices to be a higher amount. The vendees pleaded that the plaintiff should pay Court-fee on the price specified in the sale-deed plus the market value of the houses which the vendees had built before the suit was brought :

Held, that the plaintiff should pay Court-fee on the sale price even in the deed together with cost of improvements, and that if it be found when the suit was finally tried out, that he had paid more, he could claim refund under S. 10, Court-fees Act. A.I.R. 1937 Lah. 239=39 P.L.R. 511=172 Ind. Cas. 392.

——Suit for—Valuation—Appeal—Forum.

The amount which determines the jurisdiction of the appellate Court is the amount found by the trial Court as the price payable by the pre-emptor. 101 P.R. 1900, not Foll. 111 Ind. Cas. 129=10 L.L.J. 277=A.I.R. 1928 Lah. 670.

——Suit for valuation.

The value of land for purposes of jurisdiction is 30 times the proportionate amount of the revenue recorded as payable for the holding in which the land sold is comprised where land sold is a portion of part of an estate for which part of the land revenue payable is recorded in the Collector's register. 92 Ind. Cas. 986=8 L.L.J. 60=27 P.L.R. 172=A.I.R. 1926 Lah. 346.

——Suit for—Valuation—Plaintiff's choice.

The ordinary rule in a pre-emption suit is that the value of the suit is whatever the plaintiff has asked for in the plaint. The rule is not absolute : the main exception is where the plaintiff has intentionally misstated the value of the suit in order to have his matter heard by the wrong Court. 90 Ind. Cas. 760=A.I.R. 1926 Oudh 140.

——Suit for—Valuation—Market value at the date of sale.

In suits for pre-emption the market value at the time of the sale is the value for purposes of Court-fee and jurisdiction and not the market value at the time of suit. 7 A. 775, Foll. 69 Ind. Cas. 650=A.I.R. 1924 Lah. 380.

——Suit for—Valuation—Right of vendee to compensation for improvements after the purchase and before suit.

Where a pre-emptor has taken no steps to obtain an injunction against a vendee who has been carrying on building operations after puchase and before suit must pay Court-fee on the total value of the property as well as the improvements made and deposit in Court 1/5 of such total amount. (16 P.R. 1908; 19 P.R. 1908-F.). 169 P.W.R. 1912=184 P.L.R. 1912=17 Ind. Cas. 245.

——Suit for—Valuation—Appeal.

To determine an appeal in a pre-emption suit, the value for the purposes of jurisdiction and not the amout which the pre-emptors will have to pay, must be looked at. 225 P.L.R. 1912=201 P.W.R. 1912=15 Ind. Cas. 407.

——Suit for—Valuation.

In a pre-emption suit the jurisdiction of the Court is to be decided by the valuation given by the plaintiff in the plaint and not by the price set out in the sale deed upon which the suit for pre-emption is based. 12 O.C. 31. Not. Foll. 6 O.C. 255, Foll. 9 Ind. Cas. 414 (Oudh).

——Suit for—Valuation.

Obiter.—The value of the pre-emptive right which is the value of the suit for purposes of jurisdiction is the consideration for the sale, as stated in the sale deed, though the pre-emptor states that it is greater. 12 O.C. 31=1 Ind. Cas. 687.

——Suit for—Valuation—Court-fee—Suit for pre-emption of Zamindari and appurtenant grove land—Grove land found not to be appurtenant—Dismissal of suit.

The plaintiff sued for pre-emption of certain zamindari and grove land alleged to be appurtenant thereto and paid a Court-fee calculated on five times the Government revenue. The Court found—merely on the plaintiff's examination under S. 117 of the Code of Civil Procedure—that the grove land was not appurtenant to the zamindari and that the Court-fee paid by the plaintiff was therefore insufficient, and dismissed the whole suit. *Held*, that the dismissal of the suit was wrong. If the grove land was found on the evidence not to be appurtenant to the zemindari, the plaintiff's suit would fail as to that but not as to the zamindari. (1907) A.W.N. 163=4 A.L.J. 403.

——Suit for—Valuation—Suit for pre-emption of the villages out of a large number conveyed by the same sale deed—Court-fee—Distinct subject. *See* COURT-FEES ACT, S. 17. 1904 A.W.N. 210=27 A. 186.

25 (n) Miscellaneous.

——Suit for pre-emption referred to arbitration—Award—Direction to pay money to vendee—Pre-emptor depositing money in Court—Notice to vendee issued by Court—Tender, if valid.

Where, on a pre-emption suit being referred to arbitration, under the award that was passed, the pre-emptor was to pay the vendee an amount within a certain period but there was no specific direction as to the manner in which the money was to be paid and pending proceedings to have the award set aside, the pre-emptor deposited the amount in Court and the Court issued notice to the vendee :

Held, that it constituted a valid tender of the money and that O. 21, R. 2, C. P. Code, did not apply as the deposit was made before a decree was passed in terms of the award. A.I.R. 1934 Oudh 135=11 O.W.N. 459=148 Ind. Cas. 877.

——Suit for—Rights of usufructuary mortgagee.

In a suit for pre-emption if the usufructuary mortgagee was in possession of the property by virtue of his mortgage before the sale-deed, his actual possession could not be disturbed without redeeming him. A.I.R. 1932 All. 138=1931 A.L.J. 1083=134 Ind. Cas. 462 (D.B.).

——Suit for—Bar of suit to set aside alienation.

A person who instituted a suit for pre-emption is not competent to institute a suit to set aside the alienation for want of consideration and necessity because the institution of a pre-emption suit amounts to an admission of the validity of the sale. Ordinarily the sons of the pre-emptor are bound by the act of their father and are not competent to institute a suit for declaration. A.I.R. 1927 Lah. 637 and 15 P.R. 1903, Foll. 118 Ind. Cas. 910 (Lah.).

——Suit for—Preliminary decree.

It is wrong to suppose that there must be a preliminary decree in all cases in which pre-emption decree is passed embodying the condition that if the pre-emption money be not paid within the time fixed by the Court the suit shall stand dismissed. 119 Ind. Cas. 462=6 O.WN. 644=A.I.R. 1930 Oudh 13.

——Suit for—Pre-emption of equity of redemption—Procedure.

In the case of a suit for pre-emption of the equity of

redemption if the pre-emptor deposits the money in Court in time, he need not execute the decree for possession when the possession is with the mortgagee, nor need he immediately sue the mortgagee for possession. 73 Ind. Cas. 646=45 All. 482=21 A.L.J. 417=4 L.R.A. (Civ.) 223=A.I.R. 1923 All. 507.

——Suit for—Mortgagee vendee—Equities in favour of.

The mortgagee prior to 1882 obtained a sale-deed of the equity of redemption from the mortgagor for his original money with interest and the Government revenue which he paid for his default.

In a suit for pre-emption of the property the mortgagee vendee must get full amount in the sale-deed as the principle of equity in S. 72, T. P. Act, existed before. 38 All. 530=14 A.L.J. 717=35 Ind. Cas. 915.

——Suit for—By a reversioner in respect of property alienated by widow—Whether admissible of its validity.

A reversioner by bringing a suit for pre-emption in respect of an alienation by a widow must be taken to have admitted its validity and his sons are bound by such admission. 184 P.L.R. 1914=78 P.R. 1914=119 P.W.R. 1914=23 Ind. Cas. 835.

——Suit for—Portion of land exchanged by vendee—Transferee not impleaded in suit for pre-emption—Effect of—Relief omitted—Subsequent suit.

Where the vendee exchanges with a third person one of the plots purchased for another land, the pre-emptor is not entitled to the land so got in exchange. A relief which was claimable, but was not claimed against the vendee in a suit for pre-emption, cannot be subsequently claimed in another suit against him. 285 P.L.R. 1913=20 Ind. Cas. 442.

——Suit for—Mortgage money to be included in price—Compromise—Deposit of what money necessary.

In a pre-emption suit parties compromised that mortgage money charged on the property in suit be included in the price fixed before the pre-emption and that each should pay half of it. It was held that the pre-emptor must deposit half of the mortgage money. 12 Ind. Cas. 413 (Oudh).

26. Time for pre-emption.

——Time for pre-emption—Vendee cannot improve his status after.

A vendee cannot improve his status after the sale sought to be pre-empted so as to defeat the right of the pre-emptor. A.I.R. 1945 Pesh. 7=1945 Pesh. L.J. 7=218 Ind. Cas. 191.

——Time for pre-emption—Position on date of sale and not on date of suit.

A right to pre-empt arises as soon as a sale takes place and the vendee should not be allowed by his unilateral act to defeat the right which the pre-emptor has already acquired. The pre-emptor is given a certain period of limitation for instituting his suit and his right should not be made to depend on whether he brings the suit quickly or near the expiry of limitation or upon the time required for the disposal of the suit. Hence, the date of the sale should be the date on which the rights of the parties are to be considered and not the date of the suit. A.I.R. 1942 Pesh. 45=201 Ind. Cas. 230.

——Time for pre-emption—Vendee can improve his position any time up to decree.

A vendee can improve his postition at any time up to the date of the decree and thereby defeat the claim of the pre-emptor. A.I.R. 1942 Pesh. 5=198 Ind. Cas. 12.

——Time for pre-emption—Stage of suit or decree.

A pre-emptor, in order to succeed in his claim, must not only possess a superior right at the time of the sale but must retain the superiority on the basis of which he claims to pre-empt also at the stage of the suit and the stage of the decree. A.I.R. 1938 Lah. 242=40 P.L.R. 97=177 Ind. Cas. 674.

——Time for pre-emption.—Pre-emptor should have title not only at date of sale but also at date of suit.

In a suit for pre-emption, the pre-emptor must show a subsisting title not only at the date of the sale-deed forming the subject of the pre-emption but also at the date of the suit. Consequently, if, during pendency of such a suit, a collusive suit is instituted to make out a case for substantiating the title of the pre-emptor and that suit is decided by a compromise entitling him to claim pre-emption, no benefit can be derived by the pre-emptor from the compromise which is made subsequently to the institution of the pre-emption suit. A.I.R. 1936 Oudh 250=1936 O.W.N. 337=12 Luck. 101=161 Ind. Cas. 825.

——Time for pre-emption—Right, if accrues only after sale of property.

A right of pre-emption will accrue only after the property is sold to another and not before. A.I.R. 1934 Cal. 3=37 C.W.N. 848=58 C.L.J. 143=147 Ind. Cas. 1040.

——Time for pre-emption.

The right of a plaintiff to enforce pre-emption, must exist, not only at the time of the sale but also at the time of the institution of the suit to enforce that right, and if the plaintiff loses that right after the sale, or at any time after the institution of the suit and before the decree fo pre-emption can be passed in his favour, he is put out of the Court and no relief can be granted to him. But the plaintiffs do not lose their right to enforce pre-emption when the preferential right of another to pre-empt the property has been extinguished and hence, does not stand in their way. A.I.R. 1934 Oudh 303=11 O.W.N. 317=9 Luck. 475=149 Ind. Cas. 258.

——Time for pre-emption—Date of sale—Test—Intention of parties.

In determining what is the date of the sale with reference to which the ceremonies prescribed by the Muhammadan Law are to be performed by a pre-emptor, the intention of the parties to the sale has to be looked at in each case.

The intention of the parties to the sale must, however, be manifested in some unequivocal way, for example, by delivery of possession or registration of the deed. A.I.R. 1931 Pat. 72=13 P.L.T. 38=130 Ind. Cas. 165.

——Time for pre-emption—Right to pre-empt a mortgage—Date of mortgage.

Where a right to pre-empt a mortgage is given under the terms of the *wajib-ul-arz*, the said right must be deemed to accrue when the mortgage is executed, and where no suit is brought to enforce the right to pre-empt at the time of the execution of the mortgage, it cannot be enforced when the said mortgage has been foreclosed. 105 Ind. Cas. 136=4 O.W.N. 787=A.I.R. 1927 Oudh 367.

——Time for pre-emption.

Unless the proprietary possession is transferred, the right of pre-emption does not accrue. 71 Ind. Cas. 318=1923 P.H.C.C. 22=A.I.R. 1923 Pat. 217.

——Time for pre-emption—Right to pre-empt—Right on date of decree.

The right to pre-empt must exist on date of decree. 32 All. 567=7 A.L.J. 715=6 Ind. Cas. 426.

——Time for pre-emption—Nature of property—Ceremonies.

There is no limit to the size of the property of which pre-emption may be claimed by a co-sharer but there is a limit in the case of those who have their claim on vicinage. The date of the conclusion of a bargain for the purpose of the performance of the *Talabs* should be ascertained from the intention of the parties. 35 Cal. 575, Rel. on. 41 Bom. 636=19 Bom. L.R. 549=42 Ind. Cas. 32.

——Time for pre-emption—Right to pre-empt when arises.

A Mahomedan pre-emptor's right of pre-emption does not accrue until the transfer to the stranger has become complete by the registration of the deed. 41 Cal. 943=18 C.W.N. 890=19 C.L.J. 601=23 Ind. Cas. 385.

——Time for pre-emption—Mahomedan Law—Sale when complete.

A sale is not complete for purposes of pre-emption till legal ownership passes from the vendor to vendee by registration of the conveyance whether or not there has been payment and delivery in cases where the immoveable property is about the value of Rs. 100. 41 Cal. 14, approved.

——When Moushat can be performed.

The test to determine when the right to pre-emption accrues is (1) has there been a real sale, (2) at what date had the pre-emptor knowledge that the sale was complete, (3) if the sale is in the eyes of the contracting parties complete it is not necessary for the pre-emptor to wait till registration before performing the ceremony of Moushat. 20 C.W.N. 1048=1 Pat. 174=34 Ind. Cas. 210.

——Time for pre-emption—Vendee stranger at date of sale—Subsequent acquisition of share by vendee—Cause of action.

In a suit for pre-emption the crucial date for a pre-emptor to succeed is the date of the institution of the suit and if he is able at that time to fulfil the conditions necessary to entitle him to a decree, a decree ought be made in his favour. Hence where suit for pre-emption was dismissed for deficiency of Court-fees in both the Courts below, which decree was subsequently reversed by the High Court and the case remanded, and the vendor in the meantime acquired the status of a co-sharer, *held*, that the suit could not be dismissed, the pre-emptor having been entitled to a decree at the date of the institution of the suit. *Held*, further that even if the date of a decree be looked to, that date must be when the decree ought to have been made in the plaintiff's favour and not a latter date. 6 A.L.J. 699=3 Ind. Cas. 42=31 A. 530.

27. Transfer, nature of.

See also PRE-EMPTION—NATURE OF TRANSACTION.

——Transfer, nature of—Agreement not running with land—Right not defeated.

A mere agreement to reconvey the property imports a person contract and affects or creates no interest in property, nor does the agreement run with the land and it does not by itself defeat the right of pre-emption. 115 Ind. Cas. 175=A.I.R. 1929 Nag. 224.

——Transfer, nature of—Benami—No right arises.

A device is permissible, a mask is not. A device is something different from a mask. It will be contrary to the public policy to allow a mask to conceal or shroud the real nature of a transaction or to permit a party to hoodwink the public and defraud the Court by putting a *false disguise*.

A purchase *was made benami* by the father in the name of his son; subsequently the son mortgaged the property to the father and finally a deed of relinquishment was executed by the son in favour of the father.

Held, that the deed of transfer was really either a deed of relinquishment or one of gift to put the parties in the position they really were in, and no right of pre-emption would arise in respect of transfer by son to the father. 88 Ind. Cas. 33=A.I.R. 1926 Oudh 112.

——Transfer, nature of—Compromise—By reversioners—Rights unaffected by pre-emption suit.

Two sonless propertiors sold certain lands and their collaterals instituted suits against vendor and his vendee for a declaration that the sale or sales effected by him would be in operative as against the reversionary rights; but suits were compromised. The vendees resold the lands to the reversioners for certain sums somewhat less than they had paid to their vendors and the reversioners mortgaged the same to them for the same amounts. Afterwards the son of one of the original vendees brought a suit for pre-emption.

Held, that the reversioners got the lands not as ordinary purchasers, nor in pursuance of a bargain in open market, but as reversioners and they could not be deprived of what they got as reversioners by a pre-emption suit. 106 Ind. Cas. 908=A.I.R. 1928 Lah. 174.

——Transfer, nature of—Creation of under-proprietary rights—Sale and not a lease.

Where an under-proprietary right is carved by a proprietor out of his full title, the transferee is given power of transfer, and the indulgence is granted to him so far that he is directed to have his name entered in the list of under-proprietors—Ch. 30 of the Village record—and the transferee is directed to pay his share of the revenue and Re. 1 malikana to the transferor and the price Rs. 1,200 paid for the transfer is described as nazarana zar-i-peshgi, to avoid a suit for pre-emption.

Held, that the transaction is a sale and not a lease. 87 Ind. Cas. 347=A.I.R. 1925 Oudh 714.

——Transfer—Nature of—Sale—Right to pre-emption arises.

Where a superior proprietor, in consideration of a price paid, executes a document creating an under-proprietary right, the transaction amounts to a sale of under-proprietary right and gives rise to a right of pre-emption. The principle also applies to the case of *birtdar* whose possession is for practical purposes that of an under-proprietor. 89 Ind. Cas. 421=12 O.L.J. 391=2 O.W.N. 367=29 O.C. 90=A.I.R. 1925 Oudh 624.

——Transfer, nature of—Dower—Not a sale.

Transfer of property to wife by a Mahomadan in consideration of partial release from dower debt is not a sale and is not, therefore, liable to pre-emption. 29 O.C. 108, Foll. 102 Ind. Cas. 142=2 Luck. 575=4 O.W.N. 400=A.I.R. 1927 Oudh 204.

——Transfer, nature of—Exchange—Sale in exchange for maintenance right.

A died leaving his mother *R* and his widow *B*. After *A*'s death there were disputes between these ladies and eventually *R* having been ousted from possession of the portion of *A*'s estate of which she had been in occupation filed a suit for maintenance against *B* and got a decree for maintenance. This maintenance was declared by the decree of the Court to be a charge on the estate of *A* in the possession of his widow. *B* failed to pay the maintenance which was due to her mother-in-law and eventually *R* brought a suit and got a decree and was on the point of enforcing her charge on this property by having it sold, when *B* executed a sale-deed in favor of R, whereupon the plaintiff brought a pre-emption suit.

Held, that in law the transaction was not a sale within

the meaning of S. 54, T. P. Act, and the proper classification of the transaction is to put it in the category of exchanges and, therefore, there was no cause of action for a suit for pre-emption. 114 Ind. Cas. 43=26 A.L.J. 169=A.I.R. 1928 All. 204.

——Transfer, nature of.

Exchange is not sale and consequently where sale alone gives the right of pre-emption there is no such right in case of exchange. 79 Ind. Cas. 495=46 All. 359=22 A.L.J. 292=5 L.R.A. (Civ.) 254=A.I.R. 1924 All. 390.

——Transfer, nature of—Indivisible sale—Effect of.

The effect of a sale being indivisible is merely to prevent some of the vendees from defeating the claim for pre-emption by pleading that their rights are not inferior to the plaintiff's although the rights of the others are inferior. But the claim can nevertheless be defeated if, before the suit is instituted, those vendees whose rights are inferior sell their share to a person who has an equal or superior right to that of the plaintiff. 69 P.R. 1898, Foll. 59 Ind. Cas. 712=3 L.L.J. 117=37 P.L.R. 1921.

——Transfer, nature of—Mortgage—Conditions immaterial.

Wazir Hasan, J.—The fact that a mortgage is beset with onerous conditions does make it nonetheless a mortgage for the purposes of pre-emption suit. In a claim for redemption if such conditions have the effect of extinguishing the equity of redemption the Court seized with the claim may relieve the mortgagor from those conditions. 101 Ind. Cas. 282=2 Luck. 470=4 O.W.N. 265=A.I.R. 1928 Oudh 103.

——Transfer, nature of—Absence of personal liability.

Where the mortgage was not particularly onerous except that the mortgagor was not personally liable for the mortgage debt but that there was no proof of the mortgage debt exceeding tho property while the mortgage was for a fixed period,

Held, that the transaction was a mortgage and not a sale and consequently was not liable to a right of pre-emption. 84 Ind. Cas. 901=6 L.L.J. 307=A.I.R. 1925 Lah. 55.

——Transfer, nature of—Perpetual lease—'Intiqal'—Can be pre-empted.

The word "intiqal" is a word of wide import and certainly includes a transfer by way of perpetual lease which can be pre-empted under the custom to pre-empt a lease. 33 All. 104, Foll. 100 Ind. Cas. 652=A.I.R. 1927 All. 788.

——Transfer, nature of—Test.

Where a perpetual lease was sought to be pre-empted on the ground that the lease was in fact a sale.

Held, that the relation of the premium paid to the value of the property and smallness of the rent would not in themselves be sufficient to prove that the transaction was a sale and not a lease. 75 Ind. Cas. 404=21 A.L.J. 734=4 L.R.A. (Civ.) 529=A.I.R. 1924 All. 60.

——Transfer, nature of—When not amounting to sale.

An eight anna under-proprietary share in a village was perpetually leased out and the lessees were granted heritable and transferable rights. The premium was Rs. 5,000 and the annual rent payable to the superior proprietor was Rs. 52 and Re. 1 was payable to the lessor under-propreitor which loss was to be recovered in a particular way but the lessees were not liable to be ejected in any case. As to the rent to be paid to the superior proprietor it was provided that the superior proprietor could recover it from the lessor under-proprietor without notice to the lessees.

Held, that the lease was not a sale so as to give rise to a right of pre-emption. 77 Ind. Cas. 79=10 O.L.J. 399=27 O.C. 167=A.I.R. 1924 Oudh 203.

——Transfer, nature of—When amounts to sale for purposes of pre-emption.

A perpetual lease granted by a superior proprietor conferring under-proprietary rights on the lessee where the annual rent reserved is substantially equal to the Government revenue assessed on the land and no right of re-entry is reserved, amounts for purposes of pre-emption to a sale.

A perpetual lease is not a form of conveyance which the Courts should go out of their way to encourage. 65 Ind. Cas. 97=24 O.C. 310=A.I.R. 1922 Oudh 81.

——Transfer, nature of—Proof—Mortgage by conditional sale—Onus on pre-emptor.

In the case of a transaction falling within the definition of mortgage by conditional sale it is the duty of pre-emptor to show that it is an out-and-out sale transaction. But in the absence of any circumstance showing the same, the transfer is a mortgage by conditional sale and no suit for pre-emption lies. 119 Ind. Cas. 108 =1929 A.L.J. 887=A.I.R. 1929 All. 619.

——Transfer, nature of—Intention—Oral evidence—Admissible.

As between the parties to the instrument, oral evidence of intention is not admissible for the purpose of construing the deeds or ascertaining the intention of the parties. But in a suit for pre-emption, a pre-emptor not being a party to the instrument cannot be debarred from adducing evidence to show the intention of the parties or the real nature of the transaction. 22 All. 149 (P.C.), Rel. on. 113 Ind. Cas. 263=5 O.W.N. 825=4 Luck. 68=A.I.R. 1928 Oudh 472.

——Transfer, nature of—Sale-deeds—Really deeds of exchange—Evidence admissible.

Extrinsic evidence is admissible for the purpose of showing that two documents, though purporting to be separate sale-deeds, are in reality part and parcel of the same transaction, which was one of an exchange. Such evidence which shows that two documents executed and registered on the same date are part and parcel of one transaction and in fact represent only one transaction, does not amount to leading evidence so as to vary the terms of a document. 103 Ind. Cas. 399=25 A.L.J. 723=A.I.R. 1927 All. 696.

——Transfer, nature of.

It is open to the plaintiff in a pre-emption suit to show from circumstantial or oral evidence that the real transaction was one of a sale and not a mortgage. 98 Ind. Cas. 989=A.I.R. 1927 All. 204.

——Transfer, nature of—Vendee can prove real nature.

A vendee is entitled to prove the real nature of the transaction against a third party in a pre-emption suit. In order to maintain a plea of estoppel in a pre-emption suit it must be proved that the plaintiff believed the representation made and brought his suit on the basis of it. 11 O.C. 176, Foll. 73 Ind. Cas. 372=A.I.R. 1924 Oudh 136.

——Transfer, nature of—Relinquishment by reversioner—For consideration—Not a sale.

An alienation by a Hindu widow is not void but only voidable at the instance of the reversioner. Reversioners do not succeed to the property alienated by a widow but have to sue for such property and establish their right to it. Therefore, a relinquishment for consideration by the reversioner to the vendee of the widow of his right to sue to set aside the sale does not amount to a sale for purposes of pre-emption. 99 Ind. Cas. 30=A.I.R. 1927 Lah. 147.

——Transfer, nature of—Sale or no sale—Transfer, nature of—Sale by Official Assignee—Same as private sale.

In every system of law the term may vary, but in all there is an official, be he called an assignee or trustee or any other name, and that official is by force of the statute invested in the bankrupt's property. But the property he takes is the property of the bankrupt exactly as it stood in his person with all its advantages and all its burdens. Hence a sale of bankrupt's property by Official Assignee is subject to right of pre-emption if any. 101 Ind. Cas. 368=49 All. 367=54 I.A. 204=29 Bom.L.R. 877=31 C.W.N. 853=1927 M.W.N. 444=4 O.W.N. 543=25 A.L.J. 617=26 M.L.W. 326=39 M.L.T. 166= A.I.R. 1927 P.C. 113=52 M.L.J. 658 (P.C.).

——Transfer, nature of—Sale by Official Receiver—Right of pre-emption is not barred.

Sale made by an Official Receiver does not stand on the same footing as a sale at a public auction and would not defeat the right of pre-emption. 71 Ind. Cas. 836=45 A. 186=4 L.R.A. (Civ.) 25=20 A.L.J. 918 =A.I.R. 1923 All. 57.

——Transfer, nature of—Sale for unascertainable amount—Not capable of pre-emption.

Sulaiman, J.—A sale which is not in l ieu exclusively of a cash price or such price as can be definitel y ascertained, is not capable of pre-emption.

It cannot be said that in all cases where the vendor is not in possession of the property, he purports to sell the sale is not capable of pre-emption. If a registered document is executed and the transfer is to a price paid or promised, or part paid and party promised, and comes within the meaning of S. 54 of the Transfer of Property Act, a sale is duly effected and the proprietary interests in the property passes, no matter whether the vendor is or is not in actual possession. A transfer of the property which has become vested in a reversioner on the death of a Hindu widow passes the proprietary title in it even though a suit may have to be instituted to recover actual possession. The vesting of such title is not postponed till the passing of a decree on which delivery of possession would be dependent. On the other hand, there may be cases where the cash price paid or promised is not the sole consideration for the transfer, but in addition thereto there is an undertaking by vendee to fight out a litigation and to incur all its costs as well as to run the risk of losing his money. In such cases that part of the consideration which is other than the cash price is not capable of exact valuation. It is, therefore, difficult to grant a pre-emptor a decree for pre-emption of the property sold in such a way. 100 Ind. Cas. 610=49 All. 488=25 A.L.J. 322=A.I.R. 1927 All. 361.

——Transfer, nature of—Sale or no sale—Possession of vendor—Not a test.

The mere fact that a person is out of possession would not alone justify the Court in holding that a sale of property by him is a sale of a share in law suit, if it is not accompanied by other circumstances such as a doubtful right.

A was the original owner. On his death the property was mutated in the name of his widowed daughter-in-law *B* who remained in possession till her death. During her lifetime *C* and *D*, nearest collateral heirs of *A*, instituted proceedings against *B* in relation to *A*'s property, and subsequently transferred a moiety of it in possession of *B* by virtue of a sale-deed for a price part paid and part retained by vendee for meeting the expenses of the litigation relating to that property.

Held, that the sale was out and out a sale in *praesenti*, that it was not a sale of doubtful right and that a definite sum was stated in the sale-deed as sale price of property : 9 O.C. 86 ; 9 O.C. 331 and A.I.R. 1922 Oudh 223 ; held to the widely stated : A.I.R. 1922 Oudh 156, Foll. 114 Ind. Cas. 755=5 O.W.N. 920=4 Luck. 185= A.I.R. 1929 Oudh 22.

——Transfer, nature of—Test—Intention.

The criterion for deciding the question whether a certain mortgage was a sale, is the real intention of the parties when entering into the transaction, and it has to be determined on all the available material including the terms of the document itself ; 100 P.R. 1898 (F.B.), Rel. on.

A mortgagor who mortgaged his land admitted tha the transaction was in reality a sale. The terms of the mortgage-deed were so onerous as to render there redemption impossible. But it was also found that there was no necessity to disguise the transaction as a mortgage for defeating the right of pre-emption of a third proprietor because the mortgagees were themselves the proprietors in the village.

Held : that the mortgage was not a sale in spite of the admission of the mortgagor to the contrary. 109 Ind. Cas. 26=A.I.R. 1928 Lah. 726.

——Transfer, nature of—Devices though permitted can be exposed.

It is not forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale though it may evidently have the same effect as a sale. A person, in order to defeat the right of pre-emption, may decide not to have a sale-deed but to have a mortgage-deed with onerous conditions making its redemption difficult or might have a lease executed in his favour making himself liable to pay a small sum, however insignificant, as rent. Under the law of pre-emption such devices are permissible because they fall short of the transaction of sale which alone can give rise to a right of pre-emption, but it does not mean that a disguise cannot be exposed. Where the parties had really entered into a sale transaction but disguised it under the mask or cloak of a different transaction such as hiba-bil-ewaz, the Court must look to the real nature of the transaction for the purpose of determining whether it could be subject to the right of pre-emption or not. 113 Ind. Cas. 263=5 O.W.N. 825=4 Luck. 68=A.I.R. 1928 Oudh 472.

——Transfer, nature of.

A transfer of property in possession of the alienees of a Hindu widow, effected by the reversioner in consideration of the transferee's supplying funds to conduct a suit for recovering possession from the alienees, is not pre-emptible.

Lindsay, J.—The transfer in such a case is of a share of a chance of success in a suit which is subsequently to be brought and not a sale. 100 Ind. Cas. 610=49 All. 448=25 A.L.J. 322=A.I.R. 1927 All. 361.

——Transfer, nature of—Construction—Intention of parties.

Every transaction should be considered on a construction of the document effecting the transfer and parties' intentions should be considered in the light of what they had agreed to.

Where a person possessed of no security and is dependent for his success upon the speculative instinct of a moneylender in financing his litigation, who gives him pecuniary and other assistance, but for which he would not have succeeded in the litigation, and the borrowers subsequently transfers in favour of the money-lender's certain property in consideration of all the benefits received, the transfer is a hiba-bil-ewaz or a gift pure and simple, but not a sale which gives rise to a right of pre-emption. 105 Ind. Cas. 116=4 O.W.N. 814= A.I.R. 1927 Oudh 576.

——Transfer, nature of.

The law does not say that a right of pre-emption

arises when a person transfers property after a manner which produces the same result as a sale without being a sale. 101 Ind. Cas. 193=4 O.W.N. 231=A.I.R. 1927 Oudh 161.

——Transfer, nature of—Test—Payment of price.

It is necessary for a transaction to amount to a sale that there should be a price paid or promised or part paid and part promised, which means that the price must be stated or ascertainable at the time of the deed : A.I.R. 1926 Oudh 196, Rel. on.

A certain share of the property was sold and the consideration for this share was to be one thousand rupees and the obligation on the part of the vendees to finance certain litigation in respect of the property. The condition was that the thousand rupees should be kept by the vendees towards the litigation expenses and that no account should be taken between the parties if the expenditure happened to be more or less than these thousand rupees.

Held : That the transaction was not a sale and no right of pre-emption could arise in respect of the share. 93 Ind. Cas. 114=13 O.L.J. 479=A.I.R. 1926 Oudh 368.

——Transfer, nature of—Transfer of under-proprietary rights.

A clause in a deed of transfer of under-proprietary rights reserving rent to the superior proprietor above the Government revenue is not the sole test to determine whether the transfer amounts to a sale or lease. The question has to be decided with reference to all the terms of the transfer deed. 84 Ind. Cas. 667=27 O.C. 243=11 O.L.J. 477=A.I.R. 1924 Oudh 426.

——Transfer, nature of—Transfer of under-proprietary right.

Condition to pay rent in excess of Government revenue is an essential incident of an under-proprietary right and such a condition is consistent with the sale of the right.

It cannot be laid down that where the rent exceeds the revenue the transaction cannot amount to more than a lease. (A.I.R. 1922 Oudh 229, Diss.). 84 Ind. Cas. 667 =27 O.C. 243=11 O.L.J. 477=A.I.R. 1924 Oudh 426.

——Transfer, nature of—Vendor out of possession —If and when can amount to sale.

The question, whether a sale is a genuine sale or a mere sale of a share in a law suit, is one to be determined on the facts of the case. It is not correct to say that no sale can be the subject of pre-emption where legal proceedings are necessary to obtain possession of the property. Where a sale-deed definitely purports to sell not a share in a law suit, but a share in a property to which the vendor definitely and clearly states his title the sale is subject to pre-emption, even though the sale is made for the purpose of raising funds to recover the property by litigation. It cannot be said that no right of pre-emption arises in any case in which the vendor was out of possession and litigation would be necessary to recover possession of the property. 66 Ind. Cas. 684=8 O.L.J. 403=A.I.R. 1922 Oudh 156.

——Transfer, nature of—Transfer to—Transfer by virtue of compromise decree in pre-emption suit.

A right of pre-emption cannot arise upon a transaction effected by virtue of a compromise decree in a pre-emption suit. For its accrual there must be a person acquiring property by a contractual relation of sale or transfer. 74 P.W.R. 1913=195 P.L.R. 1913=18 Ind. Cas. 957.

——Transfer, nature of—Sale or lease.

When Wajib-ul-arz of a village contained the condition that the co-sharer of a mahal must transfer, in case he desires to do so, his share first to the near co-sharer, a perpetual lease given by the co-sharer to a stranger, is a transfer within the meaning of the word 'intiqal' in the Wazib-ul-arz.

A perpetual lease for a substantial sum as premium is in reality a sale, though a nominal rent is to be paid by the lessee. 33 All. 104=7 A.L.J. 1022=7 Ind. Cas. 930.

——Transfer, nature of—Exchange—Co-sharer.

Where a right of pre-emption is given to one's own brothers or other 'Ekjaddi" relations in every cases of transfer by a co-sharer, even an exchange of land does give rise to such right. 31 All. 539=6 A.L.J. 735= 3 Ind. Cas. 903.

——Transfer, nature of—Permanent lease—If sale.

A permanent lease cannot be construed as a sale-deed and can be given no right of pre-emption. 10 O.C. 348. Foll. 16 C.W.N. 717=15 C.L.J. 649=14 Ind. Cas. 715.

——Transfer, nature of—Sale—Compromise of litigation.

If a suit for the recovery of property is compromised, it does not amount to a sale of the land but to an abandonment by the plaintiffs of their rights to obtain a decision of the Court in a case which was genuinely contested. Therefore no claim for pre-emption was competent. 1 Lah. 109=96 P.L.R. 1920=55 Ind. Cas. 865.

——Transfer, nature of—Sale or Exchange.

Pre-emption is not allowed when it is proved that the transaction is an exchange and not a sale. 50 Ind. Cas. 288 (Lah.).

——Transfer, nature of—Sale or exchange—Intention—Onus.

Where a transaction which is apparently an exchange is alleged to be a sale, the onus is heavy on the party alleging to prove his case. 104 P.R. 1918=140 P.L.R. 1918=49 Ind. Cas. 275.

——Transfer, nature of—Sale or mortgage—Evidence of.

Where a deed of sale absolute and unconditional is executed, the right of pre-emption immediately accrues and is not affected by the fact that later on an agreement to reconvey the property is entered into between the parties and registered. 74 P.R. 1918=163 P.W.R. 1918 =47 Ind. Cas. 418.

——Transfer, nature of—Sale of exchange—Purchase money—What is.

A transaction of exchange does not cease to be such because a small sum of money is paid in addition for adjustment of values. The amount payable eventually by a purchaser of property in respect of mortgage charges on it, is not part of the purchase money when the property is sold for a definite amount. 100 P.W.R. 1913= 199 P.L.R. 1913=19 Ind. Cas. 301.

——Transfer, nature of—Sale or mortgage—Onerous terms.

The onerous character of a mortgage does not necessarily lead to an inference that a sale was clothed in the form of a mortgage to defeat pre-emption. If on the evidence the lower appellate Court finds that a transaction is a mortgage and not a sale its finding cannot be disturbed in second appeal. 53 Ind. Cas. 892 (Oudh).

——Transfer, nature of—Sale—Genuineness of—How determined.

The question, whether a sale is a genuine sale or a mere sale of a share in a law suit is one to be determined on the facts of each case. The mere fact that legal proceedings are necessary to obtain possession of the property sold, is no ground for holding that the sale does not give rise to a right of pre-emption. 6 O.L.J. 29=49 Ind. Cas. 462.

——Transfer, nature of—Sale—Hiba-bil-ewaz.

Hiba-bil-ewaz is not a sale and confers no right of pre-emption. A transfer of property to a wife in lieu of dower is the Hiba-bil-ewaz and not sale. 18 O.C. 67=33 Ind. Cas. 622.

——Transfer, nature of—Alienation—Operation of Law—Compromise.

Where a pre-emption suit is decreed on a reasonable compromise filed in the suit, the vendee cannot be said to have alienated the property in suit but to have lost it by operation of law. 1 O.L.J. 456=25 Ind. Cas. 849.

——Transfer, nature of—Sale or mortgage—Transfer, short of sale to circumvent pre-emption—No fraud.

The onerous character of a mortgage cannot convert it into a sale. High improbability of redemption of a mortgage would not make it any the less a mortgage, for it is capable of redemption, however remote the chance. 16 O.C. 9=19 Ind. Cas. 679.

——Transfer, nature of—Sale or mortgage—When allowed.

A document apparently one of mortgage cannot be construed as a deed of sale merely because its terms are such as to render it improbable that the redemption will ever take place. There can be no pre-emption in a case of this type. 3 O.C. 213, Foll. 15 O.C. 1=14 Ind. Cas. 8.

——Transfer, nature of—Sale of property—Assignment of mortgage.

Within the rule of pre-emption a mortgage interests in a mauza is not a *haqquiyat* in land but only a debt charge on property and an assignment by one sharer of his mortgage interest over another's share, unlike a transfer of land furnishes no claim for the exercise of the right of pre-emption.

Obiter.—Where a sharer in a mauza who has also mortgage over another's share sells his *haqquiyat* in the mauza, the mortgage interest will not pass unless specified. 1903 A.W.N. 83=25 A. 421.

28. Waiver of right.

——Right of—Waiver—Acquiescence by pre-emptor—Vendee making improvements on property—T. P. Act, S. 51.

Acquiescence in itself is not sufficient to constitute waiver of the right of pre-emption. There must be knowledge of *all* the facts. If in a suit for pre-emption the defendant transferee who has effected improvements on the land pleads waiver of the right of pre-emption based on acquiescence of the plaintiff and also relies on S. 51 of the T. P. Act, it is essential to plead not only that the defendant thought that he was absolutely entitled to the land, but also that the plaintiff knew that the defendant so thought and was being led by the plaintiff's inaction so to think. In the absence of such express pleas the plaintiff is entitled to assume that the defendant knew the law and knew that the plaintiff had such time as limitation allows to sue for pre-emption, and despite that knowledge deliberately decided to run the risk of losing the land. I.L.R. (1949) Nag. 465=1949 N.L.J. 290.

——Waiver of right—Acquiescence—Identification of vendor by pre-emptor before Registrar at the time of sale—Endorsement of Registrar.

From the mere fact that the pre-emptors identified the vendor before the Registrar as the time of the registration of the sale sought to be pre-empted, and the endorsement of the Registrar that the document was read out to the vendor, it cannot be held that the pre-emptors knew the contents of the sale-deed and had acquiesced in the sale. A.I.R. 1950 All. 190.

——Waiver of right—Willingness to purchase—Pre-emptor if bound to show—Estoppel against pre-emptor—Circumstances.

A pre-emptor is not bound to show his willingness to purchase or to go to the vendor and vendee and warn them that he has a right to pre-empt. He would not be estopped from pre-empting the property unless the property was offered to him at the price settled and he had refused to purchase the same. 1950 A.W.R. 282=1950 A.L.J. 237.

——Waiver of right—Right—Member of a family whose karta had consented to the sale, if estopped from bringing a suit for pre-emption.

Where a karta of a family had knowledge of a sale and was a consenting party thereto, it cannot be said that that would estop a member of the family from bringing a suit for pre-emption in respect of that sale. 23 Luck. 139=A.I.R. 1949 Oudh 65=1947 O.A. (C.C.) 362=1947 A.W.R. (C.C.) 362=1947 O.W.N. 615.

——Right—Waiver—Mortgagee possessing pre-emptive right accepting mortgage money from vendee.

A mortgagee possessing a superior pre-emptive right cannot be deemed to have waived his right of pre-emption by reason of his accepting payment of the mortgage money from the vendee without any reservation of his right to sue to pre-empt the sale. 49 P.L.R. 61=A.I.R. 1948 Lah. 5.

——Right—Waiver—Qualified waiver—Waiver in favour of non-agriculturist—If could be availed of by agriculturist—Waiver before bargain of sale is complete.

In the domain of the pre-emption law, there cannot be a qualified waiver or a with a reservation in waiver favour of a particular class or in favour of a particular individual. A person who has once waiverd his right of pre-emption is debarred from asserting it afterwards either as a plaintiff or a defendant. Where, therefore, a person entitled to pre-emption when informed that the vendors proposed to sell the land, agreed to their selling it to a non-agriculturist in order that they should be able to get a price higher than he, as an agriculturist, was prepared to offer, be waived his right to purchase the property, and though the waiver in terms was limited in favour of a non-agriculturist, in law it would operate as a complete and absolute waiver, and the mere fact that the higher price has been paid by an agriculturist to whom the land was sold, would not suffice to revive the right which he relinquished by an express statement. The fact that at the time of the waiver there was no definite bargain of sale is immaterial, as the right of pre-emption is capable of waiver before any bargain of sale is complete. A.I.R. 1947 Pesh. 35.

——Waiver of right—Estoppel against right to claim—Circumstances—Knowledge of transfer at definite price and failure to assert rights.

Where a person having a right of pre-emption in respect of a property knows that it is being transferred to another for a definite price and does not assert his rights, he is estopped from claiming pre-emption subsequently. Further, waiver and acquiescence may be inferred from the circumstances and there need not be an offer or refusal or express consent to the sale. 21 Luck. 598=227 Ind. Cas. 24=1946 O.W.N. 291=1946 A.W.R. (C.C.) 209=1946 O.A. (C.C.) 209=A.I.R. 1947 Oudh 81.

——Waiver of right—Joint Hindu family—Refusal by manager.

Where the manager of a joint Hindu family refuses to purchase the property in the exercise of the right of pre-emption, his refusal is binding on all the members of the family disentitling them to enforce the right. A.I.R. 1939 All. 347=1939 A.W.R. 254=182 Ind. Cas. 319.

——Waiver of right—Pre-emptor attending auction but not offering amount equal to highest bid and keeping silent for about a year—Whether amounts to waiver.

Per *Addision* and *Ram Lall, JJ., in Letters Patent Appeal.*—A pre-emptor is not bound to bid at an auction sale, and if he does not do so, he does not lose his right of pre-emption, the principle being that he is entitled to pre-empt the property at the price fixed and paid, and is not bound to make that price higher by competitive bidding. Consequently, a pre-emptor's attendance at the auction and failure to offer an amount equal to the highest bid and subsequent silence for nearly a year does not amount to waiver. He is not precluded from later pre-empting the sale. A.I.R. 1939 Lah. 517=I.L.R. (1940) Lah. 88=41 P.L.R. 261=42 P.L.R. 696=186 Ind. Cas. 450.

——Waiver of right.

Presence at the auction-sale is no waiver but making no claim after that till the last day of limitation amounts to waiver. A.I.R. 1939 Lah. 517=I.L.R. (1940) Lah. 88=41 P.L.R. 261=42 P.L.R. 696=186 Ind. Cas. 450.

——Waiver of right.

To deprive a person of any legal right that he possesses, there must be clear and cogent evidence on the record justifying that course and the mere oral statements of a few witnesses deposing to certain circumstances from which it may be possible to infer that the prospective pre-emptor had knowledge of the sale would not be enough to prove that he had positively relinquished the enforcement of his right. A.I.R. 1937 Lah. 504=I.L.R. (1937) Lah. 143=39 P.L.R. 762=170 Ind. Cas. 271.

——Waiver of right.

Right of pre-emption can be waived by conduct—When it is obvious from the circumstances that the pre-emptor is neither willing nor able to pay the purchase-money, formal offer to the pre-emptor is not necessary. 1937 O.W.N. 1113.

——Waiver of right—Ridiculous offer.

Where a pre-emptor makes a statement which shows that he has no inclination to purchase the property and though he lives in the adjoining house, evinces no interest in the matter when the house is put to auction and even afterwards makes a ridiculous offer, his conduct amount to a complete waiver. A.I.R. 1935 Lah. 884=160 Ind. Cas. 937.

——Waiver of right—Omission to assert claim when sale takes place or is first mooted—Right to set up plea subsequently.

The right of pre-emption in Berar must be claimed at the time the sale takes place or is first mooted; it cannot be raised as a defence to a suit for possession. The *ratio decidendi* of the rule is that it is only a vested and ascertained right which could be pleaded as an answer to any suit and that the right of pre-emption being inchoate gives no such vested right to co-sharers as to entitle them to resists the claim for possession by pleading it in bar of the suit. A.I.R. 1941 Nag. 110=27 N.L.R. 354=132 Ind. Cas. 460.

——Waiver of right—Acquiescence.

An undivided share in a property was sold. The plaintiff filed a suit for pre-emption after performing the ceremonies. Subsequently, in a suit for partition to which the purchaser was a party, the plaintiff applied to the Court for exchange of certain plots which had been allotted to the purchaser's share:

Held, that the application by the plaintiff for exchange of plots did not amount to acquiescence in the sale so as to debar the plaintiff's right to sue for pre-emption. A.I.R. 1931 Pat. 72=13 P.L.T. 38=130 Ind. Cas. 165.

——Waiver of right—Change of circumstances—Fresh refusal necessary.

Where a certain portion of property is excluded and the price is reduced and the purchaser is a new person, the person having right of pre-emption should be approached afresh and his refusal obtained. Circumstances having changed the pre-emptor is not estopped from asserting his right of pre-emption. 119 Ind. Cas. 9=1929 A.L.J. 1178=51 All. 1046=A.I.R. 1930 All. 77.

——Waiver of right—Nature of plea—Who can avail—Limits of plea.

The plea of estoppel or waiver is open not to the vendees alone, but also to the rival pre-emptor who is impleaded in the suit.

By consenting to a transfer, a person entitled to pre-empt disqualifies himself from pre-empting and loses his right of pre-emption altogether. He cannot waive his right of pre-emption in favour of a particular person and reserve it as against others. A person, who has forfeited his right of pre-emption, is debarred from asserting it either as a plaintiff or as a defendant. 7 O.W.N. 859=A.I.R. 1930 Oudh 447.

——Waiver of right—Conduct.

A village was originally granted to one *C*. The original grantee died and the estate vested in pursuance of his will to ten persons living in England. The owners being desirous of disposing of the property it was divided into a number of blocks which were offered for sale locally. One block was purchased by *P*. Another block was purchased by one *D* and *M* few hours after *P*'s purchase and some days afterwards some other blocks were purchased by *M*. The agreement to sell, however, was entered into prior to the agreement of *P*. The blocks were in the market for sometimes. They were clearly delineated upon separate plans and separate khasras and Jamabhandis were prepared for each. *P* had procured a list of all the blocks containing the prices. He knew that they were all in the market and could be had for the prices mentioned. *P* had expressed his desire to purchase the blocks adjacent to his estate only and that he did not wish to purchase any other block.

Held: That *P*, under the circumstances must be taken by his conduct to have waived his right of pre-emption and that it would be inequitable to allow him to re-assert it. 119 Ind. Cas. 627=6 O.W.N. 763=56 I.A. 356=50 C.L.J. 555=4 Luck. 421=1929 M.W.N. 926=30 M.L.W. 885=A.I.R. 1929 P.C. 259=57 M.L.J. 637 (P.C.).

——Waiver of right—Should be unequivocal.

The refusal to purchase the property at a particular price cannot be deemed to be also a refusal to purchase it at a lower price. Where, however, a pre-emptor has previously expressed his clear intention not to pre-empt the property on any account and has waived his objection in unequivocal language to the property being sold to the vendee, he is estopped personally from pre-empting afterwards, even though the exact share or price at which it was going to be sold was not mentioned to him. 118 Ind. Cas. 170=1929 A.L.J. 528=A.I.R. 1929 All. 453.

——Waiver of right—What may amount to.

Where a person who happens to be a lawyer, reads the draft sale-deed containing the name of the proposed vendee and even then does not assert his own right to purchase property as a sharer in preference to a stranger he is deemed to be a consenting party and there is a waiver of the right. 118 Ind. Cas. 226 (All.).

——Waiver of right—Debars right to file or defend suit.

There can never be a conditional waiver. A person who has once waived his right to pre-empt is incompetent not only to sue for pre-emption but also to defend a suit for pre-emption on the ground of his right: A.I.R.

1925 Lah. 359 (F.B.), Foll. 102 Ind. Cas. 436=A.I.R. 1927 Lah. 501.

——Waiver of right—Applicability—Oudh.

The applicability of the rule of estoppel by acquiescence in cases of pre-emption in the Province of Oudh cannot be questioned : 22 O.C. 323 ; 10 O.C. 257 ; 5 O.C. 395 and 1 O.C. 254, Foll. 93 Ind. Cas. 640= 1 Luck. 68=29 O.C. 327=13 O.L.J. 212=3 O.W.N. 356=A.I.R. 1927 Oudh 86.

——Waiver of right—Prior refusal.

A pre-emptor, previously refusing to buy the property on the ground that he had no money should be considered to have waived his right to pre-empt. 92 Ind. Cas. 289=A.I.R. 1926 Lah. 243.

——Waiver of right—No re-assertion.

A person who has once waived his right of pre-emption, (by attesting the sale-deed, in this case) is debarred from asserting it afterwards either as a plaintiff or as a defendant. A.I.R. 1925 Lah. 359 (F.B.), Foll. 89 Ind. Cas. 928=7 L.L.J. 183=A.I.R. 1925 Lah. 442.

——Waiver of right—Operates for all times.

A person who has once waived his right of pre-emption is debarred from asserting it afterwards it is immaterial whether he occupies the position of a plaintiff or that of a defendant. 42 P.R. 1878, Foll. ; 8 P.R. 1919, Diss. from.

The right of pre-emption cannot be waived in favour of a particular person and reserved as against others. 86 Ind. Cas. 1038=6 Lah. 243=7 L.L.J. 125=26 P.L.R. 146=A.I.R. 1925 Lah. 359 (F.B.).

——Waiver of right—What may not amount to.

The pre-emptor's action in taking on lease a portion of the land sold cannot be treated as acquiescence in the sale itself. Similarly the pre-emptor's presence throughout certain partition proceedings initiated by vendees does not estop him from bringing a suit for pre-emption. 79 Ind. Cas. 140=A.I.R. 1925 Lah. 178.

——Waiver of right—Cumulative—Effect of—Conduct.

Where it was found that the father of the pre-emptor had taken an active part in the negotiations, and that the pre-emptor himself assisted in collecting the money and was not merely a silent spectator of the actual registration but took an active part there also and where he delayed in bringing his suit up to the last possible moment:

Held : That although the mere presence of pre-emptor at the time of registration is not sufficient to prove acquiescence, yet all these facts taken together point conclusively to such acquiescence throughout as must have influenced the vendee in concluding the transaction. 79 Ind. Cas. 132=A.I.R. 1925 Lah. 57.

——Waiver of right—Conduct not amounting to

The plaintiff was mortgagee with possession of some of the land sold and mortgagee without possession of certain other parts of it. Subsequent to the sale he had received the monies due to him as mortgagee from the vendee without any protest or without expressing any intention of enforcing his right of pre-emption.

Held, that the conduct of the plaintiff in accepting the money from the vendee was quite consistent with his claim to pre-empt and cannot be regarded either as an act of acquiescence or waiver of such claim on his part. 69 Ind. Cas. 648=A.I.R. 1924 Lah. 159.

——Waiver of right—By father—Son not bound.

Waiver of the right to pre-empt by father does not disentitle son to bring a suit for the pre-emption. 79 Ind. Cas. 448=A.I.R. 1924 Lah. 68.

——Waiver of right.

Where the plaintiff not only did not express his willingness to pre-empt, but prohibited the alienation.

Held, the right of pre-emption was not exercised and plaintiff could not get a decree for pre-emption. 39 All. 127 ; 42 All. 402, Foll. 76 Ind. Cas. 467=A.I.R. 1924 Mad. 57=45 M.L.J. 389.

——Waiver of right—Mortgage pre-emptor accepting money from vendee—Delay in suing—No waiver.

The mere acceptance of his money by a mortgagee pre-emptor from the vendee or his omission at the time to express a desire to purchase the property,is not a waiver of his right to a claim for pre-emption. 37 P.R. 1908, Foll.

Mere delay in suing is not a waiver of the plaintiff's right of pre-emption. A pre-emptor is allowed by the law twelve months to make up his mind, whether he will sue or not, and any delay in suing is immaterial provided that the suit is within the period of limitation. 67 Ind. Cas. 395=4 L.L.J. 204=A.I.R. 1922 Lah. 42.

——Waiver of right—Involuntary sale.

A custom of pre-emption by a co-sharer does not refer to involuntary sales. Where 10 sharers having notice of an involuntary sale of property do not bid for it in an auction sale, their silence amounts to a refusal. Where the vendor offered the property for sale to a co-sharer who refused it, then he can sell to anybody at that or higher price without notice a co-sharer. 42 All. 402 =18 A.L.J. 413=58 Ind. Cas. 93.

——Waiver of right—Acquiescence—Effect of.

In a suit for pre-emption by the Plaintiff as co-sharer and brother of the vendor the vendee being only a co-sharer it was found that Plaintiff was heavily indebted and had no money on hand and was willing to sell his own share to the vendee. *Held*, that this conduct of the plaintiff amounted to acquiescence in the sale and was a bar to the suit. 16 A.L.J. 779=47 Ind. Cas. 400.

——Waiver of right—Plaintiff present at sale—Absence of protest—Effect.

Where a person was present at an auction and did not bid at all and the auction was withdrawn for insufficiency of price and was put up for auction a second time and sold to a third person, *Held*, that the conduct of the person amounted to a refusal to purchase, and that he was not entitled to maintain a suit for pre-emption. 16 A.L.J. 492=46 Ind. Cas. 106.

——Waiver of right not exercising right for an unduly long period.

Not exercising right of pre-emption till more than a year after a sale, in spite of previous wide publication of the intention to sell, is tantamount to waiver of the right of pre-emption. 39 All. 127=14 A.L.J. 1138= 37 Ind. Cas. 511.

——Wavier of right—Bona fides of vendor.

Under a custom of pre-emption, a co-sharer wishing to sell should first offer the property to his other co-sharers. The vendor offered the property to plaintiff, who refused to give more than Rs. 160. He then sold the property for Rs. 235. In the circumstances the conduct of the plaintiff amounted to a refusal to purchase the property when offered to him. 37 All. 262=13 A.L.J. 288=28 Ind. Cas. 272.

——Waiver of right—Agreement in a compromise decree—Whether right of pre-emption was relinquished.

An agreement ran thus : —"The defendant No. 1 (Lekhraj) will have right to transfer the property. He may transfer to any one he likes. The plaintiff will have no objection ".

Held, that the right of pre-emption was not thereby relinquished. 6 A.L.J. 687=3 Ind. Cas. 515.

——Co-sharer—Waiver of right—Resumed muafiholder—Wajib-ul-arz—Pre-emptor accepting mort-

gage money from vendee—No waiver of pre-emptive right.

When there is nothing to show that a resumed *muafi* stands on the same level with a khalse land, the holder of such *muafi* cannot be a co-sharer for the purposes of pre-emption within the meaning of the wajib-ul-arz which confers the right of pre-emption upon *hissadars*. The mere fact that a pre-emptor accepts from the vendee mortgage money due upon the property which is the subject of pre-emption does not amount in law to a waiver of his pre-emptive right. (1905) 2 A.L.J. 145.

——Waiver of right—Refusal to purchase at fair price.

The conduct of the plaintiffs in refusing to purchase the property except at a price far below its real value amounted to a waiver and they could not enforce their right of pre-emption. Plaintiffs had not reasonable ground for entertaining the belief that Rs. 2,000 was excessive price. 1 Lah. 51=69 P.L.R. 1920=42 P.W.R. 1920=55 Ind. Cas. 879.

——Waiver of right—Sale of property by judgment-debtor under O. 21, R. 83 (2), C. P. Code—Waiver.

Where a judgment-debtor sells property under O. 21, R. 83 (2) of the C. P. Code and even though it does not become absolute until confirmed by the Court, it cannot be said to be a sale by a Court in execution of the decree and thus not liable to pre-emption. The failure of a person entitled to pre-empt to outbid the purchaser at an auction sale does not amount to waive 52 Ind. Cas. 337 (Lah.).

——Waiver of right—Second sale—Purchaser from vendee having superior right.

A plaintiff in a pre-emption suit cannot successfully pre-empt a defendant who is the assignee of the original vendee on the ground that he had waived his right to pre-emption on the original sale. 8 P.R. 1919=49 Ind. Cas. 147.

——Waiver of right—General assent to sale.

The vendee went to the village in which the land in suit was situated and informed some of the villagers including the plaintiffs that he contemplated purchasing the land. A general assent was given to such purchase, but the agreement to purchase, was not at the time entered into between the vendor and vendee and no offer was made to the pre-emptors after the sale. *Held*, that the plaintiffs had not by their conduct waived their right of pre-emption and they were not debarred from exercising their right. 27 All. 670, Appr. 50 P.R. 1918=19 P.L.R. 1918=40 P.W.R. 1918=43 Ind. Cas. 1006.

——Waiver of right—Pre-emptor assisting in sale and demarcating land.

A pre-emptor who assists in negotiating a sale and demarcating the field sold must be deemed to have waived his right to pre-empt. 8 Ind. Cas. 246, Foll. 76 P.W.R. 1912=48 P.R. 1912=45 P.L.R. 1912=13 Ind. Cas. 561.

——Waiver of right—Mortgagee's suit for possession—Owner of property till death of another person, if has a right of pre-emption.

An owner of certain property till the death of another person has a right of pre-emption on the strength of such property. But a person who would become the owner on the death of another person has no such right.

A suit by a mortgagee for possession does not constitute a waiver of his right of pre-emption as the causes of action in the two suits are different. 99 P.R. 1910=42 P.L.R. 1911=8 Ind. Cas. 1155.

——Waiver of right—Pre-emptor taking active part in negotiations for sale to the vendee.

If the pre-emptor takes active part in negotiations for sale brings his suit just before the expiry of limitation and was present at, the time mutation was effected in favour of the vendee he must be deemed to have waived his right of pre-emption. 86 P.L.R. 1910=8 Ind. Cas. 246.

——Waiver of right—Proof.

Where the trustee of a temple executed an othi mortgage containing a right of pre-emption and subsequently called on the mortgagee to advance a further sum for temple purposes and the mortgagee expressed his readiness to advance the sum if the mortgagor would satisfy him that it was for temple purposes and the mortgagor undertook to satisfy him provided he would deposit the sum with a third party, such conduct does not amount to waiver of the right of pre-emption on the part of the mortgagee. (1911) 1 M.W.N. 263=9 M.L.T. 495=9 Ind. Cas. 1010.

——Waiver of right—Former proprietor—Effect on other proprietor's right.

The withdrawal by a former proprietor of his claim for pre-emption with regard to a portion of the property sold gives an opportunity to the person, who has the next best right, to enforce pre-emption in rgard to the portion about which the former had withdrawn his claim. 2 U.P.L.R. (J.C.) 61=22 O.C. 373=55 Ind. Cas. 830.

29. Wajib-ul-arz.

See also PRE-EMPTION—(1) CUSTOM.
(2) CUSTOM OR CONTRACT.

(a) Conflict in.
(b) Construction.
(c) Evidentiary value.
(d) Interpretation.
(e) Partition.
(f) Preferential claim.
(g) Miscellaneous.

(a) Conflict in.

——Wajib-ul-arz—Conflict in—Nature—Effect.

The mere fact that subsequent *wajib-ul-arzes* are fuller raises no presumption that they were not records of a custom; for the later *wajib-ul-arzes* may very well be mere amplifications of the previous *wajib-ul-arzes*. The case may be different when they absolutely contradict the entries in the previous *wajib-ul-arzes* and cannot be reconciled with them. 33 All. 196, Foll. 87 Ind. Cas. 298=47 All. 470=23 A.L.J. 283=A.I.R. 1925 All. 449.

——Wajib-ul-arz—Conflict in—Construction—Reading together.

There were two *wajib-ul-arzes* prepared within an interval of about six or seven years. The earlier one contained a classification of pre-emptors as follows:—

1. Own brothers; 2. Co-sharers in the same patti; 3. Co-sharers in other pattis. The second document gave only one classification of pre-emptors, namely; "own brothers and co-sharers of the village."

Held: That the two *wajib-ul-arzes* ought to be read together and that under the custom of pre-emption an own brother of the vendor had a better right to take the property than a co-sharer in the village. 92 Ind. Cas. 468=6 L.R.A. Civ. 112=A.I.R. 1925 All. 342.

——Wajib-ul-arz—Conflict in.

The presumption arising from the entry in the *wajib-ul-arz* prepared admittedly during a settlement period, cannot be negatived by a different entry contained in a *wajib-ul-arz*, which though an earlier one was not so clearly a final record of enforceable custom or contract. 92 Ind. Cas. 335=5 L.R.A. Civ. 609=A.I.R. 1925 All. 44.

——Wajib-ul-arz—Conflict in—Explanation as to.

Where under the first *wajib-ul-arz* a right was given

in the case of transfer by mortgages as well as sales, whereas in the latter *wajib-ul-arz* the right was confined to sales and it was expressly stated that there was no right of pre-emption as regards mortgages :

Held : there was nothing to prevent the co-sharers in the later *wajib-ul-arz* from abrogating that part of the custom and the two *wajib-ul-arz* were not necessarily conflicting. 92 Ind. Cas. 335=5 L.R.A. Civ. 609= A.I.R. 1925 All. 44.

——Wajib-ul-arz—Conflict in.

Where the *wajib-ul-arz* of 1884 gave a right of pre-emption to Zamindars but that of 1863 would not show such right, *held*, that the presumption created by the *wajib-ul-arz* of 1894 was destroyed by that of 1863. 78 Ind. Cas. 508=5 L.R.A. Civ. 228=A.I.R. 1924 All. 925.

——Wajib-ul-arz—Conflict in—Negatives existence of custom of pre-emption.

The *wajib-ul-arz* of the year 1880 recited that there was a custom of pre-emption and also gave details of the custom. In the *dastur dehi* of the year 1843 there was not only no reference to the right of pre-emption, but that document stated clearly that all the co-sharers had power to transfer property in their possession. This power had not been subjected to any restrictions.

Held : that this clearly negatives the existence of a right of pre-emption in the year 1843, as there was absolutely no evidence to show that there was any occasion for the custom to grow up between the years 1843 and 1880 when the *wajib-ul-arz* relied on by the plaintiff was drawn up and as these two entries conflicted with each other, no custom of pre-emption could be held to have been proved. 64 Ind. Cas. 416=19 A.L.J. 861.

——Wajib-ul-arz—Conflict in.

Successive wajib-ul-arzes not in agreement—Custom—Evidence of rights 'inter se'—Remand. 1905 A.W.N. 266=2 A.L.J. 790.

——Wajib-ul-arz—Conflict in.

Custom—Prior wajib-ul-arz recording a custom of pre-emption—Subsequent wajib-ul-arz containing an entry to the effect that the custom did not exist—Evidence. 1901 A.W.N. 29.

(b) Construction.

——Wajib-ul-arz—Construction — Insolvent's property by Official Assignee.

On the application of a creditor of a person adjudged an insolvent his property was sold by public auction by the Official-Assignee.

Held, that the village custom of pre-emption as recorded in the wajib-ul-arz referred to voluntary sales by co-sharers, and was not applicable to an involuntary sale by a Court through the Official Assignee. 42 All. 402=18 A.L.J. 413=58 Ind. Cas. 93.

——Wajib-ul-arz — Construction — Bhatija — Meaning.

A wajib-ul-arz gave a right of pre-emption first to "*Bhai Bhatija Sarik Haqiyat.*" The plaintiff pre-emptor was the own brother of the vendor, the vendees were cousins, being the descendants of the great-grandfather of the vendor.

Held, that the word 'Bhatija" in the vernacular has a far wider meaning than the words "brothers" and nephews in English, and that the plaintiff had no preferential right over the vendees. 18 A.L.J. 454=2 U.P.L.R. (All.) 158=56 Ind. Cas. 183.

——Wajib-ul-arz—Construction — Hissadar qaribi—Meaning.

The expression "hissadar qaribi" in a wajib-ul-arz does not necessarily mean a blood relation. 56 Ind. Cas. 148 (All.).

——Wajib-ul-arz—Construction—Co-sharers.

One wajib-ul-arz recorded a right of pre-emption and another four years later referred to the first one. Both together mean that every co-sharers must offer his share to the co-sharers before sale. 17 A.L.J. 461= 50 Ind. Cas. 90.

——Wajib-ul-arz—Construction.

On the construction of a wajib-ul-arz, *Held*, that even in cases of a sale in favour of a relation a nearer relative of the vendor should have a right of pre-emption. 43 Ind. Cas. 2 (All.).

——Wajib-ul-arz—Construction.

The son-in-law of a Hindu is not *qarabatdar Karibi*. 14 A.L.J. 447=33 Ind. Cas. 495.

——Wajib-ul-arz — Construction — Rishtadar Karibi—Rishtadar Baid.

A connection by marriage is not even Rishtadar Baid and cannot entitle a person to pre-emption against a Rishtadar Karibi to whom a prior right has been given by the wazib-ul-arz. 9 A.L.J. 84=13 Ind. Cas. 954.

——Wajib-ul-arz—Construction of.

Where a wajib-ul-arz gives a right to a co-sharer to mortgage or sell his property provided he has first offered it to a select class of persons, the right to pre-emption arises, the moment the co-sharer mortgages or sells in contravention of the terms of the wahib-ul-arz. 11 Ind. Cas. 628 (All.).

——Wajib-ul-arz— Construction — His sadar Shaik Milkaiat—Meaning.

Where in pursuance of a wajib-ul-arz of 1833 granting a right of pre-emption to a cosharer against strangers, the right was first given to a brother and secondly to a "Hissadar Shaik Milkaiat" the latter ought to be treated as a co-sharer in the property sold. 11 Ind. Cas. 576 (All.).

——Wajib-ul-arz — Construction — Shurkai Deh—Meaning of.

The words "Shurkai Deh" mean and imply that the pre-emptor tin question must be a partner with the vendor in the same Mahal. 11 Ind. Cas. 320 (All.).

——Wajib-ul-arz — Construction — "Sharik Deh", meaning—Construction.

The word "Sharik Deh" in their natural sense imply that the co-sharer in question shares with the vendor in the same unit of the village. 11 Ind. Cas. 290 (All.).

——Wajib-ul-arz—Construction.

Where a wajib-ul-arz gave a right of pre-emption first to brothers or descendants from the same stock and secondly to *Hissadaran Patti Dip*, *held*, the expression meant co-sharers in the same patti. 9 Ind. Cas. 856 (All.).

——Wajib-ul-arz—Construction.

A wajib-ul-arz contained three classes of pre-emptors (1) Hissadar Karibi, (2) other hissadaran of the thoke, (3) *hissadars* in other thokes.

Held, Hissadar Karibi means nearness in space and not in blood. 9 Ind. Cas. 276 (All.).

——Wajib-ul-arz—Construction.

A wajib-ul-arz provided pre-emption in favour of *apna shafi*.

Held '*Apna Shafi*' meant co-sharer near in space *i.e.*' in the same patti and not co-sharer who is near in blood relationship. 33 All. 299=8 A.L.J. 51=9 Ind. Cas. 49.

——Wajib-ul-arz—Construction—Sharik.

The word 'sharik' in a wajib-ul-arz which gave right of pre-emption to *Sharik Hakiat Deh* means a partner or co-sharer of the vendor not a co-sharer in any one of the *mahals* into which the village was partitioned because

by partition a co-sharer ceases to be a *sharik* in the *mahal*, in which he has no share. 7 A.L.J. 1066=7 Ind. Cas. 777.

——Wajib-ul-arz—Construction.

Contract or custom—Absence of proof that the record is one of contract—Presumption—(1897) A.W.N. 3 foll. 33 A. 85=7 Ind. Cas. 181=7 A.L.J. 902 (F.B.).

——Wajib-ul-arz— Construction — How far controlled by incidents of Mahomedan Law.

In a suit for pre-emption based on the *wajib-ul-arz* if the *wajib-ul-arz* is to be regarded as a contract, the same laws of interpretation are to be applied as to other contracts, if on the other hand, it is to be regarded as a record of usage or custom, the custom (if the terms of the instrument be clear), may be assumed to be recorded with all the incidents admitted to attach to it and no new incidents not mentioned in the record ought to be imported into it unless it be the manifest intention of the parties that they should be so imported. S.D.A. (1866). P. 162 ; N.W.P. (F.B.) (1866—67 P. 96) A.W.N. (1894) 193, Fol. 7 A.L.J. 660=7 Ind. Cas. 263.

——Wajib-ul-arz—Construction—Right *inter se*. 7 Ind. Cas. 261=7 A.L.J. 653.

——Wajib-ul-arz—Construction.

Where a wajib-ul-arz provides that a co-sharer must offer the property first to a co-sharer in patti, then to co-sharer in Mahal and then to the owners of the mahals, it means that a right of pre-emption is created. 7 A.L.J. 610=6 Ind. Cas. 920.

——Wajib-ul-arz—Construction—Effects of preamble.

Variation in terms—Custom or contract. 7 A.L.J. 519=6 Ind. Cas. 151.

——Wajib-ul-arz — Construction — "Hissadarkaribi."

Held, that when a wajib-ul-arz gave to a *Hissadarkarib* a superior right of pre-emption to any other hissadar.

Held, that the words hissadarkaribi' meant nearness in space. 6 Ind. Cas. 702 (All.).

——Wajib-ul-arz Construction—6 Ind. Cas. 587=7 A.L.J. 406.

——Wajib-ul-arz — Construction of — Custom or contract.

The words in the wajib-ul-arz were "Is waste ikrar ham malikan wa lambardaran la yeh kai ke la miad bando bast wa ayinda ta takmil bandobust sani paiband rakhar amal daramad kareuge.

Held, that the record was a record of contract and not of custom. 32 A. 399=7 A.L.J. 365=6 Ind. Cas. 129.

——Wajib-ul-arz—Construction—Contract or custom. 5 Ind. Cas. 212=7 A.L.J. 213=32 A. 201.

——Wajib-ul-arz—Construction—'Manzur Hai'.

The words *Ainda Jari Rakhana Rawaj Shufa Ka Hunko manzur Hai* means that the co-sharers desired to continue the existing custom of pre-emption. 32 All. 187=7 A.L.J. 173=6 Ind. Cas. 114.

——Wajib-ul-arz—Custom or contract—Construction. 22 A. 1, foll. 32 A. 265=7 A.L.J. 133=6 Ind. Cas. 17.

——Wajib-ul-arz—Construction—Intiqual if includes a usufructuary mortgage.

"Intiqual" includes a transfer by usufructuary mortgage. 10 Cr.L.J. 363=3 Ind. Cas. 721 (All.).

——*Wajib-ul-arz*—Construction—Custom or contract—Silence as to right of pre-emption in wajib-ul-arz of last settlement—Duties of Settlement Officers when preparing record of rights. 3 Ind. Cas. 2=6 A.L.J. 779=31 A. 533.

——Wajib-l-arz—Construction of — Inconsistent clauses to be rejected.

A *wajib-ul-arz* ran thus:—"A co-sharer who wishes to sell or mortgage his share must first offer to his co-sharer in the village (*Shirik debi*) after him to a *hissadar patti* degree by degree and after him to a hissadar in the village and after these persons to a stranger".

Held, that as the first clause is inconsistent with the third and the second and third clauses are plain and unambiguous, therefore the first clause must be rejected. 6 A.L.J. 652=3 Ind. Cas. 496.

——*Wajib-ul-arz*—Construction—Contract — Custom. (1908) 6 A.L.J. 9=1 Ind. Cas. 82.

——Wajib-ul-arz—Construction of document.

A *wajib-ul-arz* recorded a right of pre-emption as existing in favour of certain persons "for such price as a stranger may pay."

Held, that the right of pre-emption only arose in the case of a sale to a stranger. 27 A. 457, foll. 1908 A.W.N. 251=5 A.L.J. 655.

——*Wajib-ul-arz*—Construction of document—Custom or contract. 1908 A.W.N. 98.

——Wajib-ul-arz, construction of contract—Partition—Co-sharer.

Where *wajib-ul-arz* opened with a declaration that the zemindars and the vetdars, agreed that up to the term of settlement and in future to the termination of the next settlement they should abide by the following conditions and act upon them, and one of the conditions related to pre-emption, *held*, that the record was one of contract and not custom. Where a *wajib-ul-arz* recognised a right of pre-emption in favour of co-sharers descended from a common ancestor, and by reason of a subsequent partition, the pre-emptor though descended from the same stock as the vendor had ceased to hold any share in the *mahal*, portion of which was the subject of sale. *Semble*, if the right recorded was one existing by custom, the plaintiff would be entitled to pre-empt. 5 A.L.J. 539=1908 A.W.N. 246=30 A. 544.

——*Wajib-ul-arz*—Construction of document—Custom or contract. 1908 A.W.N. 121=5 A.L.J. 470. On appeal from. 1905 A.W.N. 219=2 A.L.J. 612 =28 A. 124.

——*Wajib-ul-arz*—Construction of documents—Mahomedan law. 1908 A.W.N. 153=30 A. 372=5 A.L.J. 414.

——*Wajib-ul-arz*—Construction of document. 1908 A.W.N. 59=5 A.L.J. 182.

——*Wajib-ul-arz* — Construction of document—"Shurkayan-i-shikmi." 1908 A.W.N. 16=30 A. 77 =5 A.L.J. 52.

——Wajib-ul-arz—Construction of document—Custom or contract.

The zamindars of a village in the district of Saharanpur, in *wajib-ul-arz* attested on the 8th November, 1861, declared they would "be bound by and act upon the undermentioned conditions" for thirty years, until the completion of the next settlement. Amongst the "undermentioned conditions" were certain conditions relating to the right of pre-emption. A fresh settlement was commenced in 1890, and in the *wajib-ul-arz* prepared at that settlement it was provided that "as to the remaining customs in the village the record of rights prepared at the former settlement is to be looked at."

Held, that the earlier wajib-ul-arz recorded, not a custom, but a contract, which came to an end with

the term of two settlement, and the latter *wajib-ul-arz* could not be construed as the record of a custom after the lapse of only thirty years there was therefore no right of pre-emption in the village. 1907 A.W.N. 285.

——Wajib-ul-arz—Construction of document—"Sale"—"Exchange".

Held, that the word "bai" used in the pre-emptive clause of a *wajib-ul-arz* would include a transfer by way of exchange. 7 A. 626, foll. 1907 A.W.N. 280=4 A.L.J. 756.

——*Wajib-ul-arz*—Construction of document. 1907 A.W.N. 55=4 A.L.J. 222=29 A. 303.

——*Wabib-ul-arz*—Construction of document. 27 A. 457. 1907 A.W.N. 95=4 A.L.J. 352.

——*Wajib-ul-arz*—Construction—Custom or contract—Construction of document. 1907 A.W.N. 87=4 A.L.J. 191.

——*Wajib-ul-arz*—Construction of document. 1906 A.W.N. 247=3 A.L.J. 515. *See also* 1906 A.W.N. 308=3 A.L.J. 830; 1906 A.W.N. 249=3 A.L.J. 646; 1906 A.W.N. 205=28 A. 679.

——Wajib-ul-arz—Construction of document—Custom or contract. 27 A. 552, foll. 1906 A.W.N. 92=3 A.L.J. 207=28 A. 466.

——Wajib-ul-arz—Construction of document—Meaning of the term 'ekjaddi'. 23 A. 32, foll. (1906) A.W.N. 72=3 A.L.J. 179.

——Wajib-ul-arz—Construction — Contract—Registration—Termination of settlement.

A contract of pre-emption recorded in a *wajib-ul-arz* does not require registration. In the absence of the evidence to the contrary such a contract will be held to last only as long as the settlement during which it is made continues. Where the language of *wajib-ul-arz* is abscure, it affords no basis for a right of pre-emption. 1906 A.W.N. 149=3 A.L.J. 307.

——*Wajib-ul-arz*—Construction—Retention of same *wajib-ul-arz* after division of village into mahals—Hissedarm same deh hissedaram patti, on a footing. 1906 A.W.N. 134=28 A. 614.

——Wajib-ul-arz—Construction of document—'Quimat'.

Held, that the word *'quimat'* as used in the pre-emptive clause of a *wajib-ul-arz* is wide enough to include the consideration given for a usufructuary mortgage with possession as well as for a sale. 1906 A.W.N. 82=3 A.L.J. 215=28 A. 454.

——*Wajib-ul-arz*—Construction of document—Partition of village into separate mahals. 1906 A.W.N. 2=28 A. 286=2 A.L.J. 833.

——*Wajib-ul-arz*—Construction of document—Partition of village into separate mahals—Provisions of existing *wajib-ul-arz* as to pre-emption copied verbatim into *wajib-ul-arzes* of new mahals. 1905 A.W.N. 115=27 A. 602=2 A.L.J. 313.

——*Wajib-ul-arz*—Construction of document—Rules of the Board of Revenue for the settlement of Gorapkhpur and Basti (1888) Rule 38. 1897 A.W.N. 3, foll. 1905 A.W.N. 16=2 A.L.J. 6.

——*Wajib-ul-arz,* construction of—Applicability of settlement—*Wajib-ul-arz* after partition. 22 A. 1, foll. (1904) 1 A.L.J. 33=1907 A.W.N. 40 (N.)=29 A. 299 (N.).

——*Wajib-ul-arz,* construction of—Uncle not included in the category of bhai hakiki or bhatya hakiki. (1905) 2 A.L.J. 687.

——Wajib-ul-arz—Construction, rule of.

Where the pre-emptive clause in a *wajib-ul-arz* ran as "if any co-sharer desires to sell or mortgage, etc., let him sell first to so and so, and then to so and so".

Held, by *Stanley, C.J.*: It is a mere record of a pre-existing custom and not a new contract. 1897 A.W.N. 3; 25 A. 90, foll. 26 A. 10=1903 A.W.R. 162.

——Wajib-ul-arz—Construction of document.

The pre-emption clause of a *wajib-ul-arz* ran in the following terms: — *"Bahalatinti-qual-i-haiqyat kish hissadar-ki istehquq-in-kari-dari shurkai mahal shakhs ghairpar-ba-quimat munsaib mugadmam Sadjha Jawega."*:

Held, that no right of pre-emption could arise thereunder upon the making of a usufructuary mortgage in favour of a stranger, the words *"kharidari"* and *"quimat"* pointing to sale only being within the contemplation of the framers of the document. (1902) A.W.N. 16.

——Wazib-ul-arz — Construction — Hissadar Quaridi.

If a village is further divided into sub *pattis* also at the time of the *wajib-ul-arz* the word Hissadar Quaribi means a co-sharer in the sub-division of the patti. 2 Ind. Cas. 855 (All.).

——Wajib-ul-arz—Construction — Kareebi and Karabatdaran, meaning of.

Where the word 'kareebi' in a *wajib-ul-arz* is used together with the word "Karabatdaran", the same meaning should be attached to both words. 1 Ind. Cas. 390 (All.).

——Wajib-ul-arz—Construction of document—'Hissadara deli' not ordinarily inclusive of muafidars.

As a general rule of construction to be applied to *wajib-ul-arzes* the co-sharers of mahals and the owners of muafi plots in the mahals have no necessary connection with each other, and it does not follow that a custom adopted by or existing among the members of the khalisa co-parcenary body should be applicable to muafidars. 20 A. 429, foll. 1902 A.W.N. 68=24 A. 302.

——Wajib-ul-arz—Construction — Presumption—Evidence Act, S. 35.

In the absence of any evidence that the right of pre-emption recorded in a *wajib-ul-arz* is one arising from contract, the presumption is that it is a record of custom. The words "every co-sharer is *entitled* to the right of pre-emption," etc., makes custom the more probable source of right. The record of a custom in the *wajib-ul-arz* is *prima facie* evidence of its existence and the onus will be shifted on to the other side to prove the incorrectness of the record. The omission to record pre-emption in a later *wajib-ul-arz* is no evidence that the custom evidenced by an earlier record has fallen into desuetude. The word *'Nadarad'* only means a 'nill' or 'nothing to record,' and does not amount to a positive statement of the non-existence of custom mentioned in a earlier record, and is of no more value than if it had been left blank. The authoriy of the recording officer being confined by the rules for recording customs which the local proprietors may ask him to record, any record of the existence of non-existence of a custom which the officer makes of his own accord will be *ultra vires* and will be of no evidentiary value. A record of *existing* custom which the *wajib-ul-arz* is under the rules cannot, by its omission or positive statement be adduced as evidence of the non-existence of any custom. 1902 A.W.N. 207=25 A. 90 (F.B.).

——Wajib-ul-arz — Construction — Hissadar Karibi—Zemindar.

The construction of the words *hissadar karibi* in a *wajib-ul-arz* and the circumstances of the village and tenure. Except in a Zemindari village they need not refer to blood relationship of the pre-emptor. 1901 A.W.N. 183=24 A. 119.

——Wajib-ul-arz—Construction of document—Meaning of the term 'hissadaran shikmi'.

Held, that the expression 'hissadaran shikmi' as used in the clauses of a *wajib-ul-arz* dealing with various classes of persons who were entitled to pre-emption in preference to strangers did not necessarily imply any idea of subordination, but was rightly considered applicable to persons who were co-sharers in the *khata* of the *pati* in which the land sold was situated. 1901 A.W.N. 63=23 A. 260.

(c) Evidentiary value.

——Wajib-ul-arz—Evidentiary value.

Absence of an actual transfer in accordance with a custom recorded in a *wajib-ul-arz* in a pre-emption does not rebut the presumption raised by the *wajib-ul-arz.* 84 Ind. Cas. 1017=5 L.R.A. Civ. 11=A. I.R. 1924 All. 723.

——Wajib-ul-arz—Evidentiary value—Unusual language—Record cannot be treated as a valid custom.

A *wajib-ul-arz* provided that a co-sharer is at liberty to sell his share but that he must first offer it to co-sharers in his own *patti* preference being given to near relations, that if none of the persons just mentioned were willing to take the property he is at liberty to sell to co-sharers in any *thok* or *patti.* These words however were qualified by the addition of the words "*jis se razi ho*".

Held, that the plaintiff, pre-emptor cannot maintain a suit, unless he can show that he is a person whom the vendor approved of as a purchaser of the property. Bearing in mind the unusual language of this document it is not proper to treat it as a valid record of an existing custom. 74 Ind. Cas. 824= A.I.R. 1923 All. 519.

——Wajib-ul-arz—Evidentiary value.

In pre-emption cases entries in *wajib-ul-arz* constituting merely an expression of the wishes of the co-sharers as to certain practices which they approve, unsupported by any other evidence are utterly insufficient to establish the custom. 64 Ind. Cas. 484 (All.).

——Wajib-ul-arz—Evidentiary value of—Custom of—Substitution.

Where a *Wajib-ul-arz* of a village recorded the right of pre-emption in case of transfer of any kind to a co-sharer in a particular order and laid down the procedure to be adopted in exercising the said right and also provided for the terms applicable to a pre-emptor borrowing money from the mortgagee creditor by mortgaging the same property: *Held,* that an extract from the *wajib-ul-arz* is evidence to be taken into consideration in considering the issue as to whether or not the custom exists; but the mere production of the extract is insufficient to prove the existence of the custom for substitution. 38 All. 361= 14 A.L.J. 441=35 Ind. Cas. 210.

——Wajib-ul-arz — Evidentiary value of—Owner of isolated plot.

An owner of an isolated plot of land in a Mahal not assessed to Government Revenue cannot pre-empt. A *Wajib-ul-arz* is only a piece of evidence to be taken into consideration in the course of an inquiry into custom. 34 All. 434=9 A.L.J. 670=14 Ind. Cas. 278.

——Wazib-ul-arz—Evidentiary value of.

Wajib-ul-arz as evidence varies in value according to circumstances. Where the *Wajib-ul-arz* was not a clear record of custom but of a number of arrangements between co-sharers it was held to be insufficient to establish the custom of pre-emption. 8 A.L.J. 786=10 Ind. Cas. 558.

——Wajib-ul-arz — Evidentiary value of — Presumption.

The existence of a right to pre-emption is presumed by law, in Oudh and an inconclusive entry in the *Wajib-ul-arz* is not sufficient to rebut it. 4 O.L.J. 452=42 Ind. Cas. 50.

——Wajib-ul-arz—Evidence Act, S. 91—Regulation No. VII of 1822, S. 9—Evidentiary value.

Held, that previous to the coming into force of Act No. XIX of 1873, the record of a village custom entered in the village administration papers had not the same effect as evidence as that which was given to such record by S. 90 of Act No. XIX of 1873. 1904 A.W.N. 117.

(d) Interpretation. *See also* PRE-EMPTION. Wajib-ul-arz—Construction.

——Wajib-ul-arz—Interpretation—'In future'—Does not necessarily mean new creation.

Where the *wajib-ul-arz* provided: "in future, every co-sharer has a right to transfer the whole or a portion of his property. Up till now no pre-emption suit was instituted on behalf of any co-sharer and decided. In future if any co-sharer likes to sell his property, he will at first sell it to his co-sharers in the village, and if they also refuse to purchase it, he may sell it to any one he likes....."

Held: that there was nothing in the language of the *wajib-ul-arz* which would rebut the *prima facie* presumption that it is a record of a custom.

The use of the words 'in future', in no way indicated that it was for the first time that the co-sharers were expressing the desire that a right of pre-emption should exist: A.I.R. 1914 P.C. 11 and A. I. R. 1927 P.C. 113, Foll. 102 Ind. Cas. 624=49 All. 869=25 A.L.J. 655=A.I.R. 1927 All. 787.

——Wajib-ul-arz — Interpretation — 'Shurkayandeh' means 'Shurkayan mahal'.

A *wajib-ul-arz* gave the right of pre-emption first to own brothers and on their refusal, to 'shurkayandeh.' Subsequent to the preparation of the *wajib-ul-arz,* there was a partition of the village.

Held: that after the partition though the right of pre-emption continued, the words 'shurkayandeh' should be interpreted as meaning 'shurkayan mahal' and that the right of pre-emption was confined only to those co-sharers who had a joint interest in the same mahal as the vendor. 88 Ind. Cas. 434=6 L.R.A. Civ. 317=A.I.R. 1925 All. 554.

——Wajib-ul-arz—Interpretation — Charge of circumstances subsequent to preparation of wajib-ul-arz should be taken into account.

One of the classes of pre-emptors in a *wajib-ul-arz* consisted of "*Hissadaran patti gur gaon ke*" The village which was undivided at the time the *wajib-ul-arz* was prepared, was subsequently divided into several mahals. The pre-emptor was a co-sharer in the same mahal as that in which the property sought to be pre-empted was situated. The vendee was a co-sharer in a different mahal,

Held: that though in the *wajib-ul-arz* for purposes of pre-emption the co-shares in the patti and the co-sharers in the village (*gaon*) were placed upon the same footing, yet these words had to be interpreted in the light of existing circumstances. The class of pre-emptors referred to in the *wajib-ul-arz* consisted of co-sharers who were united by bonds of common interest and liability. In the new constitution of the village these bonds had been severed and the purchaser in the present case, whose property was situated in a different mahal had no community of interest or liability with any of the co-sharers in the other mahal, namely, that in which the property was situated and in which the plaintiff was a co-sharer. Hence the plaintiff was entitled to pre-emption. 88 Ind. Cas. 136=23 A.L.J. 447=6 L.R.A. Civ. 336=A.I.R. 1925 All. 491.

——Wajib-ul-arz—Interpretation—No mention of pre-emption after 1897.

A comparison of the directions issued in 1897 with the previous directions makes it clear that no specific authority was given to Settlement Officers to make an entry of custom like that of pre-emption, prevailing in the village other than those covered by certain specified clauses. Accordingly under the new rules no entry was ordinarily to be made by the Settlement Officers as regards a custom of pre-emption, and it is on this account that in *Wajib-ul-arzes* prepared subsequent to 1897 there is no mention of any such rights either way. 92 Ind. Cas. 335=5 L.R.A. Civ. 609=A.I.R. 1925 All. 44.

——Wajib-ul-arz—Interpretation.

There is no difference in principle between a clause which casts a duty on co-sharer to sell the property to the different classes of persons mentioned in their order, and a clause which defines the classes of persons among whom the right of pre-emption would be enforceable whenever a sale was effected by a co-sharer in respect of his share. 82 Ind. Cas. 526=46 All. 674=5 L.R.A. Civ. 469=A.I.R. 1924 All. 753.

——Wajib-ul-arz—Interpretation—Record at partition—Old custom not destroyed.

Where a *wajib-ul-arz* allowed pre-emption to co-sharers who were kinsmen and on their refusal to other co-sharers and later on a village was divided into two mahals one of which temporarily became the property of a single individual and the *wajib-ul-arz* prepared at the time of partition provided that the right of pre-emption shall belong to the *Hissader ekjaddi* and after him to the other co-sharers of any mahal of the village and the mahal owned by single person became the property of several co-sharers one of whom sold his share to a stranger, *held*, that the partition *wajib-ul-arz* did not record a contract and that the partition did not destroy the old custom. 78 Ind. Cas. 586=46 All. 361=22 A.L.J. 289=5 L.R.A. Civ. 233=A.I.R. 1924 All. 425.

——Wajib-ul-arz—Interpretation—Record of custom.

A *wajib-ul-arz* referred, besides pre-emption to other matters, namely, the manner of inheritance, the powers of the widow in possession after her husband's death, the manner of succession when a deceased co-sharer left two widows and provisions, for the exclusion of daughters and daughters' sons from inheritance. But it could not be said that they could not be the subject of custom.

Held, that the *wajib-ul-arz* was a record of custom. 74 Ind. Cas. 339=45 All. 559=A.I.R. 1923 All. 530.

——Wajib-ul-arz—Interpretation—"The right of pre-emption is lawful"—Custom of pre-emption not established.

The *wajib-ul-arz* of the village recited that in case of a transfer a co-sharer had a preferential right to a stranger. It further recited the rights of the widows *inter se* and the children by different wives and many other matters which cannot possibly be construed to refer to custom. There was a further provision that "the right of pre-emption is lawful."

Held, none of these provisions of the *wajib-ul-arz* bear out the case of the plaintiff pre-emptor that there was a custom of pre-emption. On the other hand the words simply mean that the co-sharers recognized that the right of pre-emption among themselves was lawful, *i.e.*, that it could be enforced according to law. 28 All. 60, Foll. 71 Ind. Cas. 1025=4 L.R.A. Civ. 349=A.I.R. 1923 All. 296.

——Wajib-ul-arz — Interpretation — Spelling out new categories.

Mahal Lalman consisted of 16 portions each in 16 different villages. The pre-emption clause of the *wajib-ul-arz* placed persons entitled to claim pre-emption in three categories, (1) near co-sharers; (2) co-sharers in the same *thok* as the vendor; and (3) co-sharers in *thoks* other than that of the vendor.

If the record-of-rights on the basis of which pre-emption was claimed was drawn up for the Mahal Lalman considered as a single unit, then every *thok* appertaining to that Mahal, in whichever village it may be situated, was a *thok* of Mahal Lalman. Thus there would be inserted a fourth category in the record-of-rights between the second and the third and preference would be given to co-sharers who shared in the proprietary rights in *thoks* other than that of the vendor, but in the same village as the vendor, as against co-sharers in *thoks* other than that of the vendor situated in different villages.

Held, the *wajib-ul-arz* does not contain such a category and such category cannot be read into the specification therein given. 79 Ind. Cas. 470=21 A.L.J. 84=4 L.R.A.Civ. 87=A.I.R. 1923 All. 255.

——Wajib-ul-arz—Interpretation—Language negativing custom.

After reciting that in the case of transfer by a co-sharer the own brother of the transferor in the first instance and in case of refusal by him the co-sharers of the patti, and in case of refusal by the latter the co-sharers of the village will have the right to take the property proposed to be transferred in preference to a stranger, the *wajib-ul-arz* goes on to mention what would happen in case of a gift or in case where a co-sharer died childless leaving one or more widows and what rules should be observed in case of adoption by the widow of a deceased co-sharer.

Held, the language of paragraph negatives the contention for the pre-emptor that the reference to the transfer by a co-sharer is based upon a custom obtaining in the village. 70 Ind. Cas. 951=21 A.L.J. 61=4 L.R.A. Civ. 82=A.I.R. 1923 All. 254.

——Wajib-ul-arz—Interpretation.

The words *karabatmand karibi* do not include a relation who is eleven degrees removed. 60 Ind. Cas. 992=19 A.L.J. 108=A.I.R. 1921 All. 208.

——Wajib-ul-arz — Interpretation — Custom not applicable to leases.

In a suit for pre-emption, the plaintiff produced two *wajib-ul-arzes*, one of 1840 and the other of 1885. The *wajab-ul-arz* of 1840 mentioned a custom of pre-emption in respect of sales and mortgages, while that of 1885 mentioned the custtom regarding "intikal"

generally. (Intikal in the vernacular was broad enough to cover all kinds of transfers). No change of custom in the interval was alleged.

Held, that the loose use of the word "intikal" in the later *wajib-ul-arz* could not be utilized to broaden the custom as laid down in the earlier *wajib-ul-arz* and make it applicable to leases. 62 Ind. Cas. 884=19 A.L.J. 442=A.I.R. 1921 All. 154.

——Wajib-ul-arz—Interpretation—Sale to strangers alone contemplated.

An entry in the *wajib-ul-arz* said that in case of a transfer of property the right to claim pre-emption would be as follows: "First to *warisan ek jaddi qaribi*, then to *hissedar* of the patti and then to co-sharers in the village.

Held, that the correct interpretation of this *wajib-ul-arz* is to hold that the right of pre-emption arises only when there is a sale to a stranger and that no such right is conclusively established when the property is sold to a co-sharer, although he may not own any share in the patti in which the share sold is situated. 64 Ind. Cas. 486=19 A.L.J. 903.

——Wajib-ul-arz — Interpretation — Biradaran karibi ek jaddi.

According to an entry in the *wajib-ul-arz* in the case of a sale of a share the first right was given to *biradaran karibi ek jaddi* and then to co-sharers in the thok and after them to co-sharers of other thoks and it provided that in case the co-sharers of a village do not take then the property could be sold to a stranger. The plaintiff was a co-sharer in the village but was no relation of the vendor. The defendant vendee was found to be the own uncle of the vendor but he was not a co-sharer in the village.

Held, the expression *biradaran karribi ek jaddi* is a wide expression that might include own uncles. The contention that the latter portion of the *wajib-ul-arz*, which says that in case none of the co-sharers of the village take the property then it can be sold to a stranger, would confine the right to persons who are co-sharers. The document does not conclusively give the plaintiff a preferential right and does not establish a custom under which plaintiff had a preferential right as against the defendant who came with the class *biradaran karibi ek jaddi*. 64 Ind. Cas. 617=19 A.L.J. 889.

——*Wajib-ul-arz*—Interpretation of — Sharik—Perfect partition. 6 Ind. Cas. 115=7 A.L.J. 415.

——*Wajib-ul-arz*—Interpretation — Perfect partition—No new *wajib-ul-arz* framed—*Malikkan deh*. 28 A. 286; 28 A. 614; 29 A. 295, foll. 6 A.L.J. 958=4 Ind. Cas. 138=32 A. 63.

——Wajib-ul-arz—Interpretation of—Intiqual—Conditional sale.

A *wajib-ul-arz* recording a custom of pre-emption gave a right of pre-emption in case of any *intiqal* of property in the village.

Held, that a suit for pre-emption in case of a conditional sale was maintainable. 4 A.L.J. 814=1908 A.W.N. 19.

——*Wajib-ul-arz*—Interpretation 'for such price as a stranger may pay'. 23 A. 427, foll. 1905 A.W.N. 45=2 A.L.J. 689=27 A. 457.

——*Wajib-ul-arz*—Interpretation of document. 1905 A.W.N. 101; 1905 A.W.N. 92.

——Wajib-ul-arz — Interpretation — Pattidar Karibi.

The words "Pattidar Karibi" in a *wajib-ul-arz* refer to nearness of relationship and not to vicinity. (1904) 1 A.L.J. 705.

——*Wajib-ul-arz*—Interpretation of deed. 1904 A.W.N. 104=26 A. 544=1 A.L.J. 272.

——*Wajib-ul-arz*—Interpretation of—Mortgage by conditional sale—Cause of action—Covenant running with land:

Held, also, that the stipulation as to price to be paid by the pre-emptor was of the nature of a covenant running with the land and was enforcible even against a *bona fide* purchaser. 1904 A.W.N. 149=1 A.L.J. 353=27 A. 12.

——*Wajib-ul-arz*—Interpretation of document—U. P. Land Rev. Act, S. 21—Reg. Act (VII of 1822), S. 9—Evidence Act, S. 35—Parties. 6 A. 57 and 1903 A.W.N. 259, foll.; 1904 A.W.N. 117, overruled. 1904 A.W.N. 128=1 A.L.J. 278=26 A. 549.

——*Wajib-ul-arz*—Interpretation of—Mortgage by conditional sale—Cause of action—Covenant running with land. 1904 A.W.N. 149=27 A. 11.

——*Wajib-ul-arz*—Interpretation of document—"Co-sharer"—Owners of share in "Haquat muta farigo". 17 A. 447 and 20 A. 419, foll. 1904 A.W.N. 118=26 A. 547.

——*Wajib-ul-arz*—Interpretation of document. (1901) A.W.N. 120=23 A. 427.

——*Wajib-ul-arz*—Inerpretation—Meaning of 'Ek jaddi'—The term 'Ek jaddi' in the pre-emption clause of a *wajib-ul-arz* signifies 'descended from a common ancestor through the male line.' 1900 A.W.N. 188=23 A. 32.

(e) Partition.

——Wajib-ul-arz—Partition—Perfect—Effect.

Where after the preparation of a Wajib-ul-arz containing an agreement as to pre-emption between co-sharers, the village was perfectly partitioned and no fresh contract was entered into, *held*, that the *Wajib-ul-arz* contract had ceased to be binding on the co-sharers. 24 Ind. Cas. 416 (All.).

——Wajib-ul-arz—Partition—Perfect — Hissadar deh—Meaning of.

'Hissa Dar Deh', appearing in a *Wajib-ul-arz* means a sharer in the village, and a perfect partition subsequent to the preparation of the Wajib-ul-arz has not the effect of converting it to mean a co-sharer in the mahal.

Per *Karamat Hussain, J.*:—Deh and Mahal are two distinct conceptions. In one Deh there may be several Mahals and in one Mahal there may be several Debs or portions of them. It however sometimes happens that a definite area of land is one Deh and also one Mahal. This is pure accident and must not lead to the erroneous notion that when the term Deh and Mahal may be predicated of one and the same area of land, they become synonymous. 34 All. 13=8 A.L.J. 1072=11 Ind. Cas. 305.

——Wajib-ul-arz—Partition—Effect of.

The *wajib-ul-arz* of a village conferred the right of pre-emption to the co-sharers in the village. Subsequently the village was divided in 3 mahals and separate *wajib-ul-arzes* were prepared incorporating bodily however the pre-emption clause in the original. *Held*, the right of pre-emption continued to all co-sharers in the village as before and was not restricted to the co-sharers of the mahal in which the property is situated. 33 All. 296=8 A.L.J. 23=9 Ind. Cas. 23.

——**Wajib-ul-arz—Partition—Plaintiff sharer in different mahal.**

The word *shark* means a partner and the fact of its being used in a record of the custom of pre-emption in a *wajib-ul-arz* shows that what is intended is that the person is entitled to the right of pre-emption must be a *shark* or partner of the vendor in the *hakkia* of the village. Where therefore a *wajib-ul-arz* gave a right of pre-emption to *shark-hakkia-deh* and the village was afterwards divided in mahals by perfect partition and the plaintiff in pre-emption was not a sharer in the mahal sold but to another mahal: *Held,* that he was not a *shark* of the vendor. The fact of the new *wajib-ul-arz* having been prepared after partition by which the co-sharers agreed to abide by the terms of the *wajib-ul-arz* does not make any difference as regards the plaintiff's right. 7 A. L.J. 1066=7 Ind. Cas. 777.

——**Wajib-ul-arz — Partition — Imperfect Effect of.**

An imperfect partition does not affect a right of pre-emption which existed before the partition. 8 Ind. Cas. 867 (All.).

——**Wajib-ul-arz—Partition, effect of.**

A *Wajib-ul-arz* provided.—"A co-sharer wishing to sell his share must sell it first, to brothers who are also co-sharers, second, to *Hissadars* in the patti, third, to the *Lambardar* of the patti, fourth, to the Lambardar of the village, Fifth, to a co-sharer in the village". When the *wajib-ul-arz* was prepared the village was an imperfect *Pattidari* village. There was no mahal and the whole of the co-parcenary body were jointly responsible for the payment of the revenue. Subsequently the village was divided into two mahals and the plaintiff, held a share in the Mahal other than that in which the property was situate. *Held,* that the plaintiff ceased to be a co-sharer of the vendor and therefore had no right of pre-emption. 22 A. 1, Foll. 3 Ind. Cas. 827 (All.).

——*Wajib-ul-arz*—Partition—Effect of perfect partition, no new *wajib-ul-arzs* for the new mahals being framed. 1907 A.W.N. 39=4 A.L.J. 137=29 A. 295.

(f) Preferential claim.

——**Wajib-ul-arz—Preferential claim — Classes mentioning priority among pre-emptors—Priority applies to cases inter se.**

Where a *wajib-ul-arz* classified the pre-emptors as first class of own brothers, the second class of cousins and nephews, the third class, co-sharers in the same patti; the fourth class of co-sharers in the thok, and last class of co-sharers in the village.

Held, that on the language of the *wajib-ul-arz* these classes were set out in order of preference and that it did provide for pre-emption *inter se* between the various classes specified therein and therefore a sale to a person in the third class was liable to be pre-empted by a person in the second class. 87 Ind. Cas. 434=6 L.R.A. Civ. 281=A.I.R. 1925 All. 719.

——**Wajib-ul-arz—Preferential claim — Rights of co-sharers inter se.**

In the absence of specific words giving priority in the case of a sale by a co-sharer belonging to one category, to a co-sharer belonging to another category, a clause for pre-emption, defining the rights of co-sharers *inter se* as against a stranger cannot be construed so as to give a right of pre-emption to a co-sharer of a superior class upon a sale to a co-sharer of an inferior class. 23 All. 427, Foll. 87 Ind. Cas. 92=47 All. 320=6 L.R.A. Civ. 150=A.I.R. 1925 All. 378.

——**Wajib-ul-arz—Preferential claim.**

Where the *wajib-ul-arz* provided for a right of pre-emption in three classes of persons, namely (1) Bhai haqiqi, (2) Bhai quaribi and (3) Digar hissedran-i-deh.

Held, that no person can claim to pre-empt as a "Bhai Haqiqi" or a "Bhai caribi" unless he has got the further qualification of being a co-sharer in the village. 86 Ind. Cas. 595=47 All. 330=23 A. L.J. 144=6 L.R.A. Civ. 126=A.I.R. 1925 All. 360.

——**Wajib-ul-arz — Preferential claim — Co-sharers—Preferential right inter se.**

The pertinent words relating to the right of pre-emption and contained in a chapter of the *wajib-ul-arz* expressly dealing with the rights of co-sharers *inter se* were, "whenever the share of a co-sharer is sold or mortgaged."

Held: that the right of pre-emption arose not only on sale or mortgage to a stranger but that there was a preferential right *inter se* between co-sharers. 86 Ind. Cas. 728=23 A.L.J. 242=6 L.R.A. Civ. 115 =A.I.R. 1925 All. 345.

——**Wajib-ul-arz—Preferential claim—Spelling out preference inter se among co-sharers.**

Two *wajib-ul-arzes* were produced by the plaintiff in support of the custom of pre-emption. The first one of 1860 provided that every co-sharer has a right to transfer his share but at the time of transferring it, it is incumbent on him to inform the near co-sharer (*hissedar qaribi*) and in case of his refusal the other co-sharers of the village, and in case of both these sets of co-sharers refuse, then he is entitled to sell it to whomsoever he likes.

The other *wajib-ul-arz* of 1886 provided that when a co-sharer wishes to sell his share the right of a co-sharer who is a near relation, than of a co-sharer who is a distant relation, then all co-sharers in the patti and then co-sharers in the *nambardari* and then the other co-sharers of the village have a priority and preference. In the case of refusal by them the co-sharer has a right to sell it to any one he likes.

Held: that having regard to the language of both the *wajib-ul-arzes* there was a right of preference *inter se.* 78 Ind. Cas. 904=46 All. 170=21 A.L.J. 928 =5 L.R.A. Civ. 14=A.I.R. 1924 All. 227.

——**Wajib-ul-arz—Preferential claim.**

A *wajib-ul-arz* recorded a custom of pre-emption which gave to a co-sharer's own brother or an *ek jaddi* brother a preferential right of purchase. If they did not purchase, the co-sharer was free to sell to any other co-sharer or to a stranger if he pleased. *Held,* that the *wajib-ul-arz* placed the stranger and other classes of co-sharers on the same footing, and that the latter had no preferential right of purchase as against the stranger. 61 Ind. Cas. 894 (All.).

——**Wajib-ul-arz—Preferential claim — Different mahals.**

A *wajib-ul-arz* prepared before the partition of a village into mahals gave rights of pre-emption first to brothers and nephews, then to cousins who were co-sharers, then to co-sharers in the *patti* and then to co-sharers in the village. *Held,* that a co-sharer in one *mahal* had no right to pre-empt property in another mahal where he was not a co-sharer. 37 All. 573=13 A.L.J. 712=29 Ind. Cas. 1000.

——Wajib-ul-arz—Preferential right.

The *Wajib-ul-arz* of 1860 and 1883 of a village recorded the fact that the co-sharers had a right or pre-emption, that after him the co-sharer in the same *thok*, and after him the co-sharers in other *thoks*, had the same right. *Held*, that the co-sharer in the same *thok* as the vendor had a preferential claim as against the vendee who was a co-sharer in a different *thok*. 29 Ind. Cas. 485 (1) (All.).

——Wajib-ul-arz—Preferential claim.

Held, that under the terms of the wajib-ul-arz the *ek jaddi* co-sharer had a preferential claim to pre-emption over a co-sharer in the mahal. 29 Ind. Cas. 425 (All.).

——Wajib-ul-arz—Preferential claim—Division into several Mahals—Suit on ground of nearness of relationship.

Where a village had been partitioned into several *Mahals* and there was an arrangement of pre-emption to the effect that one co-sharer had to sell only to his near co-sharer and then to sharers in the *patti*, *mahal* or *village*, *Held*, the provisions gave a preferential right of pre-emption to sharer in one Mahal who was a relation over sharer in another Mahal and not related. 35 All. 478=11 A.L.J. 766=21 Ind. Cas. 628.

——Wajib-ul-arz—Preferential right—Hissadar Karibi.

A mere statement in a *wajib-ul-arz* that the right to pre-empt should in the first instance be given to a nearer co-sharer does not give a preferential right to a blood relation of the vendor who in other respects was on equal footing with the vendee, to pre-empt. 11 Ind. Cas. 286 (All.).

——Wajib-ul-arz—Preferential right—Hissadar Karibi—Meaning of.

There is no preferential right of pre-emption to a relation nearer in degree from the mere fact that a *Wajib-ul-arz* mentions that the property is to be offered first to a *'hissadar thok'*; evidence of special custom indicating the above is necessary for the purpose of giving such preference. 11 Ind. Cas. 278 (All.).

——Wajib-ul-arz—Preferential right—"Qarabatdar Qaribi"—Meaning of.

The *Wajib-ul-arz* of a village gave a right of pre-emption to three classes of people:—*First* near relatives (Qarabatdar Qaribi); *secondly* near co-sharers in the same *Thok*; thirdly co-sharer in another *Thok*. Both the vendees and the pre-emptor were co-sharers in the same *Thok* but the latter was nearer in blood to the vendor than the former. *Held*, that the plaintiff had no preferential right, there being nothing in the *wajib-ul-arz* to explain the meaning of the words *Qarabatdar Qaribi* nor any other evidence of the custom. 11 Ind. Cas. 274 (All.).

——Wajib-ul-arz—Preferential Right.

In a *Wajib-ul-arz* different classes of pre-emptors were mentioned *Alatarjib* (*i.e.*), one after another.

Held, that the right of pre-emption existed between the different classes of pre-emptors *inter se*, *i.e.*, one class of pre-emptors excluded another. 10 Ind. Cas. 442 (All.).

——Wajib-ul-arz—Preferential rights — Near relation v. member of the same caste.

A *Wajib-ul-arz* provided "the right of pre-emption is given first to co-sharers or who are near in blood to the vendor and then to other co-sharers of the same caste and lastly to the co-sharers of the village."

Held, that near relation had a preferential right over persons of the same caste. 10 Ind. Cas. 40 (All.).

——Wajib-ul-arz—Preferential right.

Where the *wajib-ul-arz* gave the order of pre-emption as real brothers, nephews and then the persons entitled to inherit to the vendor. The latter's claim to pre-empt is maintainable when the two nephews of the vendor did not claim to pre-empt. Real brothers and the nephew form only one class of pre-emptors. 7 Ind. Cas. 739 (All.).

——Wajib-ul-arz—Preferential right — Sabseqaribi rishteder.

Where a *Wajib-ul-arz* dealing with the right of pre-emption contained the words *"sabseqaribi rishtedar"* (the nearest of all co-sharers) priority of right is given not to every co-sharer who is a relative of the vendor but to the co-sharer who is the nearest relative among all relatives. 7 A.L.J. 653=7 Ind. Cas. 261.

——*Wajib-ul-arz*—Preferential claim—Giving preference over strangers—Acquisition by a stranger of a share other than one sought to be pre-empted—Effect of. 5 Ind. Cas. 520=7 A.L.J. 77.

———Wajib-ul-arz—Preferential claim — Co-sharer—Owner of resumed muafi land.

The pre-emptive clause of a *wajib-ul-arz* contained the following provision:—*"Minjumla melikon-ke- agar koi kissadar apni hagpuit bai karjo chahe to awwal dusre hissadar apni haggiot ki hath bai kareja."*

Held, that the owner of resumed *muafi* land (which had been resumed before this *wajib-ul-arz* was framed) in the same *Khewat* as the land sold was entitled to pre-emption as against a vendee who was merely a co-sharer in a different *khewat*. (1907) 30 A. 329=1908 A.W.N. 142=5 A.L.J. 302.

On appeal from. 1907 A.W.N. 174=4 A.L.J. 665.

——Wajib-ul-arz—Preferential right.

Where a *wajib-ul-arz* provides that property should be sold in a certain order, it must be sold in that order and the right of pre-emption can be exercised. 2 Ind. Cas. 383 (All.).

(g) Miscellaneous.

——Wajib-ul-arz—Simple Mortgage—Rehan.

Wajib-ul-arz of 1875 gave a right of pre-emption in the case of "rehan" (mortgage).

Held, that the right could not be exercised if the transaction was a simple mortgage. 29 Ind. Cas. 554 (All.).

——Wajib-ul-arz—Unreasonable agreement.

An agreement, in a *Wazib-ul-arz*, that in a case of dispute between the vendor and the pre-emptor as to the price, the price should be Rs. 200 per Biswa, is unreasonable. The price paid by the vendee should be accepted. 7 A.L.J. 504=6 Ind. Cas. 118.

——Wajib-ul-arz—Right of co-sharer in a village.

A *Wajib-ul-arz* granting rights of pre-emption, to sharers in a patti, sharers in Thok and then villages in order, and later on Thoks and pattis, being done away with, a co-sharer in a village cannot claim pre-emption, when a part of Thok is purchased by a sharer in one of the old Thoks. 31 All. 274=6 A.L.J. 180 =2 Ind. Cas. 208.

——Wajib-ul-arz—Clause incapable of enforcement.

A *wazib-ul-arz* contained the following clause—"If a co-sharer, being in collusion and concert with

a stranger. . . . gets an improper and unreasonable price settled for the property through animosity or with the intention of causing disturbance in the village, and if there be a dispute as regards the price, the price shall be settled by an arbitrator, who shall be nominated by mutual consent. If none of the parties be willing to refer the matter to arbitration, the Collector shall have power to appoint an arbitrator on behalf of the Government and have the price settled."

Held, that the clause in question could not be enforced. The Collector has no power on behalf of Government to appoint an arbitrator and the Court is not entitled to vary the contract entered into between the vendor and vendee. It cannot fix "a reasonable price" or, indeed, any price other than that actually paid. 1906 A.W.N. 218=3 A.L.J. 479.

——Wajib-ul-arz—Pre-emptor accepting lease of property in suit from the vendee.

Where in a suit for pre-emption based upon a custom declared in the *wajib-ul-arz* it was found that the pre-emptor had, with knowledge of his right as pre-emptor, accepted a lease of the land claimed from the vendee, it was *held,* that this amounted to such an acquiescence in the sale as would bar the plaintiff's right of suit. 1905 A.W.N. 260=28 A. 237.

——Wajib-ul-arz—Sale of land by Government.

When Government has acquired land permanently it does not become a co-sharer in the village to which the land originally appertained, and on a sale thereof the provisions contained in the village *wajib-ul-arz* which deal with sales by co-sharers in the village are not applicable. 1905 A.W.N. 259=2 A.L.J. 787=28 A. 235.

——*Wajib-ul-arz*—Cause of action—Acquisition by defendants to a pre-emption suit of a title as co-shares—Suit dismissed. 21 A. 374 and 21 A. 441, foll. (1904) A.W.N. 68=1 A.L.J. 209=26 A. 389.

——Wajib-ul-arz—Pre-emptive rights of the Manager of a Hindu temple.

The manager of a Hindu temple who as such manager holds Zemindari property on behalf of the temple has the same rights of pre-emption (or pre-mortgage) under the village *wajib-ul-arz* as any other Zemindar in the village may possess. 1903 A.W.N. 238=26 A. 212.

——*Wajib-ul-arz*—Sale to a stranger— Re-sale to a co-sharer having a right of pre-emption, but subsequently to a suit brought by another such co-sharer. 1901 A.W.N. 66=23 A. 247.

30. Who can pre-empt.

——Who can pre-empt—Sale by two joint Hindu brothers—Their wives, if have right of pre-emption.

The property of a Hindu joint family goes by survivorship to the male members and not to the females. Where, therefore, the two Hindu brothers who were joint, sold their immovable property, their wives, who would not inherit if the vendors died, have no right of pre-emption. A.I.R. 1945 Pesh. 24 =1945 Pesh.L.J. 24=222 Ind. Cas. 618.

——Who can pre-empt—Benami purchaser.

Benami purchaser is an inadmissible notion, in a case of claim for pre-emption. If a person produces money and has the requisite qualifications for pre-empting the suit property, the Courts have no cause for going into his *bona fides* or to trace the origin of the money which he has offered to pay. The basic principle is that after all the statutory right depends on certain qualifications and the production of money, and when those requirements are met with, nothing else remains but to grant a decree. A.I.R. 1941 Pesh. 52=195 Ind. Cas. 26.

——Who can pre-empt—Mere tenant.

The right of pre-emption has always been restricted to persons who have the proprietary interest. A mere tenant, whether he be an occupancy tenant or a tenant of an orchard or a garden, has no right of pre-emption. A.I.R. 1941 Pat. 35=7 B.R. 89=21 P.L.T. 835=190 Ind. Cas. 577.

——Who can pre-empt—Muafidar paying no rent—Rent not determinable under S. 40, Oudh Land Revenue Act (17 of 1876)—If can pre-empt.

Where a *Muafidar* pays no rent and it has not been shown that his rent has to be determined by the Settlement Officer under S. 40, Oudh Land Revenue Act, 1876, he is neither an under-proprietor nor a proprietor and is, therefore, not entitled to pre-empt. A.I.R. 1940 Oudh 117=1939 O.W.N. 1111 =1939 A.W.R. 322=185 Ind. Cas. 272.

——Who can pre-empt.

Wakif can sue for pre-emption as plaintiff. A.I.R. 1938 All. 157=1938 A.W.R. 15=1937 A.L.J. 1337=I.L.R. (1938) All. 206=174 Ind. Cas. 241.

——Who can pre-empt—Custom—Relative entitled to pre-empt—Illegitimate son—Whether can pre-empt.

If an illegitimate son is not a relative of a legitimate son within the meaning of the custom which entitles a relative to pre-empt as against a co-sharer who is not a relative, the illegitimate son is not entitled to pre-empt. A.I.R. 1936 All. 78=1935 A.W.R. 1335=160 Ind. Cas. 912.

——Who can pre-empt—Birtdar, whether owner of land—If entitled to pre-empt whether or not he is proprietor under S. 3 (2), Bengal Tenancy Act (VIII of 1885).

A person may be the owner of property so as to be entitled to pre-empt and yet not be a proprietor according to the definition of the term in S. 3 (2), Ben. Ten. Act. The *birt* is an absolute gift. The fact that the *birtdar* is treated as a tenant in the record of rights is not incompatible with the conception of his ownership of the land. A.I.R. 1934 Pat. 596=15 P.L.T. 796=1 B.R. 160=152 Ind. Cas. 983.

——Who can pre-empt—Talukdar, whether superior proprietor—Right of pre-emption—Payment of dues by Government from revenues, effect of.

The word *'talukdar'* is ordinarily understood in the Punjab as meaning a superior proprietor.

A *talukdar* may be a superior proprietor even though the amount which is paid to him as *talukdari* is not levied in addition to the amount of land-revenue payable by the proprietors to the Government but is paid by the Government to the *talukdar* out the revenue assessed at ordinary rates on the proprietors. A.I.R. 1933 Lah. 57=33 P.L.R. 1054=140 Ind. Cas. 566.

——Who can pre-empt—Member of joint family—When cannot.

Where certain property is sold and a suit for pre-emption is brought by the brother of the vendor, it is absolutely necessary to determine the question

whether the two brothers were joint or separate at the time when the sale-deed was executed, for a member of a joint family cannot institute a suit for pre-emption on the sale of joint family property. 42 All. 264, Rel. on. 118 Ind. Cas. 719=1929 A.L.J. 899=A.I.R. 1929 All. 658.

——Who can pre-empt—Member of joint Hindu family—When can pre-empt.

It is open to a member of a joint Hindu family to acquire by pre-emption a portion of the property belonging to the joint family of which he happens to be a member when the said property has been sold by the manager of the family. The question of family property is immaterial because by making a claim for pre-emption the co-sharer is precluded from disputing the validity of the sale on the ground that it was not for family necessity. 67 Ind. Cas. 76; 42 All. 264 and A.I.R. 1925 Oudh 352, not Foll.; A.I.R. 1922 Oudh 115; 1 O.C. 252; 7 O.C. 61, Foll. 115 Ind. Cas. 433=6 O.W.N. 374=4 Luck. 370=A.I.R. 1929 Oudh 265 (F.B.).

——Who can pre-empt—A sharer of trees in a survey number is not an occupant in that survey number. 112 Ind. Cas. 642=24 N.L.R. 171=11 N.L.J. 182 =A.I.R. 1928 Nag. 324.

——Who can pre-empt—Purchaser subsequent to contract to purchase.

A person who has subsequently purchased the property has no right to pre-empt as against purchaser whose contract to purchase has become final before the purchase of the subsequent purchaser. 102 Ind. Cas. 307=1 L.C. 10=A.I.R. 1927 Oudh 227.

——Who can pre-empt—Donee from co-sharer Hindu widow.

A donee from a co-sharer Hindu widow is entitled to pre-empt in the capacity of a co-sharer so long as the gift is not declared voidable at the instance of the next reversioners. 96 Ind. Cas. 195=A.I.R. 1926 All. 680.

——Who can pre-empt.

Persons eight degrees removed cannot be called near relations for the purpose of pre-emption. 58 Ind. Cas. 87, Foll. 95 Ind. Cas. 268=A.I.R. 1926 All. 479.

——Who can pre-empt—Owner of share in the materials of a house.

A person owning a share in the amla or materials of a house, but having no right to or interest in the site of the house, cannot maintain a suit for pre-emption of a sale of the materials by the co-sharer. 93 Ind. Cas. 279=13 O.L.J. 463=A.I.R. 1926 Oudh 361.

——Who can pre-empt—Woman succeeding as heir can.

There is no bar in the way of a woman maintaining a suit for pre-emption if she is by law entitled to inherit even though it may be, a life-estate. 84 Ind. Cas. 484=5 Lah. 435=A.I.R. 1925 Lah. 83.

——Who can pre-empt.

A plaintiff cannot pre-empt the sale made by his father by reason of the fact that he is a co-sharer as a member of a joint Hindu family in some other portion of the tenure. A.I.R. 1925 Oudh 352, Foll. 89 Ind. Cas. 287=12 O.L.J. 300=A.I.R. 1925 Oudh 443.

——Who can pre-empt — Foreclosure decree against Hindu joint family—Member of family cannot pre-empt.

Dalal, Off. J. C. dissenting.—No member of a Hindu joint family acquires a right of pre-emption by reason of a decree for foreclosure of joint family property in which he himself is a co-parcener notwithstanding that the joint family may own property other than foreclosed. 88 Ind. Cas. 879=12 O.L.J. 202=2 O.W.N. 264=28 O.C. 139=A.I.R. 1925 Oudh 352 (F.B.).

——Who can pre-empt—Mohtamims can pre-empt.

Where the *wajib-ul-arz* recording the custom of pre-emption, was verified by all the *mohtamims* and some of the superior proprietors; *Held,* these *mohtamims* held at any rate a kind of proprietary interest in the village and that the custom of pre-emption recorded in the *wajib-ul-arz* was applicable to them. 79 Ind. Cas. 327=46 All. 549=22 A.L.J. 441=5 L.R.A. Civ. 301=A.I.R. 1924 All. 735.

——Who can pre-empt—Sale of site—Owner of building thereon can pre-empt.

A mortgagee of a site had built upon it on the strength of a prior lease. The site was subsequently sold, *Held*: that the mortgagee had a right to pre-empt the sale of site by virtue of his being owner of the building thereon. 71 Ind. Cas. 893=A.I.R. 1924 Lah. 335.

——Who can pre-empt—Arazidars of village Dudhi have no right of pre-emption.

The persons termed Arazidars in the village called Dudhi in the pargana of Sidhua Jobna in the Parauna tahsil of the Gorakpur district, are not co-sharers and thus not entitled to pre-empt. 30 A. 479, Foll.

Mr. Reid, the Settlement Officer of Azamgarh, defined the term 'arazi' as "plots of land, which though included within the area of mauzas and mahals, are held on a distinct tenure from and convey no title to rights or interests in other parts of the mauzas and mahals."

The ultimate test in a litigation in which a right of pre-emption is claimed is whether or not the person who seeks pre-emption is co-sharer either in the profits or in the liability for revenue with the vendors. 74 Ind. Cas. 124=21 A.L.J. 65=45 All. 237=4 L.R.A. Civ. 57=A.I.R. 1923 All. 129.

——Who can pre-empt—Owner and not lessee.

The milkiat or ownership of the property is *sine qua non* for the exercise of the right of pre-emption and the pre-emptor must have the *milkiat* or ownership in the property on account of which he claims the right of pre-emption. But it is not necessary that he should be in actual possession of it. As a corollary to the above principles it follows that no right of pre-emption arises in respect of property leased in perpetuity. 71 Ind. Cas. 318=1923 P.H.C.C. 22=A.I.R. 1923 Pat. 217.

——Who can pre-empt—Joint Hindu family—Sons.

In a joint Hindu family consisting of a father and his son, the father is presumably the managing member of the family and *prima facie* a sale by him is binding on his sons. The sons in a joint Hindu family cannot maintain a suit to pre-empt a sale of a joint family property made by the father as a manager and for legal necessity. 67 Ind. Cas. 76 (Lah.).

——Who can pre-empt.

When a joint Hindu family property is sold by one of the members of the family a suit for pre-emption by another member of the same family is maintainable. 65 Ind. Cas. 772=25 O.C. 57=8 O.L.J. 506=A.I.R. 1922 Oudh 115.

——Who can pre-empt—Co-sharer—Patti—Imperfect partition.

A plaintiff claiming to pre-empt as a co-sharer, must prove that he is one of the class of co-sharers within the meaning of the Mahomedan Law. In an imperfect partition of a village where there is complete separation of all rights, the owner of a *patti* in that village cannot be regarded as a co-sharer and consequently he has no right to pre-empt as cosharer. 42 All. 477=18 A.L.J. 518=56 Ind. Cas. 174.

——Who can pre-empt—Zamindar's right to pre-empt house.

A Zamindar owning a fractional share in the Zamindari in which a house is situate, cannot, under the Muhammadan law, thereby pre-empt the house. 12 A.L.J. 88=20 Ind. Cas. 367.

——Who can pre-empt—Mahomedan Law—Classes of pre-emptors.

There are three classes of pre-emptors, *viz.*, co-sharers in the subject-matter of sale, in its appurtenances and contiguous neighbours. 33 All. 299=8 A. L.J. 51=9 Ind. Cas. 49.

——Who can pre-empt—Muhammadan Law—Shafi-e-sharik.

Shafi-e-Sharik has a right of pre-emption in villages of large estate. 33 All. 28=7 A.L.J. 879=7 Ind. Cas. 404.

——Who can pre-empt—Sale of several plots.

Several plots of land were sold by one sale. A person, having property in the vicinity of one of those, can claim to pre-empt all the plots. 7 A.L.J. 641=6 Ind. Cas. 358.

——Who can pre-empt—Houses connected by public road.

Where a public road stands between the pre-emptor's house and the house sold, no right of pre-emption arises. 6 A.L.J. 539=2 Ind. Cas. 468.

——Who can pre-empt—House — Vicinage.

Under the law, the sale of Mokrari interest does not give right of pre-emption. Where a house is sold apart from the site for occupation, the right of pre-emption accrues to the owner of the adjoining house on the ground of vicinage. 58 Ind. Cas. 534 (Pat.).

31. Miscellaneous.

——Pre-emption — Failure to exercise right — Not a breach of trust.

It cannot be said that it is always desirable for a person in possession of land to purchase neighbouring land when it comes into the market. Where a trustee, a relation of beneficiary, purchases certain field for himself and though the beneficiary had a right of pre-emption with regard to the field, and the field adjoined his land, the trustee does not exercise the right of pre-emption on behalf of beneficiary, he does not commit a breach of duty unless it can be shown that such failure to purchase is an act prejudicial to beneficiary. A.I.R. 1925 All. 333, Rel. on. 122 Ind. Cas. 433=13 N.L.J. 49=A.I.R. 1930 Nag. 182.

——A general clause in a sale-deed making the vendor liable for any loss which might accrue in connexion with the sale can properly be held to include the risk of the vendee's title being defeated by a pre-emptor. 94 Ind. Cas. 1055=A.I.R. 1926 Lah. 455.

——Evidence should not be ambiguous.

If the only evidence which the plaintiff can produce is ambiguous that is to say is capable of two interpretations and if on one of such interpretations the suit cannot succeed then the suit must fail and it is not the duty of the Court to give it necessarily the other interpretation which would entitle the plaintiff to a decree. (A.I.R. 1924 All. 541; 15 Ind. Cas. 54; 12 A.L.J. 19; 28 Ind. Cas. 306, Foll.) 82 Ind. Cas. 526 =46 All. 674=5 L.R.A. Civ. 469=A.I.R. 1924 All. 753.

——A pre-emptor is bound to pay off the amount of the mortgage which was mentioned in the sale-deed under which he is pre-empting as part of the consideration for the sale. 65 Ind. Cas. 543=44 All. 348=20 A.L.J. 164=A.I.R. 1922 All. 25.

——Construction—Award—Sales in invitum—Construction of document—Award—Term in an award granting pre-emption to the co-owners over the joint family property—Property sold through Court in execution of decree—The condition of pre-emption attached to private and voluntary sale—Court sales not affected by the provision.

An award which effected partition of certain family property provided among other things that in the case of a sale by any of the co-sharers of his portion of the house of residence he should sell it to his co-sharer for Rs. 1,800, and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (co-sharers) were not willing to buy it. The share of one of the co-sharers was subsequently sold in execution of a decree against him and purchased by an outsider. The other co-sharer then sued to have it declared that the purchase at the Court sale was not binding upon him. *Held*, that the privilege which the award conferred upon the co-sharers of becoming purchasers by pre-emption attached to sales made privately and willingly and not to sales in invitum 12 Bom. L. R. 582=34 B. 567=7 Ind. Cas. 663.

——Katra-jna-Khana.

For the purposes of pre-emption Katra-Jna-Khana is not a separate sub-division of Jullandar City. 70 P.R. 1909=102 P.W.R. 1909=140 P.L.R. 1909=2 Ind. Cas. 984.

——Involuntary sale—Right in respect of.

In the case of involuntary sales in execution of decree for revenue there is no right of pre-emption unless specially conferred by statute. 13 A. 224; 24 A. 670: Foll. 41 Mad. 582=34 M.L.J. 412=23 M.L.T. 302=(1918) M.W.N. 318=7 L.W. 547=45 Ind. Cas. 46 (F.B.).

——Purchase in execution — Suit in respect of sale of another share before confirmation of plaintiff's purchase.

Plaintiff purchased a share in a village in execution of a decree on 20th June. The sale was confirmed on 24th July. On 23rd July defendant purchased another share in the same village. On a suit for pre-emption being brought by the plaintiff to pre-empt the later share, *held*, that the plaintiff did not become a *hissadar* on the mahal until the date when the same became absolute and his right to pre-empt could not arise until the sale has been confirmed in his favour. 33 A. 45=7 A.L.J. 893=7 Ind. Cas. 409.

——Right of vendee to deal with property before pre-emption suit.

A vendee can deal with the property he bought in any way he likes before a pre-emption suit is instituted. 1 Ind. Cas. 528 (All.).

——Compensation for pre-emptor for being kept out of the use of pre-emption money.

The pre-emptor can claim reasonable interest for the period during which he is kept out of the use

of the pre-emption money and the pre-empted property by any act or omission on the vendee's part. 170 P.W.R. 1916=37 Ind. Cas. 382.

——Suit by Reversioner challenging alienation of Hindu widow—Bound to pay amount advanced for necessity.

A pre-emptor having purchased property alienated by a widow cannot call upon the reversioner challenging the alienation to pay more than what was advanced by him to the widow for a necessary purpose. 184 P.L.R. 1914=78 P.R. 1914=119 P.W.R. 1914 =23 Ind. Cas. 835.

——Mortgage by owner.

The right of pre-emption on a *sale* by a co-sharer does not improve any right of pre-mortgage. 1903 A.W.N. 83=25 A. 421.

PREFERENCE.

See (1) PRESY. TOWNS INSOL. ACT, S. 56.
(2) PROV. INSOL. ACT, S. 54.
(3) T. P. ACT, S. 53.

Preference among creditors—When not bad. *See* 16 M.L.J. 418.

PREFERENTIAL HEIR.

See (1) HINDU LAW—SUCCESSION.
(2) MAH. LAW—SUCCESSION.

PREGNANCY.

See (1) EVIDENCE ACT, S. 112.
(2) HINDU LAW—SUCCESSION.

PRELIMINARY DECREE.

See also C. P. CODE, SS. 2 (2) 97; O. 20, RR. 12 TO 18 AND O. 34, RR. 2, 4, 7.

——May be challenged in appeal against final decree. 13 C.W.N. 498=9 C.L.J. 367=1 Ind. Cas. 86.
——No appeal against preliminary decree—Final decree—Appeal—Finality of first decree. 5 C.W.N. 617=29 C. 758.

——Time for payment fixed in—Power of Court to extend.

Where a preliminary decree in a suit for partition provides for the plaintiff being entitled to a half share in a plaint item on payment into Court within six months from the date of a particular sum with interest thereon at six per cent. from date of plaint till payment, that Court has jurisdiction to extend the time for payment of the sum mentioned in the decree. 37 M.L.J. 695: I.L.R. 43 Mad. 357 and 44 M.L.J. 107: I.L.R. 46 Mad. 148, foll. A.I.R. 1950 Mad. 1=(1949) 1 M.L.J. 181.

PRELIMINARY ENQUIRY.

See CR. P. CODE, SS. 195 & 476.

PRELIMINARY OBJECTION.

See C. P. CODE, O. 41, R. 23.

PREROGATIVE.

See (1) CONSTITUTIONAL LAW.
(2) CROWN AND DEBTS.
(3) PRIVY COUNCIL—SPECIAL LEAVE TO APPEAL.

PREROGATIVE WRITS.

See CONSTITUTION OF INDIA, 1950—ART. 226.

PRESCRIPTION.

See (1) ADVERSE POSSESSION.
(2) EASEMENTS ACT, S. 15.
(3) LIMITATION ACT, S. 26, ARTS. 142 AND 144.

——Easement—Landlord and tenant. *See* 29 C. 363.
——Joint possession for over statutory period. *See* LIMITATION ACT, SS. 7 AND 28. 5 C.W.N. 545=3 Bom.L.R. 303=24 M. 387=28 I.A. 81 (P.C.).
——Pleading—Special plea if necessary. 3 Bom.L.R. 303=5 C.W.N. 545=24 M. 387=28 I.A. 81 (P.C.).

——Projection of eaves—Owners of adjacent plots—Mandatory injunction against one by the other to remove eaves—Prescriptive right to project eaves.

In a suit by the plaintiff for a mandatory injunction against the defendant to direct the defendant to remove at her expense the eaves of her roof projecting into the land of the plaintiff and for a permanent injunction restraining her from allowing the rain water falling into plaintiff's land, the defendant raised the defence of prescriptive right to project the eaves.

Held, that the defendant had a right to project her eaves by possession for a period of more than twelve years prior to the institution of the present suit against her and hence the mandatory injunction could not be granted against her. 16 M.L.J. 281; 29 M. 511, foll. A.I.R. 1949 Mad. 826=(1949) 1 M.L.J. 314.

——Removal of trees. *See* SPECIFIC RELIEF ACT, S. 53 AND TORTS—NUISANCE. 8 C.W.N. 710=31 C. 944.

——Village, acquisition of prescriptive right by.

Case where a prescriptive and customary right was recognised in favour of a whole village represented by a few villages under S. 30. C. P. Code. (1901) 29 C. 100.

——Wall—Window—Privacy.

The mere fact of a wall having stood for over fifty years without a window does not create a prescriptive right in the neighbour to prevent, the opening of a window in the wall. (1900) 5 C.W.N. 147.

PRESIDENCY BANKS ACT (XI OF 1876) REPEALED BY IMPERIAL BANK OF INDIA ACT (XLVII OF 1920)—BANK OF BOMBAY—Share-holder—Right to examine the register of share-holders—Object of the search—Corporation—Member of the Corporation—Common-law right of the member to inspect books of the Corporation.

The plaintiff, a share-holder of the Bank of Bombay claimed to be allowed to inspect the register of share-holders of the Bank with the object that having "observed irregularities in the management of the said bank, in the election of its Directors, in the advancing of large sums of money to its Directors and in other matters relating to the said bank he desired inspection of the register of the present share-holders so as to enable him to communicate with the other share-holders, and if possible obtain their assent to

certain proposed resolutions for the better management of the affairs of the said bank and for the removal of some of the existing Directors which he intended to bring before a general meeting of the share-holders.",

Held, allowing the plaintiff's claim that it was but reasonable that a share-holder of a concern like the defendant Bank should desire from time to time to consult other shareholders and discuss with them the affairs of the Bank for the purpose of taking concerted action, where and when necessary, apart from any question of any irregularity existing in the management of the Bank, and that for that purpose inspection of the register of share-holders was necessary. Every member of a Corporation has the right under common law to inspect its book and records. This right does not cease merely because a Corporation is created by a statute which does not confer the right unless the statute expressly excludes it. A member of a Corporation has a right to inspect any of its books, provided he has a definite object or specified purpose in which he is interested and provided also that an inspection of the books which he requires is necessary for that purpose. He must satisfy the Court that he is seeking inspection not from mere idle curiosity or for some speculative purpose, but that he has some reasonable and definite object in which he is interested and for which the inspection is required whether that definite object concerns or not any subject then actually in controversy or discussion. 2 Stra. 1221 and 2 B. & Ad. 115, followed. (1907) 9 Bom.L.R. 165=31 B. 319.

——Right of member to inspect books of Bank. *See* CORPORATION. 8 C.L.J. 103=18 M.L.J. 355 =32 B. 466=5 A.L.J. 463=10 Bom.L.R. 636=12 C.W.N. 825=35 I.A. 130 (P.C.).

——Succession Certificate—Bank if bound to accept.

A Bank constituted under the Presidency Banks Act (1876) is not bound to recognise the holder of a succession certificate. But it would not be contravening the provisions of the Presidency Banks Act if it did accept the succession certificate. 45 Bom. 138 =A.I.R. 1921 Bom. 204=57 Ind. Cas. 964=22 Bom.L.R. 869.

——S. 23—Certificate—Right of person holding succession certificate—Transfer of shares.

S. 23 does not prevent the Bank from accepting a succession certificate in lieu of Letters of Admn. and paying dividends of shares in the Bank to a person who has obtained the certificate and transferred the share to him. 45 Bom. 138=A.I.R. 1921 Bom. 304=22 Bom.L.R. 869=57 Ind. Cas. 964.

——Ss. 36, 37—Banks—Existing loans—Charge—Immovable property.

It is not illegal for a bank incorporated under the Presidency Banks Act, to take a charge on immovable property for an existing loan. (1900) 2 Bom. L.R. 803=25 B. 52.

——S. 37—Scope of—Position of Directors.

S. 37 must be regarded as containing instructions for the guidance and governance of the Directors and as defining the powers exercisable by them. This section is only directory of the powers of the Directors and not mandatory. If the Directors act in disregard of these powers they are liable to the Bank for any loss that it may sustain by their unauthorised act but the section does not enable third parties with whom contracts have been entered into, to deny their liability to the Bank if the Bank chooses to act upon the contract of its Directors. The action of the Directors under such circumstances will not be *malum prohibitum.* In this particular case, the plaintiff was entitled to the decree he sought for. 38 Mad. 1076= 28 M.L.J. 525=29 Ind. Cas. 314.

——S. 37—Scope.

Contravention of the provisions of S. 37 renders directors liable for loss. S. 37 defines powers of directors. The action of the directors in excess of their powers is not void but voidable. Directors are not identical with the Bank. They fill a double character as agents of the Bank and as trustees of the shareholders. 39 Mad. 101=28 M.L.J. 444=17 M.L.T. 326=(1915) M.W.N. 316=29 Ind. Cas. 192.

PRESIDENCY MAGISTRATES—Bench of—Rule that Chairman's opinion shall prevail—*Ultra vires. See* 8 C.W.N. 862.

——Jurisdiction. *See* CORONER'S ACT, S. 24. 7 C.W.N. 889=31 Cal. 1.

——Not a magistrate of the first class. *See* PRISONS ACT, S. 62. 32 M. 303=10 Cr.L.J. 393= 3 Ind. Cas. 885.

——Powers of—Discharge—Fresh evidence—Commitment. *See* 5 C.W.N. 169=28 C. 211.

——Recording of evidence by. *See* CR. P. CODE, S. 362. 4 C.L.J. 408=33 C. 1036.

——Recording of evidence in petty cases—Discretion—*See* CR. P. CODE, S. 362.

——Recording of reasons for conviction by. *See* CR. P. CODE, S. 370. 8 C.W.N. 839=31 C. 983.

——Warrant case—Discharge—Rehearing.

Held by (F. B. Ghose, J., dissenting), that a Presidency Magistrate is competent to rehear a warrant case triable under Ch. XXI, Criminal P. C., though he had once discharged the accused person. (1901) 5 C.W.N. 457=28 C. 652 (F.B.).

PRESIDENCY SMALL CAUSE COURTS ACT (15 OF 1882)—Reference to High Court—Provisions governing such references—Strict compliance. *See* 28 C. 260.

——Single Judge, power and duties of.

The Presidency Small Cause Courts Act nowhere provides for any powers which may be exercised by a single Judge except certain duties specifically imposed on the Chief Judge or his *locum tenens.* It only speaks on the powers of the Small Cause Court. (1902) 4 Bom.L.R. 940=27 B. 130.

——S. 6—Revisional powers of High Court. *See* C. P. CODE, S. 115. 7 C.W.N. 547=30 Cal. 588.

——S. 6—High Court of Calcutta—Revisional jurisdiction over the Presidency Small Cause Court—Right of audience.

An application for revision of a decree of the Presidency Small Cause Court is properly made to the High Court in the exercise of its original jurisdiction and as such should be presented by an advocate instructed by an attorney and not by a Vakil. 30 C. 986=7 C.W.N. 843.

——S. 9—Record of evidence—Duty of Small Cause Court—Rules of Calcutta High Court.

Under the Rules framed by the Calcutta High Court, it is not incumbent upon the Judge of the Presidency Small Cause Court to record the evidence or a memorandum thereof. 52 C.W.N. 602=A.I.R. 1949 Cal. 65.

——Ss. 9, 38—Full Court—Appeal from the decision of single Judge—Powers of Full Court to interfere on question of fact.

There exists a long and inveterate practice, in the Court of Small Causes at Bombay, under which the Full Court consists of two Judges, the Chief Judge or in his absence, the senior Judge, presiding; and the Judge against whose decree any application is made, is the second member, if he is present in Court, and if he is absent, any other Judge takes his place, and the Court thus constituted proceeds to hear and dispose of the application preferred against the decision of an individual Judge of the same Court. This practice is not *ultra vires* and void although there are no rules framed respecting it under S. 9. The power to alter, set aside, or reverse the decree or order, contemplated by S. 38 includes the power to pass a decree in favour of the party in whose favour the application is granted. The practice in the Court of Small Causes at Bombay of reviewing evidence in cases in which the notes of evidence are sufficient to enable the Full Court to undertake that review and of setting aside a wrongful dismissal of the suit, where the decision is manifestly against the weight of evidence, is not contrary to law. (1903) 5 Bom.L.R. 555=27 B. 563.

——S. 9—Registrar has no jurisdiction to set aside his ex-parte decree.

The Court as opposed to the Registrar, is under the rules the proper and the only authority which can deal with such an application. (1902) 7 C.W.N. 547=30 Cal. 588.

——S. 9—Revision by High Court. *See* C. P. CODE, S. 115. 8 Bom.L.R. 969=31 B. 138.

——S. 9—Jurisdiction—Title, question of—Sole or principal question in the cause.

The jurisdiction of the Presidency Small Cause Courts is not ousted even though the question of title is the principal question to be tried in the case. The jurisdiction is ousted only if it is the sole question to be tried in the case. 31 C. 100 (F.B.).

——S. 9—Jurisdiction to entertain an application under S. 521 of the C. P. Code.

The Presidency Small Cause Court has jurisdiction to entertain an aplication under S. 521 of the C. P. Code. (1903) 30 C. 397=7 C.W.N. 545.

——S. 9—Jurisdiction—Claim arising in execution of decree—Title to tiled huts—Immovable property—Title to immovable property arising incidentally.

Ordinarily, where property attached as being the property of a judgment-debtor is claimed by a third person, that third person may file a claim, and where the Court has jurisdiction to try the question, the title to the property is determined in execution proceedings. Tiled huts are immovable property and the Small Cause Court has no jurisdiction to try a question of title to such huts as between one attaching creditor and a stranger claiming title to it. Where the sole object of the stranger in filing the suit is to try the question of title to immovable property, the Small Cause Court has no jurisdiction to try it though it may have jurisdiction to try it if the question of title only incidentally crops up. A suit by an attaching decree-holder as if for damages made up of the Small Cause decree amount and peon's wages paid by plaintiff and for trespass made under a *bona fide* claim by the petitioner that the tiled hut is the property of the judgment-debor is not a suit in which the real object is to obtain a remedy grantable by a Small Cause Court. 11 C. 261, dist. 5 B. 512, foll. (1904) 31 C. 340=8 C.W.N. 246.

——Ss. 9, 19, 28—Jurisdiction to enquire into question of title in tiled hut cases—Amending Act, IV of 1906—Effect of.

The Presidency Small Cause Court has jurisdiction to enquire into questions of title in tiled hut cases by reason of the amending Act (IV of 1906). This jurisdiction is possessed by it not only in execution proceedings connected with its own decrees but also in the execution of decree of other Courts transferred to it. (1907) 34 C. 823.

——Ss. 9 and 38—Rules framed by High Court—O. 41, R. 2, if ultra vires.

O. 41, R. 2, is *ultra vires* of the High Court though a condition similar to that laid down in the said rule may be taken advantage of, and imposed under S. 38 of the same Act. S. 9 of the Act empowers the High Court to make rules only with reference to matters of practice or procedure; no power is given to make sub-rules with regard to the matters of substantive rights. The right to apply for a new trial given by S. 3 of the Act is a substantive right. 38 Mad. 823=15 M.L.T. 156=(1914) M.W.N. 216=26 M.L.J. 227=1 L.W. 172=22 Ind. Cas. 775.

——Rules under—Madras Small Cause Court Rules—O. 21, Rr. 53 and 32—Order for attachment of goods of defendant in possession of stranger—Validity—Proper procedure—Regular suit under O. 21, R. 53—What plaintiff has to prove.

The plaintiff filed a small cause suit against *K* for money alleged to be due to him, and obtained an order for attachment before judgment of certain electric fans belonging to *K* in possession of *A*. The bailiff seized the fans in spite of *A's* allegations that the fans were his and he had purchased them from defendant No. 3. *A* filed an application for release of fans on the ground that they were his property. The application was dismissed on the ground that the fans belonged to the defendant *K* and *A* had no title to them. Thereupon, *A* filed a regular suit under the provisions of O. 21, R. 53 of the Small Cause Court Rules for setting aside the adverse order on his application:

Held, (1) that the bailiff had no power to seize the fans from the possession of *A* and the seizure was illegal. The correct procedure was to serve upon *A* a prohibitory order under O. 21, R. 32 preventing him from giving possession of fans to defendant *K*.

(2) That in the suit under O. 21, R. 53, the plaintiff *A* had to establish his title to the property in dispute, merely proving that attachment of property was illegal was not sufficient. A.I.R. 1945 Mad. 127=(1945) 1 M.L.J. 50=1945 M.W.N. 3=58 M.L.W. 303=I.L.R. (1945) Mad. 720=211 Ind. Cas. 639.

——Rules framed by Madras High Court under, O. 41, R. 7—Application for review—Onus not discharged—Mere absence of counter-affidavit—Court, if can grant application—Strict proof that new matter was not within knowledge of applicant when decree was passed—Necessity of.

The mere absence of a counter-affidavit will not enable the Court to grant an application under O. 41, R. 7 of the Rules framed by Madras High Court under the Presidency Small Cause Courts Act when the party on whom the onus rests of making out the facts necessary for such an order has not done so, and when the Court's attention has been clearly directed to evidence conclusively proving the contrary.

Clause (*c*) of O. 41, R. 7 of the Rules framed by the Madras High Court under the Presidency Small Cause Courts Act means that the new and important matters which are alleged by the applicant for review were not within his knowledge, and therefore, could not be produced by him at the time of the decree sought to be reviewed. The Court cannot therefore, pass an order granting review without calling for strict proof that the new matter was not within the knowledge of the applicants when the decree was passed. A.I.R. 1935 Mad. 768=1935 M.W.N. 333 =159 Ind. Cas. 737.

——R. 20—C. P. Code, S. 266—Decree against the separate property of a married woman—Attachment—Income of property subject to restraint upon anticipation.

The income of property subject to a restraint upon anticipation accruing due after the date of the judgment cannot be attached in execution of a decree against the separate property of a married woman. S. 8 of the Married Woman's Property Act, 1874, was not intended to affect the operation of the doctrine of restraint upon anticipation by rendering pro perty so restrained liable on contracts made by her as to her separate estate. Decrees passed in accordance with S. 8, of the Married Woman's Property Act, against the separate property, if any, of a married woman in respect of a contract entered into by her cannot considered as passed against property which she is restrained from alienating. Rule 20 of the Presidency Small Cause Court Rules (S. 260, C. P. Code) is only a rule of procedure. It and the exceptions mentioned in the *proviso* are not stated in terms to be exhaustive. Such a rule cannot be taken as authorizing the attachment of property which by a rule substantively now embodied in S. 10 of the Transfer of Property Act, is incapable of being transferred or charged by the beneficiary. (1907) 17 M.L.J. 363=2 M.L.T. 322= 30 M. 378.

——S. 9—Madras rules—R. 33—Limits of Registrar's power.

The Registrar has no jurisdiction under R. 30 to enquire into the liability of the Garnishee, when the identical claim is already the subject-matter of another suit in the Court. His jurisdiction extends to those cases only where suit is not actually instituted. 114 Ind. Cas. 847=30 M.L.W. 217=A.I.R. 1929 Mad. 274.

——S. 9—Calcutta rules—R. 92 of the Calcutta High Court—Scope and object of.

The object of the R. 92 which runs:—"Provided that the Court may, if in its opinion no sufficient grounds are shown for the application, dismiss it without directing service on the party against whom the application is made," was to remove the difficulty by which a preliminary hearing was precluded for finding out whether there were grounds for the application as indicated in the rule. The rule is not *ultra vires* but as regards S. 38, the preliminary hearing must be made before a Bench of the Small Cause Court. 60 Ind. Cas. 917=47 Cal. 763=24 C.W.N. 783.

——Rules of Practice—R. 102—Claim proceedings—Decree-holder attaching property—Whether necessary party—Jurisdiction of Small Cause Court—Value of claim more than Rs. 2,000.

A sued *B* under his trade name in the Small Cause Court for goods sold and delivered and he obtained a decree for a sum including certain costs. In execution of his decree, *A* attached certain properties. *C* made a claim to the attached properties. *C* entered into a bond to pay the decretal sum if his claim proceedings failed and consequently, the properties were released. Subsequently, however, the claim was dismissed whereupon *C* instituted a suit claining that he had a charge on the properties impleading *A* in his suit:

Held, that *A* was not a necessary party as he had no interest in the properties and that he should be dismissed from the suit.

Obiter:—The Small Cause Court has jurisdiction to adjudicate upon a claim preferred in regard to movable properties attached by the Court even though the value of the properties may be estimated at above Rs. 2,000. Where a decision is arrived at in such a claim proceeding, it is final beween the parties subject to a new trial. A.I.R. 1932 Cal. 661=59 C. 827=36 C.W.N. 397=56 C.L.J. 349=139 Ind. Cas. 183.

——S. 14—The Registrar is a Court only when he is trying suits of the value of Rs. 20 or less under the powers invested under S. 14, Presidency Small Cause Courts Act. A.I.R. 1942 Mad. 737 (2)=55 L.W. 700=(1942) 2 M.L.J. 571=1942 M.W.N. 748=44 Cr. L.J. 144=I.L.R. (1943) Mad. 600=204 Ind. Cas. 33.

——S. 16, whether affects provisions of Limitation Act (9 of 1908).

All questions relating to limitation must be decided with reference to the provisions of the Limitation Act subject, of course, to the express provision of any special or local law. S. 16 of the Presidency Small Cause Courts Act in no way affects the provisions of the Limitation Act. A.I.R. 1942 Pat. 128=23 P.L.T. 87=7 C.L.T. 45=197 Ind. Cas. 627.

——S. 17—Application for review.

In the case of an application for review of a decree of a Small Cause Court, which is not accompanied by a deposit in Court, if a deposit is made before the expiry of time for presenting such application has expired the application may be treated as having been effectively presented on the date of deposit. A.I.R. 1933 Nag. 102=29 N.L.R. 104= 141 Ind. Cas. 813 (1).

——S. 18—Jurisdiction of Small Cause Court—Cause of action arising outside jurisdiction—Defendant residing or having head office outside jurisdiction.

The Small Cause Court has no jurisdiction to decree a suit against a defendant when the cause of action arises against him outside the jurisdiction of that Court and that defendant resides or has his head office outside the jurisdiction of that Court and has not acquiesced in the institution of the suit against him in that Court. A.I.R. 1948 Cal. 268.

——Ss. 18 and 19, Cl. (s)—Suit for declaration of mainteanance right — Cognizability by City Civil Court.

Where a suit is for declaration of maintenance right it would come within the saving of Cl. (*s*) of S. 19 of the Presidency Small Cause Courts Act and can be filed in the City Civil Court. 63 M.L.W. 1017=(1950) 2 M.L.J. 255=A.I.R. 1951 Mad. 360.

——Ss. 18, 37—Calcutta Small Cause Courts Rules of Practice, R. 96—C. P. Code, O. 21, R. 51—Small Cause suit—Attachment of property—Value of property and decree amount exceeding Rs. 2,000—Jurisdiction.

The Small Cause Court has no jurisdiction to entertain a claim suit relating to property attached in execution of a decree where property exceeding Rs. 2,000 in value has been attached and the total decretal amount for which the decree can be executed also exceeds Rs. 2,000. A.I.R. 1932 Cal. 67=58 C. 1251=134 Ind. Cas. 903.

——S. 18—Foreign Company—Carrying on business—Service of writ.

A foreign corporation can only carry on business in a town in India through an agent and it can only be served with the writ through its agents so carrying on its business, but in order that service on an agent in such circumstances should be treated as service on the foreign corporation, the agent must have power to enter into contracts on behalf of the foreign corporation. 97 Ind. Cas. 286=43 C.L.J. 576= A.I.R. 1926 Cal. 1030.

——S. 18—Leave to sue—Absence of.

Where the cause of action had arisen wholly outside the territorial jurisdiction of the Small Cause Court and no leave had been taken under S. 18.

Held, that the absence of leave is not a mere error of law and the decision is without jurisdiction, 40 Cal. 308 and 14 Cal. 256, Foll. 97 Ind. Cas. 246=43 C.L.J. 574.

——S. 18—Suit against Secretary of State—Forum.

A suit against the Secretary of State for India in Council can only be brought in the Court within the local limits of whose jurisdiction the cause of action arises. The Secretary of State cannot be said to carry on business in Calcutta merely because the Head Office of the Eastern Bengal Railway against whom the plaintiff claims, is situate at Kaila Ghat Street within the jurisdiction of the Small Cause Court. 97 Ind. Cas. 246=43 C.L.J. 574.

——Ss. 18 and 19—Cognizability—Test.

It is the amount recovered and not the amount claimed which is the dominating and deciding factor for the purpose of determining whether or not a suit is cognizable by the Small Cause Court: A.I.R. 1924 Cal. 405 Diss. from: Cal. Suit No. 1657 of 1922 and Cal. Suit No. 537 of 1925, Foll. 115 Ind. Cas. 85=32 C.W.N. 684=56 Cal. 1292=A.I.R. 1929 Cal. 63.

——S. 18 (a) and (c)—Application — Loss of consignment on Railway — Suit for damages against two railway companies in Calcutta—One having headquarters in Calcutta and the other outside—Leave of Court obtained before suit—Effect—Railway having offices at Calcutta exonerated—If affects jurisdiction of Court.

A suit was brought against the Governor-General in Council as representing the Bengal Nagpur Railway and the East Indian Railway in the Small Cause Court at Calcutta, for damages for loss of goods lost in transit. Notices under S. 77, Railways Act and under S. 80, C. P. Code, were duly served and the plaintiff brought the suit in Calcutta where the East Indian Railway had its headquarters, after obtaining leave of the Court, the Bengal Nagpur Railway having its headquarters outside Calcutta at Kidderpore. It was found that the Bengal Nagpur Railway was solely responsible for the loss and the suit was dismissed against the East Indian Railway. In revision it was contended that the Court had no jurisdiction to entertain the suit as the defendant held to be liable was not residing or carrying on business in Calcutta within the jurisdiction of the Small Cause Court.

Held: (1) that part of the cause of action against the Governor-General was the service of notices under S. 77, Railways Act and S. 80, C. P. Code, and these were served in Calcutta, and the suit regarded as against one defendant, Governor-General in Council, who owned both Railways, was maintainable in Calcutta and clearly fell under S. 18 (a), Presidency Small Cause Courts Act; (2) that if the suit be regarded as against two defendants, *viz.*, the two different entities, the Railway Companies separately, then too the Court clearly had jurisdiciton, because one of them, the East Indian Railway carried on business in Calcutta where it had its headquarters; and leave of the Court had been obtained in respect of the other defendant, the Bengal Nagpur Railway which had its headquarters elsewhere and the case therefore fell clearly under S. 18 (*c*) of the Act; and (3) that the fact the Bengal Nagpur Railway alone was held responsible and the East Indian Railway exonerated, did not affect the jurisdiction of the Court, as it had jurisdiction to entertain the suit as framed, and on the pleadings. A.I.R. 1949 Cal. 622=84 C.L.J. 175.

——S. 18—Suit on award—Cognisable.

A suit on an award to recover a certain sum of money allowed by the arbitrator is not a suit for specific performance of the award, but a suit for the recovery of money and for relief incidental thereto, and therefore such a suit is cognizable by Small Cause Court. 13 Mad. 344; 28 Bom. 1 and 33 Cal. 88, Rel. on. 59 Ind. Cas. 189=45 Bom. 318= A.I.R. 1921 Bom. 399.

——S. 19—Award.

A suit to enforce an award is in essence a suit for specific performance of a contract, and is not of a Small Cause nature. 79 Ind. Cas. 718=1 Rang. 700=A.I.R. 1924 Rang. 192.

——S. 19—Suit by A against B and C—A claiming to be co-sharer with C of certain premises and that B was tenant of premises under him and C—A claiming his share of rent from B and in the alternative from C—Suit, if cognizable by Small Cause Court.

A, in his suit against *B* and *C*, claimed that he was a co-sharer with *C* with respect to certain premises. He alleged that *B* was a tenant of those premises under himself and *C* and claimed his share of rent from *B*. In the alternative, *A* prayed that if *B* had paid all the rent to *C*, *C* should be made to pay *A's* share of his rent. *B* took up the position that he was *C's* tenant and had nothig to do with *A*. *C* claimed to be the sole owner of the premises:

Held, that although a substantial question of title to immovable property was involved in the suit, this question was merely an incidental one, and the Court, therefore, had jurisdiction to try the suit which was for the recovery of the rent and, in the alternative, for the recovery of money had by the defendants on behalf of the plaintiff. Since the plaintiff claimed to be a co-sharer landlord with *C*, he was bound to add *C* as party to the suit for rent inasmuch as he alone could not sue for rent. Therefore, there was no error committed in making *C* party to the suit; nor was the fact of his being party to the suit a circumstance which would oust the jurisdiction of the Court of Small Causes. A.I.R. 1942 Cal. 530=46 C.W.N. 838=203 Ind. Cas. 368.

——S. 19—Matrimonial suit—Suit by Parsi wife to recover costs.

A Court has jurisdiction under the Act to entertain a suit by a Parsi wife to recover costs incurred by her in a matrimonial suit and to recover arrears of maintenance awarded to her by arbitrators. 22 Bom. L. R. 1293=59 Ind. Cas. 189.

——S. 19—Test—Small Cause nature.

In deciding the question whether a suit is of a Small Cause nature or not, attention has to be paid to the nature of the suit, as it was presented to the first Court and not to the subsequent shape that it may have taken as a result of the findings of the lower Courts.

Where the suit was for the specific performance of a contract or in the alternative for damages,

Held, that such a suit is not of a Small Cause nature. 82 Ind. Cas. 123=20 M.L.W. 321=1924 M.W.N. 691=A.I.R. 1924 Mad. 844.

——S. 19 (f) (g) (h)—Maintenance suit.

A suit to recover arrears of maintenance does not fall under Cl. (f), (g) or (h) of S. 19 of the Act. 10 M.L.T. 331=(1911) 2 M.W.N. 341=12 Ind. Cas. 426.

——S. 19 (g)—Suit for recovery of stones forming part of well alleged to be removed by defendant—Defendant setting up title—Small cause.

A suit to recover stones forming part of a well alleged to have been wrongfully removed, or to recover their value, is a suit cognizable by a Court of Small Causes, though on the defendant's plea of title in the well, it may be necessary to determine the question of title in order to dispose of the suit. 20 Mad. 155, not Foll. 16 Ind. Cas. 201, Foll. 43 Mad. 903=39 M.L.J. 490=(1920) M.W.N. 599 =28 M.L.T. 275=59 Ind. Cas. 532.

——S. 19—Suit for recovery of—Presents by bridegroom.

A suit for the return of ornaments and cloth presented by custom by the prospective bridegroom at the time of betrothal is not a suit for compensation for breach of promise of marriage, and therefore the Small Cause Court has jurisdiction to try it. 79 Ind. Cas. 517=A.I.R. 1923 Bom. 393.

——S. 19 (g)—Suit for breach of promise of marriage.

The words 'suit for breach of promise of marriage' mean one between the parties who contemplate contracting marriage, and not between an intended bridegroom and the parent of the intended bride. A suit of the latter kind is cognizable by the Small Cause Court Madras and so cannot be filed in the Madras City Civil Court. (1901) 24 M. 652.

——S. 19 (k)—Suit to enforce arrears of annuity —Suit to enforce a trust.

A suit to enforce the arrears of annuity payable under a will and to which the executors have assented is cognizable by the Presidency Small Cause Court; it does not fall under S. 19 (*k*). (1908) 10 Bom.L. R. 758=32 B. 575.

——S. 19 (s)—Tenders invited by Municipal Corporation, Rangoon—As required plaintiff depositing certain money with his tender as earnest money —Corporation forfeiting deposit in exercise of powers under Rangoon City Municipal Act—Suit by plaintiff for return of deposit:

Held, that the suit did not fall within S. 42, Specific Relief Act, and the suit was cognizable by the Small Cause Court, Rangoon.

Under S. 19 (*s*), what is excepted from the cognizance of Small Cause Court, Rangoon, is the class of suits that fall within the purview of S. 42 Specific Relief Act. To brieng the case strictly within the ambit of S. 42, Specific Relief Act, the defendant must deny the plaintiff's right of any legal character or the plaintiff's title to any property. In the absence of such denial from the defendant, the suit does not fall within the ambit of thae section. A.I.R. 1943 Rang. 70=1941 Rang.L.R. 724.

——S. 19 (s)—A company dissatisfied with services of one of its servants—Agreement between company and its servant that on adjustment and payment of account and delivery of charge, servant should resign—A letter sent by servant to that effect—Resolution by company accepting resignation—Suit by servant for salary, allowance, etc., alleging that he was still servant—Matter referred to arbitration—Arbitrator granting award:

Held, that the suit was not for a declaratory decree but for salary and allowances. The Small Court having jurisdiction to try the suit, the arbitrator was justified in deciding that the servant was an employee of the company. The servant was, therefore, entitled to a decree in terms of the award. A.I.R. 1939 Cal. 489.

——Ss. 19 and 20—Jurisdiction of Small Cause Court.

A decree-holder in Small Cause suit is entitled to attach superstructure which is deemed to be movable property under S. 28, Presidency Small Cause Courts Act, and a suit to claim such property must be filed in the Small Cause Court and not in the City Civil Court which has no jurisdiction to entertain it. A. I.R. 1939 Mad. 610=(1939) 1 M.L.J. 776=1939 M.W.N. 582=50 L.W. 133=184 Ind. Cas. 516.

——S. 19 (s)—Suit under O. 21, R. 63, C. P. Code—Small Cause Court can entertain.

Where a decree-holder files a suit under O. 21, R. 63, Civil P. Code, it is no doubt a suit to establish a right and not to establish title to property, but the right which the plaintiff seeks to establish is a right to attach the judgment-debtor's property and not merely a right to a declaration that he is entitled to attach the judgment-debtor's property. Such a suit, therefore, can be tried by a Small Cause Court. A. I.R. 1937 Bom. 490=39 Bom.L.R. 890=I.L.R. (1937) Bom. 807=172 Ind. Cas. 420.

——S. 19 (s)—Suit under O. 21, R. 63, C P. Code; aim being to release property attached by order of Madras City Civil Court—Small Cause Court, if can entertain it.

The Small Cause Court cannot entertain a suit under O. 21, R. 63, Civil P. Code, by the unsuccessful party in a claim petition under O. 21, R. 58; in the City Civil Court of which the aim and object is to release property from an attachment made by order of the City Civil Court, because if the suit succeeded, it would involve the setting aside of an order made by the City Civil Court over which the Small Cause Court has no jursdiction or control whatever. City Civil Court is not precluded from entertaining such a suit by S. 3, City Civil Courts Act, as even though the value of the subject-matter is within the jurisdiction of Small Cause Court, it is not cognizable by the Small Cause Court. A.I.R. 1936 Mad. 551=44 L.W. 150=1936 M.W.N. 790=166 Ind. Cas. 385.

——S. 19 (s)—Claim suit—Jurisdiction of Small Cause Court.

A suit to establish a right given to the unsuccessful party in claim proceedings under the C.P.C., involves in every case a prayer for the setting aside of a summary order of a civil court. Such a suit cannot be regarded as a suit for a mere declaration and is not excluded from the jurisdiction of a Small Cause Court under S. 19 (S.). 39 Mad. 219=(1915) M.W.N. 376=28 M.L.J. 600=29 Ind. Cas. 908.

——S. 20—Suit in which plaintiff claims more than Rs. 1,000—Applicability of section.

S. 20 applies even to cases where the plaintiff claims more than Rs. 1,000, if the Court really finds he is entitled to less than Rs. 1,000. (1901) 3 Bom.L.R. 893=26 B. 235.

——S. 21—(as amended by Bombay Act (44 of 1948)—Scope—Suits above Rs. 1,000 and below Rs. 2,000 instituted in High Court before Amendment—Jurisdiction to try.

S. 21 of the Presidency Small Cause Courts Act, as amended by Bombay Act XLIV of 1948, does not deprive the High Court of its jurisdiction, but continues the jurisdiction of the High Court in the matter of the trial and determination of suits of the value exceeding Rs. 1,000 but below Rs. 2,000 which were rightly received by the High Court, having been instituted there at a time when it had jurisdiction under S. 21 of the Presidency Small Cause Courts Act, as it stood before the Bombay Amendment Act. 51 Bom.L.R. 122=A.I.R. 1949 Bom. 182.

——S. 22—Appeal — Order of costs—Interference.

Blackwell, J.—Appeal Courts should interfere with the exercise of discretion by the lower Courts as to costs when there has been any misapprehension of facts, or violation of any established principle, or where there has been no real exercise of discretion at all.

Marten, C. J.—An order based on an erroneous view of S. 22, and on an erroneous view as to the proper principles applicable to the awarding of costs apart from S. 22, is laible ti be discharged in appeal 16 Bom. 676, Rel. on. 105 Ind. Cas. 395=51 Bom. 885=29 Bom.L.R. 1220=A.I.R. 1927 Bom. 556.

——S. 22—Appeal — Discretion in — Disallowance of costs.

The Appeal Court while setting aside a decree passed by the lower Court before which the question whether S. 22 of the Presidency Small Cause Courts Act applied was not relevant owing to the decision being in favour of the plaintiff, has discretion to disallow costs to the defendant in the lower Court. 80 Ind. Cas. 766=26 Bom.L.R. 382=48 Bom. 531=A.I.R. 1924 Bom. 422.

——S. 22—Applicability.

S. 22 is applicable to cases where the sum decreed is within the amount cognizable by Presidency Small Cause Court. 24 Cal. 399, Foll.; A.I.R. 1924 Cal. 405, Not approved. 120 Ind. Cas. 714=56 Cal. 575 =A.I.R. 1929 Cal. 641.

——S. 22—Applicability.

Where the suit is cognizable in the Small Cause Court and where it is instituted in the High Court, the provisions of S. 22, Small Cause Courts Act are attracted. 116 Ind. Cas. 736=56 Cal. 484=33 C.W.N. 95=A.I.R. 1929 Cal. 560.

——S. 22—Applicability — Ejectment suits.

A suit for ejectment is outside the jurisdiction of the Small Causes Court, and therefore, S. 22 does not apply. 17 Mad. 216, Foll. 105 Ind. Cas. 395=51 Bom. 885=29 Bom.L.R. 1220=A.I.R. 1927 Bom. 556.

——S. 22—Condition precedent for costs.

In caees governed by S. 22 no costs are allowable to the plaintiff, unless the Judge who tries the suit certifies that it was one fit to be brought in the High Court. A party, having chosen to avail himself of O. 37, Civil P. Code, in a suit for the recovery of a sum less than the amounts mentioned in S. 22, takes the risk of having no costs allowed to him unless he can induce the judge to certify that it is a fit and proper case to be brought in the High Court. 116 Ind. Cas. 736=56 Cal. 484=33 C.W.N. 95=A.I.R. 1929 Cal. 560.

——S. 22—Duty of Court—With reference to costs.

The Presidency Small Cause Court is not a tribunal intended or designed for the determination of substantial commercial cases. It is the duty of the Court to deal with the question of costs in a matter of this kind after a careful examination of the issues which were raised between the parties particularly for the purpose of ascertaining whether there was any undue exaggeration or inflation of the claim on the part of the plaintiff in the suit and whether it was a suitable matter to be tried in the High Court rather than in the Small Cause Court. Claim and counter-claim would justify costs on amounts decreed to either party. 115 Ind. Cas. 85=32 C.W.N. 684 =55 Cal. 1292=A.I.R. 1929 Cal. 63.

——S. 22—High Court passing decree with costs —If deemed to have granted certificate—Powers of taxing authorities.

If a suit on a contract cognizable by the Small Cause Court is instituted in the High Court, and the High Court passes a decree for less than Rs. 1,000, it must be deemed to have impliedly given a certificate under the proviso to S. 22 of the Presidency Small Cause Courts Act that the suit is one fit to be brought in the High Court, for without a certificate the Court could not award the costs. Once the Court has made an order for costs, rightly or wrongly, the taxing authorities have got to accept the decree and assess the quantum of costs. S. 22 is not a rule of taxation; it is a provision of law directed to the Judge who is hearing the suit. I.L.R. (1945) 2 Cal. 192 =A.I.R. 1949 Cal. 346.

——S. 22—High Court—Scale of costs—Suit for account instituted in High Court.

A suit for an account without a claim to a specific sum which is within the competence of the Small Cause Court cannot lie in the Small Cause Court and even if it lies, it is a fit case to be certified to be brought in the High Court and costs will be awarded on the High Court scale. 43 Cal. 190=19 C.W.N. 880=31 Ind Cas. 662.

——S. 22—Object and scope of.

The object of the legislature was to prevent congestion in the High Court, and to provide, where the plaintiff values his claim at a sum which brings his suit within the jurisdiction both of the High Court and of the Small Cause Court, and yet elects to institute proceedings in the High Court, that he should do so at his peril. It is not to be supposed that the legislature intended *ex post facto* to penalise a plaintiff because he had failed to guess correctly which

was the proper Court in which to launch his suit. (16 All. 286, Appr., 13 All. 320, 8 Bom. 31, 24 Cal. 661 and 40 Cal. 245, Foll.)

But it is erroneous for that reason to suppose that the plaintiff is entitled, by a designed exaggeration of the claim, to oust the jurisdiction of the Small Cause Court. The plaintiff by placing a fictitious value on his claim is not at liberty to determine the tribunal by which his suit is to be tried. (31 Bom. 73, 39 All. 723, Foll.) 80 Ind. Cas. 317=51 Cal. 62=28 C.W.N. 6=A.I.R. 1924 Cal. 405.

——S. 22—Valuation — Jurisdiction — Decree—Costs.

S. 22 is applicable to cases in which the suit is cognizable by the small Cause Court so far as its nature goes, even though the amount claimed is beyond its jurisdiction. Where a suit is of the nature cognizable by the Presidency Small Cause Court, but being valued at a higher amount is brought in the High Court and the final decree awards less than Rs. 1,000, the plaintiff under S. 22 is not entitled to any costs. (1901) 3 Bom. L.R. 893=26 B. 235.

——Ss. 28, 18 and 19—Jurisdiction of Court to decide questions of title to immoveable property of any value.

S. 28, Presidency Small Cause Courts Act, applies only where the property attached to the immovable property is of value not exceeding Rs. 2,000. The amendment which gave the Court jurisdiction to decide all questions arising in execution of a decree, even though the subject-matter is a tiled hut, and, trar to make any order in respect of execution ssss therefore, immovable property, simply removed the bar contained in S. 19 (g) and did purport to remove the bar contained in S. 18.

Section 28 only applies when the judgment-debtor is a tenant of immovable property at the time of the attachment. A.I.R. 1932 Cal. 629 =36 C.W.N. 333=59 C. 1092=141 Ind. Cas. 303.

——S. 31—If attracts operation of S. 48, C. P. Code. A.I.R. 1950 Mad. 504=(1950) 1 M.L.J. 437 (F.B.).

——Ss. 31 (a), 47 and 49—Forum provided by Ss. 47 and 49—Madras City Civil Court Act S. 12.

In the classes of suit provided for under Ss. 47 and 49, the High Court is the proper forum. By S. 12 of the City Civil Court Act the City Civil Court is substituted for the High Court only under S. 31 (a). 4 L.W. 402=37 Ind. Cas. 436.

——S. 31 (b) — Decree, transfer of to Munsiff's court direct, legality—Clerical error in the decree effect of.

The transfer of a decree by the Presidency Small Cause Court direct to a Munsif's court for execution, without the intervention of the District court is valid under S. 31 (b) of the Act. 37 C. 574, Foll. A mere clerical error is of no consequence in the certificate of transfer, 'Das instead of Benode Behari Bose'. 28 C.L.J. 264=41 Ind. Cas. 815.

——S. 31 (b)—Transfer of decree for execution.

A presidency Small Cause Court cannot transfer to a civil court a decree for execution which is beyond the pecuniary jurisdiction of the civil court. 37 Cal. 574=14 C.W.N. 662=6 Ind. Cas. 97.

——S. 35—Registrar of Small Cause Court, if can pass judicial order—Order passed by Registrar for transmission of decree, if judicial order.

The language of S. 35, Presidency Small Cause Courts Act, is sufficiently wide to empower the Registrar to make any order in respect of execution matters "which a Judge of the Court might make under this Act." An order for transmission of a decree made by the Registrar of the Small Cause Court, upon an application made in accordance with law, must, therefore be regarded as a judicial order on an application made in accordance with law. A. I. R. 1940 Cal. 557=71 C.L.J. 535=I.L.R. (1940) 2 Cal. 252=191 Ind. Cas. 574.

——S. 35—Registrar of Presidency Small Cause Court—Power to make order under S. 52 (2), C. P. Code.

An order under sub-S. (2) of S. 52, Civil P. C., is an order in execution and in view of S. 35, Presidency Small Cause Courts Act, the Registrar of the Small Cause Court has jurisdiction to make an order under that sub-section. A.I.R. 1935 Mad. 298 (1)=1935 M.W.N. 226=41 L.W. 350=159 Ind. Cas. 490 (1).

——S. 35—Powers of a single Judge to exercise powers under the section.

In the absence of any rule framed under S. 9 a single Judge of the Presidency Small Cause Court cannot exercise the powers conferred by S. 35 and other sections of the Act on the "Small Cause Court." (1902) 27 B. 130=4 Bom. L.R. 940.

——Ss. 37 and 38—Jurisdiction conferred by S. 38 only revisional. 34 B. 316=11 Cr. L.J. 271=12 Bom. L.R. 130=5 Ind. Cas. 862.

——S. 38.

Synopsis.

1. Limitation.
2. Modification of award.
3. Nature of jurisdiction.
4. New trial application—When lies.
5. New trial — Order for — Revision.
6. New trial—Power to order.
7. New trial—Second application.
8. Powers of Full Court.
9. Procedure.
10. Question of fact.
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12. "Suit."
13. What reliefs can be claimed.
14. Miscellaneous.

1. Limitation.

——S. 38—Limitation — Reckoning of period of —Decree amended as to costs.

Even when a decree is amended as to costs the eight days' period under S. 38 will be reckoned from the date of the original decree. (3 C.L.J. 188; 22 M. 364: Foll. I.L.W. 855=16 M.L.T. 438=25 Ind. Cas. 647.

2. Modification of award.

——S. 38—Modification of award — Application to Full Bench lies.

Where a single Judge of the Presidency Small Cause Courts Act modifies an award given by arbitrators, his decision does not amount to a decree passed on an award and, therefore, an application to the Full Bench of the Small Cause Court is competent.

95 Ind. Cas. 442=24 M.L.W. 66=1926 M.W.N. 772=A.I.R. 1926 Mad. 878=31 M.L.J. 498.

3. Nature of jurisdiction.

——S. 38—Nature of jurisdiction.

S. 38 does not confer Appellate powers and hence a person against whom an order is passed may apply to the High Court for revision under C.P.C, S. 115. 2 L.W. 719=18 M.L.T. 254=(1915) M.W.N. 907=30 Ind. Cas. 488.

4. New trial application—When lies.

——S. 38—New trial application—When lies.

Where a decree passed without contest by a Presidency Small Cause Court is amended by that Court on the application by the judgment-debtor under S. 19 of the Madras Agriculturists' Relief Act, 1938, after contest, the judgment-debtor, if he is dissatisfied with the amended decree on the ground that full effect has not been given to the defence which he urged under S. 19, can properly file a new trial application under S. 38, Presidency Small Cause Courts Act. A.I.R. 1942 Mad. 610=(1942) 1 M.L.J. 213=55 L.W. 73=1942 M.W.N. 110=202 Ind. Cas. 771.

——S. 38—New trial application—When lies.

When a suit has been decreed *ex parte* and an application under S. 108, C.P.C., for setting aside such decree dismissed, an application cannot be made under S. 38 for a new trial. S. 38 only applies where the case has been contested. Where there was no 'trial,' there cannot be 'new trial'. In an application under S. 38 for a new trial of the matters arising under S. 108 C.P.C., or Rule 70 of the High Court's Rules, the Small Cause Court has no jurisdiction to go into the merits of the case. (1901) 3 C.L.J. 199.

5. New trial—Order for — Revision.

——S. 38—New trial — Order for — Revision.

The jurisdiction exercised by a Presidency Small Cause Court under S. 38 is in no way limited like the jurisdiction exercised by the High Court under S. 622 of the C.P.C. (O.C.), S. 38 is in the widest possible terms. 8 Bom. L.R. 678.

6. New trial—Power to order.

——S. 38—New trial--Power to order.

The Court may order a new trial if the judgment is manifestly against the evidence; the power of the Court is not limited to the question of law only. 38 Cal. 425=16 C.W.N. 25=12 Ind. Cas. 11.

7. New trial—Second application.

——S. 38—New trial — Second application for—Small Cause Court, Jurisdiction of—C. P. Code, Ss. 13 and 622.

While there can be only one application for a new trial in respect of a particular order or decree if, as the result of such an application the original order is reversed, the subsequent order becomes the existing order in the suit and may be the subject of an application for a new trial. Where however, upon an application for a new trial the application is refused, and the original order stands, there can be no second application for a new trial. 4 C.L.J. 46.

8. Powers of Full Court.

——S. 38—Powers of Full Court.

When any Court fails to apprcciate a question of fact which is vital for the determination of the issue in the suit, it must be considered to be an error in law.

Whenever it is found that the findings of the trial Court are not supported by the evidence and are such as to justify interference in revision, the proper course for the Full Bench of the Court of Small Causes would be to send back the matter to the trial Court for fresh trial and decision according to law. Its jurisdiction is not always confined to questions of law alone. 63 L.W. 58=A.I.R. 1950 Mad. 269=(1949) 2 M.L.J. 737.

——S. 38—Powers of Full Court — Nature and scope of.

The jurisdiction of the Full Court under S. 38 is revisional and not appellate. The Full Court cannot reverse the decision of the trial Judge merely because it disagreed with his view on the facts of law. A. I. R. 1944 Bom. 189=46 Bom. L.R. 389.

——S. 38—Powers of Full Court.

Application to Full Court under S. 38 against trial Court's order decreeing suit—Full Court making rule absolute for new trial and on new trial, dismissing suit:

Held, that the formality gone through by the Full Court in dismissing the suit was not necessary, as, under S. 32, they could have set aside or reversed the decree or order. Technically, they ought to have reversed the lower Court's order and dismissed the suit:

Held, further that as in substance though not technically, the Full Court's order had reversed the lower Court's order and dismissed the suit, there was no reason to interfere in revision. A.I.R. 1944 Bom. 189=46 Bom. L.R. 389.

——S. 38—Powers of Full Court.

Where the trial Judge has heard the case, and arrived at a certain conclusion on the evidence, and there is no reason for suggesting that the trial had not been a proper one, the Full Court has no jurisdiction to entertain the application made to it under S. 38, Presidency Small Cause Courts Act. A.I.R. 1943 Bom. 42=44 Bom. L.R. 924=I.L.R. (1943) Bom. 33=204 Ind. Cas. 567.

——S. 38—Powers of Full Court.

A Full Bench of the Small Cause Courts under S. 38, Presidency Small Cause Courts Act does not exercise appellate powers and has no jurisdiction to decide questions of fact. If it comes to the conclusion that the findings of fact by the trial Court are unsupported by evidence and are such as to justify interference in revision, the proper procedure is not to give fresh findings of fact but to order a trial at which the facts may be gone into afresh. A.I.R. 1941 Mad. 769=1941 M.W.N. 919=(1941) 2 M.L.J. 571=200 Ind. Cas. 615.

——S. 38—Powers of Full Court.

A Full Bench Court of Small Causes, when called upon to exercise its powers under S. 38, Presidency Small Cause Courts Act, is not a Court of Appeal and cannot arrogate to itself the powers of an Appellate Court. In other words, its jurisdiction is merely revisional in nature and it can only interfere and exer-

cise the powers mentioned in S. 38 when it finds some question of law or usage having the force of law to have been wrongly decided, or when it holds that the verdict of the trial Judge was not based on any legal evidence, or possibly when it finds that no reasonable person could have arrived at the conclusion to which he had arrived. In no other circumstances is it possible for the Full Bench Court to interfere with a finding of fact for the simple reason that it is otherwise declared to be final and conclusive.

A re-trial cannot be ordered unless the trial has been vitiated by some legal defect in omitting to observe some rule of procedure or on account of some mistake in appreciating or applying the correct rule of substantive law or the discovery of some important matter or evidence which may necessitate a further re-hearing or re-consideration. The Full Bench Court has no powers to order an amendment of the plaint for the simple reason that they have not been conferred on it by the Act. It cannot be reasonably contended that although it may not have the power to order an amendment, it would have jurisdiction to order a re-trial after the proposed amendment has been permitted by the trying Judge. Assuming however, that in a suitable case it has the power to order a re-trial for this purpose, it is essential for the Full Bench Court to consider whether the proposed amendment could be legally ordered to be made. A. I. R. 1938 Mad. 669=1938 M.W.N. 542=182 Ind. Cas. 19.

——S. 38—Powers of Full Court.

Where a Judge of the Presidency Small Cause Court refuses to stay proceedings in a suit either under S. 19, Arbitration Act, or under Cl. 18 of Sch. II, Civil P. C. and decides the suit on the merits without objection from the parties, the Full Court of the Presidency Small Cause Court is not competent, under S. 38, Presidency Small Cause Courts Act, to revise the order by interferring with the discretion of the trial Judge and to grant a stay, and if the Full Court grants a stay, it will be acting in the exercise of its jurisdiction with material irregularity. A.I.R. 1933 Bom. 202=35 Bom. L.R. 287=144 Ind. Cas. 643.

——S. 38—Powers of Full Court.

A Full Bench of the Presidency Small Cause Court sitting under the section cannot decide question of fact generally and especially when the question of first arises before it in consequence of its finding on another question of law or fact. 40 Mad. 355=21 M.L.T. 111=(1917) M.W.N. 156=32 M.L.J. 213=5 M.L.W. 377=38 Ind. Cas. 346 (F.B.).

——S. 38—Powers of Full Court—Power to allow withdrawal of suit.

The Full Bench of Presy. Sm. C. Court acting under S. 38 is not an appellate court and thus can allow withdawal of suit either to bring a fresh suit or to add a claim to those in the first suit. 5 M.L.W. 147=36 Ind. Cas. 1003.

——S. 38—Powers of Full Court —Power to allow withdrawal after grant of new trial. *See* C. P. C., O. 23, R. 1. 20 C. 239.

——S. 38—Powers of Full Court.

The full bench may on application for a retrial allow a plaint to be amended even though the suit was decided by a single judge, and though it changes the nature of the suit when its effect would be an avoidance of a multiplicity of suits and the determination of the suit itself or the questions at issue between the parties. 22 Ind. Cas. 241 (Mad.).

——S. 38—Powers of Full Court.

On a new trial the Full Bench of a Small Cacse Court can interfere with the finding of the original Court on a question of fact. 18 C.L.J. 594=22 Ind. Cas. 32.

——S. 38—Powers of Full Court.

(Per *Chandavarkar and Batchelor, JJ.*) The section does not seem to confer appellate power on the full Bench.

(Per *Batchelor, J.*) The power conferred by the Section is revisional only. The full Court cannot grant or revoke a sanction refused by a single judge of that Court. There is no distinction between the powers of a single judge and full bench of that Court. 34 Bom. 316=12 Bom.L.R. 130=11 Cr.L.J. 271=5 Ind. Cas. 862.

9. Procedure.

——S. 38—Procedure — Applications under.

The proviso to R. 92, published in the Calcutta Gazette of the 16th July, 1917 is not *ultra vires*, but so far as applications under S. 38 of the Act are concerned, the preliminary hearing must be before a bench formed on the lines laid down in R. 95. *Quaere* —Whether the jurisdiction conferred on the Small Cause Court under S. 38 is revisional or appellate? 60 Ind. Cas. 917=47 Cal. 763=24 C.W.N. 783.

10. Question of fact

——S. 38—Questions of fact—Interference with.

The powers conferred by S. 38 are not restricted to interference with only questions of law. The small cause court has power to reverse a decree on a question of fact. 42 Bom. 80=19 Bom.L.R. 944=43 Ind. Cas. 486.

11. Scope.

——S. 38—Scope—Order made under O. 21, R. 2, C. P. Code whether falls under S. 38.

An order made under O. 21, R. 2, Civil P. C., does not fall within the scope of S. 38 and the decision of a Small Cause Court on an application under S. 38 against this order is withaut jurisdiction. A. I.R. 1938 Cal. 862=I.L.R. (1938) 2 Cal. 637=179 Ind. Cas. 423.

——Ss. 38 and 37—S. 38—Scope — Right of appeal, if given—Revisional powers—Nature of.

It is clear upon reading Ss. 37 and 38 Presidency Small Cause Courts Act, together, that S. 38 was not intended to confer a general right of appeal. The right conferred is upon the Court to be exercised on the application of a party. The powers under S. 38 are revisional in character but they are not limited to the particular matters mentioned in S. 115, Civil P. C., which confers powers in revision on High Courts nor are they limited to points of law. A.I.R. 1943 Bom. 42=44 Bom.L.R. 924=I.L.R. (1943) Bom. 33=204 Ind. Cas. 567.

——S. 38—Scope—Only revisional power cannot decide questions of fact.

The wording of S. 38 of the Presidency Small Cause Courts Act is wide enough to cover appellate jurisdiction both on fact and on law. But it is well settled that the Court can under the section only exercise revisional jurisdiction, that it has no jurisdiction to decide questions of fact. The court can however order a new trial where the judgment was

manifestly against the weight of evidence. This only means that a new trial may be granted when the trial is one to which no reasonable man ought to have come and not merely because the Court to whom application is made takes a different view of the evidence. Where a Full Bench of two judges ordered a new trial on the ground of discovery of new evidence and subsequently a Full Bench of three judges set aside the previous order, *held*, that the Full Bench of three Judges had acted without jurisdiction because it was an interference on facts and that their order should be set aside in revision. *Held also*, that while the section contemplated successive applications for new trial it did not permit successive applications for orders to cancel earlier orders granting new trial. 57 Cal. 612 =34 C.W.N. 413=A.I.R. 1930 Cal. 806.

——S. 38—Scope.

Although S. 38 provides for a more extended jurisdiction than what would be technically called a new trial, a jurisdiction analogous to an appeal yet there is no appeal on facts. But though the power of interference is thus restricted. the application under S. 38 is nevertheless an application in the suit and attracts the operation of S. 69. 80 Ind. Cas. 419= 50 Cal. 919=38 C.L.J. 275=27 C.W.N. 883=A.I.R. 1924 Cal. 446.

——S. 38—Scope — Application to Full Bench to set aside order of Judge—Order setting aside prior order dismissing suit for default of appearance.

An application does not lie to the Full Bench of the Presidency Small Cause Court to set aside an order of a judge of that Court setting aside his order dismissing suit for default of appearance. The word "decree or order" in S. 31 construed. 26 M. 163.

12. Suit.

——S. 38—Suit—Scope of.

Proceeding under O. 21, R. 50 (2), Civil P. C., is a suit within the meaning of S. 38, Presi. Small Cause Courts Act and the Full Court has the jurisdiction to entertain an application under S. 38 against an order passed in such proceeding. 44 Bom.L.R. 124.

——S. 38—Suit—Scope of—C. P. Code, O. 21, R. 50.

Word 'suit' in S. 38, Presi. Small Cause Courts Act includes a proceeding under O. 21, R. 50 (2), Civil P. C. and application against the order passed in such proceedings, can be entertained by the Full Court. 44 Bom.L.R. 120.

——S. 38 'Suit'—Independent proceeding not a suit—Order passed with contest — Whether can be questioned.

Qaere.—Whether an order in an independent proceeding which is not a suit, though it has been contested and ends in a decretal order can be called into question under S. 38 Preidency Small Cause Courts Act. A.I.R. 1942 Mad. 610=(1942) 1 M.L.J. 213 =55 L.W. 73=1942 M.W.N. 110=202 Ind. Cas. 771.

——S. 38—Suit, what is.

Proceeding in which leave is applied for to execute the decree under O. 21, R. 50 (2), Civil P. C., is not a suit within the meaning of S. 38, Presidency Small Cause Courts Act. 32 Bom.L.R. 1009=128 Ind. Cas. 17=A.I.R. 1930 Bom. 412.

——S. 38, Ch. VII—Suit — Preceeding —Power of the Small Cause Court in the Presidency Town to order new trial.

The Presidency Small Cause Court cannot take action under S. 38 of the Presidency Small Cause Courts Act, in reference to an order passed in a proceeding under Ch. VII of the Act. 9 Bom.L.R. 208 =31 B. 259.

——Ss. 38 and 69—Suit — Sitting in suit—Reference to High Court.

Where two or more judges of a Presidency Small Cause Court sit to exercise jurisdiction under S. 38 they are sitting in a suit within S. 69 of the Act from which a reference lies to the High Court. 38 Mad. 438=14 M.L.T. 310=1 L.W. 529=21 Ind. Cas. 302.

13. What reliefs can be claimed.

——S. 38—What reliefs can be claimed—Nature of proceedings under.

An application under S. 38 need not be confined to the prayer for the relief of a new trial but may also include prayers for modifying or reversing the decree or order. An application under S. 38 is not an application by way of an appeal to an appellate Court. If two or more judges of the Small Cause Court sit together for the purpose of exercising jurisdiction under S. 38 they sit 'in a suit' within the meaning of S. 69. Under S. 38 the suit is kept alive for eight days after decree for the purpose of empowering the Court to exercise the appellate powers given to it by the section. Applications for new trials are therefore made 'in the suit' whether the claim has been allowed or dismissed. 19 M.L.T. 165=30 M.L.J. 207=33 Ind. Cas. 929.

14. Miscellaneous.

——S. 38 — Miscellaneous — Application under S. 38, heard and decided by two Judges who signed judgment—Third Judge also signing subsequently—Validity of judgment.

An application under S. 38 was heard and decided by the Chief Judge and another Judge of the Small Cause Court Bench, third Judge being absent. The two Judges who had heard the case signed the judgment. Subsequently, the third judge who knew nothing about it and was not concerned about it in any way, signed the judgment:

Held, that the error of adding the superfluous signature of the third Judge to the judgment could not be taken to detract from the validity of the judgment. A.I.R. 1941 Mad. 769 (770)=1941 M. W.N. 919=(1941) 2 M.L.J. 571=200 Ind. Cas. 615.

——Ch. VII—Proceedings under — Nature of—If suit—Order for ejectment—If decree. *See* LIMITATION ACT, ART. 11-A. 50 Bom.L.R. 747. =A.I.R. 1949 Bom. 104.

——Chap. 7 (Ss. 41 to 49)—Nature of proceedings—Not suits under C. P. Code.

Proceedings instituted under Chap. 7 are not suits within the meaning of the Civil Procedure Code. The decision of the Court based on such proceedings cannot be said to be a decree under S. 2 (2), Civil P. C. 115 Ind. Cas. 504=1929 M.W.N. 174=29 M.L.W. 537=A.I.R. 1929 Mad. 69=56 M.L.J. 199.

——Chap. 7 (Ss. 41 to 49)—Orders under—Not a decision on title.

Orders passed under Chap. 7 cannot be regarded as a "decision or order" on the question of title. In a subsequent suit against an order under that chapter, there is no necessity to alter or set aside any such "decision or order." Consequently, Art. 13, Limitation Act has no application. The article applicable may be Art. 120 or Art. 144. 115 Ind. Cas. 504=1929 M.W.N. 174=29 M.L.W. 537=A.I.R. 1929 Mad. 69=56 M.L.J. 199.

——S. 41—Chap. VI and New trials—Application to proceedings under S. 41.

The provision as to new trials in Chap. 6, does not apply to proceedings under S. 41. Under S. 41 the court can deliver possession only when tenancy has been determined. 26 M.L.J. 467=(1914) M.W.N. 368=23 Ind. Cas. 572.

——Chap. 7 (Ss. 41 to 49)—Question of title—No decision thereon.

As regards orders passed under Chap. 7, Presidency Small Cause Courts Act, there is neither enquiry nor adjudication with reference to the title of parties. 115 Ind. Cas. 504=1929 M.W.N. 174=29 M.L.W. 537 =A.I.R. 1929 Mad. 69=56 M.L.J. 199.

——S. 41—Applicability — Licence from grantor —Suit for ejectment against license and another —Death of licensee—Suit not maintainable against legal representative of licensee.

A licence is not annexed to the property in respect of which it is enjoyed nor is it a transferable right, but is a right purely personal between grantor and licensee. Unless a different intention appears, it cannot even be exercised by the licensee's servants or agents.

Where in a suit for ejectment against two defendants, the defence of the second defendant was that with the death of the first defendant there would be no proceeding to be continued against the second defendant as holding under or by assignment from first defendant within the language of section 41 of the Presidency Small Cause Courts Act.

Held: That there would be no suit against second defendant as with the death of the first defendant there was an end of it and it could not be continued against second defendant as the purely personal right which existed between grantor and licensee cannot be made the basis for having the second defendant as the legal representative for continuing the suit. 63 M.L.W. 1023=(1950) 2 M.L.J. 280.

——Ss. 41 and 47—Applicability — "Occupant" sub-tenant—Right of to apply under S. 47, after order for delivery of possession against tenant.

The term "occupant" in S. 47, Presidency Small Cause Courts Act, means only a person who was a party to the proceedings filed under S. 41 of the Act, and not a person who is or claims to be in possession either at the time of the institution of those proceedings, or thereafter, but who has not been sued, *e.g.*, a sub-tenant.

It is doubtful whether it is open after the disposal of an application under S. 41 of the Act, when an order has been passed for delivery of possession, to a person who is bound by that order to contend that an action taken, in furtherance or execution of an order lawfully passed by a Court competent to pass that order, is an act of trespass. 1949 Cal. 248, foll. I.L.R. (1950) Bom. 281=A.I.R. 1950 Bom. 120=51 Bom. L.R. 842.

——S. 41—Application against tenant — Notice upon sub-tenants—If necessary.

Under, S. 41 of the Presidency Small Cause Courts Act the application made and indeed must be made against the particular occupant who had been asked to deliver possession and failed to do so. If the applicant demands possession of the tenant, he is well entitled under the section to proceed against him alone and obtain an order for possession against him, although he may have sublet the premises to others. He is not required to implead the sub-tenants in order to get an effective order so far as his immediate tenant is concerned. I.L.R. (1949) 1 Cal. 507=52 C.W.N. 804=A.I.R. 1949 Cal. 185.

——S. 41 — Contested application — Jurisdiction of Small Cause Court to decide.

The Small Cause Court has jurisdiction to decide contested applications under S. 41 of the Presidency Small Cause Courts Act. A.I.R. 1947 Cal. 401= 83 C.L.J. 173.

——S. 41—Ejectment suit.

A suit to eject a tenant is not cognizable by the Small Cause Court. 68 Ind. Cas. 983=16 M.L.W. 137=1922 M.W.N. 462=32 M.L.T. 288=A.I.R. 1922 Mad. 445=43 M.L.J. 288.

——S. 41—Ejectment — Rent of portion of house not exceeding Rs. 1000 — Jurisdiction—Question of title.

A suit to eject a tenant of a portion of a house, the rent of which is less than Rs. 1,000 per annum, is cognisable by the Small Cause Court, though the annual rent of the whole building exceeds Rs. 1,000. If the Court goes into the question of title to enable it to exercise jurisdiction, its order cannot be set aside by the High Court as being without Jurisdiction. 7 L.W. 610=51 Ind. Cas. 512.

——S. 41—Ejectment order — City Civil Court has no jurisdiction to set aside an order of Presidency Small Cause Court.

It is not within the jurisdiction of the City Civil Court to set aside an order in ejectment made by the Presidency Small Cause Court. 4 L. W. 402=37 Ind. Cas. 436.

——S. 41—Mortgage — Power of sale—Purchaser—Permissive possession — Jurisdiction of Small Cause Court.

Where a mortgagee sells under a power of sale the mortgaged properties which were in the possession of the mortgagor, the purchaser cannot claim ejectment under S. 41 as the possession of the mortgagor is not within that section one held with the permission of the purchaser or any one from whom he claims, but adversely to him from the date of the sale. 3 Bom. L.R. 456=26 B. 82.

——S. 41—Nature of proceedings.

Though an application under S. 41 is to be in the form of a plaint, it is not a suit. 68 Ind. Cas. 983 =16 M.L.W. 137=1922 M.W.N. 462=32 M.L.T. 288=A.I.R. 1922 Mad. 445=43 M.L.J. 288.

——S. 41—Sub-tenant,

A sub-tenant is an "occupant" according to the meaning of the word in S. 41. 89 Ind. Cas. 881 =49 Bom. 685=27 Bom. L.R. 938=A.I.R. 1925 Bom. 415.

——S. 41—Suit for ejectment of sub-tenant who had been let into possession before the commencement of the Madras Buildings (Lease and Rent Control) Act—Maintainabiblity.

A tenant sub-let before the commencement of the Madras Buildings (Lease and Rent Control) Act, a godown attached to the premises let to him. The landlord terminated the tenancy and filed a suit under S. 41 of the Presidency Small Cause Courts Act against the sub-tenant for his ejectment. On a question as to the maintainability of the suit,

Held, under the circumstances as the landlord could not be evicted under the provisions of the Madras Buildings (Lease and Rent Control) Act and his possession through the sub-tenant could not be disturbed the sub-tenant himself could not be evicted by the landlord and the suit for his ejectment would not be maintainable. 61 L.W. 387 (2)=1948 M.W.N. 374 =A I.R. 1948 Mad. 440=(1948) 1 M.L.J. 456.

——Ss. 41 and 43—Notice to quit valid—Jurisdiction under S. 41 is not ousted by tenant's taking defence under Bombay Rent Restriction Act (16 of 1939), S. 11.

When the landlord gives the tenant a valid notice to quit, the tenancy is determined in law at the expiration of the period and the Small Cause Court gets jurisdiction to entertain the application for summons in ejectment under S. 41. Even if the tenant relies on the provisions of S. 11, Bombay Rent Restriction Act, the tenancy will be deemed to be subsisting only if his defence succeeds and it is the Court which is seized of the application which has the power to decide whether the defence is good. The jurisdiction is not, therefore, ousted by taking up the defence under S. 11, Rent Restriction Act. A. I. R. 1946 Bom. 212=47 Bom. L.R. 825=224 Ind. Cas. 18.

——S. 41—Rental agreement — Execution on same date as mortgage allowing mortgagor to be in possession — Application for ejectment under S 41—Maintainability — S. 41, essentials to be proved.

A executed a mortgage deed in favour of *B*, under which the mortgagee was to have possession of the mortgaged property. There were also certain stipulations therein regarding the interest to be paid on the principal. On the same date a deed of rental agreement was entered into between *A* and *B* under which *A* was to remain in possession on payment of a rent per mensem, and in case of failure to pay rent as stipulated, *B* was entitled to possession of the property even without giving notice to quit or notice demanding possession. On the allegation that rent was allowed to fall in arrears, *B*, under the rights secured by the deed of rental agreement, applied to the Court of Small Causes, under S. 41, Presidency Small Cause Courts Act, to eject *A*. It was urged that the Small Cause Court had no jurisdiction to proceed under S. 41:

Held, that *B* was within his rights in having applied to the Court of Small Causes under S. 41 and that he was not bound to go to the City Civil Court to enforce his right to possession under his mortgage, it being admitted that the tenancy had been terminated or, the permission withdrawn.

One of two things must be shown under S. 41, *viz.*, that the respondent to the application was either a tenant of a person who was occupying the property by the permission of another person and, that such tenancy or permission has been withdrawn or determined. A.I.R. 1932 Mad. 318=35 M.L.W., 272= 1932 M.W.N. 219=62 M.L.J. 346=138 Ind. Cas. 509 (2).

——Ss. 41 and 43—Writ of possession—Force—Use of by bailiff.

In a writ of possession the order to give possession authorises and requires the removal by bailiff of all persons from off the premises by force if need be, to vacate the same. 42 Cal. 313=19 C.W.N. 273= 16 Cr. L.J. 424=28 Ind. Cas. 1000.

——S. 42—Summons not served in ejectment suit.

Where summons was not served on the party sought to be ejected as under S. 42, an order passed to eject him cannot bind him. 7 M.L.T. 385=6 Ind. Cas. 722.

——S. 42—Validity of Summons.

Though Form No. 13 is sanctioned by O. 37, R. 1 yet the direction given in the summons of giving 3 days for obtaining leave to defend before date of hearing is unreasonable and *ultra vires*. 75 Ind. Cas. 390=18 M.L.W. 414=1923 M.W.N. 750=46 Mad. 847=A.I.R. 1924 Mad. 46=45 M.L.J. 699.

——S. 43—Nature of order under—If ex parte—Jurisdiction to pass order for delivery of possession after appearance.

It cannot be held that S. 43 of the Presidency Small Cause Courts Act contemplates only an order passed in the absence of the occupant, *i.e.*, an *ex parte* order. Under the section order for delivery of possession may be passed even after the opponent has appeared in reply to the summons. 45 Bom. 1048, rel. on. I. L. R. (1950) Bom. 453=52 Bom. L.R. 349=A. I. R. 1950 Bom. 321.

——S. 43—Occupant appearing and showing some cause—Jurisdiction of Small Cause Court—If ousted.

Under S. 43 of the Presidency Small Cause Courts Act, the Small Cause Court Judge should make an order for possession if the occupant does not appear or if, after appearing, he does not show cause to the contrary. The section does not use the word "cause" *simpliciter*, but uses the phrase "cause to the contrary" which must clearly mean cause why the order for possession should not be made, in other words, good and sufficient cause for not making the order. It is, therefore, not possible to contend that as soon as the occupant appears to answer an application under S. 41 of the Act and shows some cause, good, bad or indifferent, the Small Cause Court Judge is rendered incompetent to proceed further and must throw out the application or return it to the applicant. The Explanation to the section plainly implies power and a duty to decide the case on the cause shown. I. L. R. (1949) 1 Cal. 507=A.I.R. 1949 Cal. 185=52 C.W.N. 804.

——S. 43—Order for possession—Application for stay under S. 47, C. P. Code—Maintainability—Nature of proceedings under Chap. VII.

Proceedings under Chap. VII of the Presidency Small Cause Courts Act are not regular suits in ejectment. They aer proceedings *sui generis* and partake of a mixture of suit and execution procedure rolled into one. Where therefore after an applicant in such proceedings files a writ of possession for the carrying out of the order for delivery of possession passed under S. 43 of the Act, the occupant of the premises makes an application under S. 47, C. P. Code, for permanent stay of the order, the application cannot be dismissed as premature on the ground that no execution is in progress. The occupant is entitled to a decision of the Court on a contention that the

order for possession has by agreement in some way been satisfied or otherwise disposed of. 54 C.W.N. 931.

——**Ss. 43, 46, 47 and 49—Order for possession against tenant — Whether binds sub-tenant—Suit by latter for declaration that order not binding on him and for injunction — Maintainability—Sub-tenant, when may maintain suit.**

An order for possession made against a tenant under S. 43 of the Presidency Small Cause Courts Act binds the sub-tenant as well and so can be executed against him, although he was not a party to the proceeding under S. 41 of the Act.

After a proceeding has been initiated against the tenant under S. 41 and before an order for possession under S. 43 has been made, even a sub-tenant may perhaps maintain a suit in the High Court for a declaration that the landlord is not at all entitled to the possession of the premises and for an injunction restraining him from proceeding with the application. Such a suit may be taken to be one authorised by S. 46 of the Act, or it may be taken to be a suit under the general law. Again, a suit relating to the title to the premises can perhaps be brought by the sub-tenant at any time. But after an order for possession has been made against the tenant, a sub-tenant cannot maintain a suit for a declaration that the order is not binding on him and for an injunction restraining the landlord from interfering with his possession, in order to avert execution of the order against him. He is a representative of the tenant and any question relating to the execution of the order must be agitated in a proceeding under S. 47, C. P. Code, and not by a separate suit, unless such suit has been specially authorised by the Act. Such a suit is not one specially authorised by either S. 47 or S. 49, apart from the fact that a sub-tenant cannot maintain a suit under S. 47 when the landlord's application is against the tenant. 52 C.W.N. 843.

——**Ss. 43 and 46**—Before the tenant can dispute landlord's title, he must first ordinarily deliver possession. Estoppel ordinarily continues even beyond the term of tenancy unless the tenant first delivers possession. S. 43 does not purport to lay down any law modifying the ordinary law with regard to relations between landlord and tenant. S. 46 has no application, A.I.R. 1940 Mad. 700=1940 M.W.N. 308=(1940) 1 M.L.J. 605=193 Ind. Cas. 251.

——**S. 43—Variation in order.**

The Small Causes Court has no jurisdiction to alter or amend the terms of a decree or order for possession once it has been passed under Chap. VII of the Presidency Small Causes Courts Act.

There is nothing in the Rent Act (II of 1918) which gives the Small Causes Court any power to alter orders for possession made in due course. The Court may fix the time for giving possession at a considerable interval from the date of decree. But once the time is fixed, the plaintiff is entitled to the benefit of that order. 62 Ind. Cas. 45=45 Bom. 1048=23 Bom.L.R. 442=A.I.R. 1921 Bom. 201.

——**S. 45—Ejectment suit — Applicability of the C. P. Code.**

S. 8 of the Act enables a Court to apply the provisions of the C. P. C., in dealing with ejectment suits under the Act. The remedy of a person dispossessed is not merely by way of suit against the dispossessor. 7 M.L.T. 385=6 Ind. Cas. 722.

——**Ss. 46 and 47—Scope — Order under S. 43—Suit by occupant after order and application for order staying proceedings in Small Cause Court Competency.**

It is open to an occupant who considers himself aggrieved by an order under S. 43, Presidency Small Cause Courts Act, to file a suit under S. 46, even after an order has been passed under S. 43, for handing over possession. Such person can also apply under S. 47 for stay of proceedings before the Small Causes Court and obtain an order of stay. 51 Bom.L.R. 842, diss.; A.I.R. 1918 Mad. 757; A.I.R. 1923 Mad. 323, foll. I.L.R. (1950) Bom. 453=A.I.R. 1950 Bom. 321=52 Bom.L.R. 349

——**Ss. 46 and 49—Suit for superceding order under Chap. VII—Procedure.**

No suit can be brought in any court for superceding order under Chap. VII except in the manner provided by Ss. 46 to 49 of the Act. In the event of delivery of possession, S. 46 becomes applicable, and the suit for trying title, must be in the High Court according to S. 19. 4 L.W. 402=37 Ind. Cas. 436.

——**S. 47—"Occupant" — Meaning of—Proceedings against tenant—Right of sub-tenant to apply for stay.**

The word "occupant" in S. 47 of the Presidency Small Cause Courts Act has the same meaning as it has in the last paragraph of S. 41 and in Ss. 42 and 43, namely, the person who has refused to deliver up possession when requested to do so, and who has been made a defendant in the proceedings under S. 41. Accordingly, where a landlord has instituted proceedings under S. 41 of the Act against the tenant, a sub-tenant who has not been made a party to the proceedings cannot apply under S. 47 of the Act for stay of the proceedings. 84 C.L.J. 118=A.I.R. 1949 Cal. 248=53 C.W.N. 187.

——**S. 47—Right of occupant—No discretion to Judge.**

The words of S. 47 leave no discretion to the Judge of the Court of Small Causes at all. The rule is that when proceedings of a summary nature are taken under S. 41, the occupant whom it is proposed to eject shall have a right to say to the Small Cause Court, "I want to have this case tried in the High Court and I am prepared to bind myself with two sureties for the probable costs of the suit." Such an application need not be supported by an affidavit. It is not open to the Judge to dismiss the application as frivolous on the ground that it was not supported by an affidavit unless it was called for. The words "on an application" in S. 47 do not mean at some early time during the currency of such proceedings. They mean at any time during the currency of the proceedings. 72 Ind. Cas. 154=17 M.L.W. 179=32 M.L.T. 294=A.I.R. 1923 Mad. 323=44 M.L.J. 386.

——**S. 47—Sub-tenant not party to proceedings under S. 41—Whether can apply — West Bengal Premises Rent Control (Temporary Provisions) Act—Effect of.**

It is now well-settled law that a sub-tenant who was not a party to the proceedings against the tenant under S. 41 of the Presidency Small Cause Courts Act has no right to apply under S. 47 of that Act. This is a section giving certain rights to a particular class of persons, namely, persons who have been proceeded against under S. 41 of the Act and to no others. There is nothing in the West

Bengal Premises Rent Control (Temporary Provisions) Act which extends these powers to sub-tenants. 53 C.W.N. 708.

——S. 48—Order for possession — Sub-tenant claiming not to be bound thereby—Proper remedy —C. P. Code, S. 141 and O. 21.

If an order for possession passed against a tenant in a proceeding under Chap. VII of the Presidency Small Cause Courts Act is sought to be enforced against a sub-tenant who is not a party to it and who claims to be in no way bound by it in view of the provisions of S. 11 (3) of the West Bengal Premises Rent Control Act, 1948, the latter can come to the Court under the appropriate provision under O. 21, C. P. Code, and he would be heard. S. 48 of the Presidency Small Cause Courts Act itself provides that the procedure in the Small Causes Court in these matters under Chap. VII is to be the same as that prescribed in what may be called a Mofussil Court by the Civil Procedure Code. This automatically brings into operation the provisions of Chap. XXI and in particular the rules relating to the procedure for hearing claims. This is recognised in the form of S. 141, C. P. Code, as applied to the Calcutta Courts of Small Causes by the Calcutta High Court in exercise of its powers under S. 8, C. P. Code, itself. A.I.R. 1950 Cal. 244=54 C.W.N. 376.

——S. 48—Review.

No review lies from the decision of a Presidency Small Cause Court in proceedings under Chap VII. 61 Ind. Cas. 567=45 Bom. 972=23 Bom.L.R. 383 =A.I.R. 1921 Bom. 180.

——S. 48—Scope and powers under.

S. 48 of the Small Cause Courts Act applies the provisions of the Code of Civil Procedure to proceedings under Chap. VII and the language of it is wide enough to include a power to act under O. 21, R. 98, C. P. Code. The Small Cause Court therefore has power to remove any improper obstruction to the carrying out of its own order. 7 M.L.T. 385, Foll. 73 Ind. Cas. 985=18 M.L.W. 135=1923 M. W.N. 882=A.I.R. 1924 Mad. 74=45 M.L.J. 66.

——S. 49—Suit for declaration that plaintiff is monthly tenant under defendant and for injunction—If suit for trying title.

S. 49 of the Presidency Small Cause Courts Act provides that even recovery of possession under Ch. 7 of the Act shall be no bar to the institution of a suit in the High Court for trying the title to the property. A suit for a declaration that the plaintiff is a monthly tenant under the defendant and for injunction restraining the defendant from interfering with the plaintiff's possession and from ejecting the plaintiff in execution of an order of the Small Cause Court is such a suit for trying plaintiff's title, and is, therefore, not barred. 83 C.L.J. 328.

——S. 49—Meaning of 'Suit for trying title'.

A suit for trying title includes a suit wherein any title which the party against whom an ejectment order is passed alleges 'has to be tried and decided.' 4 L. W. 402=37 Ind. Cas. 436.

——Chap. VIII, C. P. Code, Ss. 108 and 647—Ex parte order—Power of the Small Causes Court to set aside the order.

The Court of Small Causes at Bombay has inherent power to deal with an application to set aside an order made *ex parte* and to set it aside upon a proper cause being substantited. 32 C. 253 (F.B.); 9 C.W.N. 81, Foll. 8 Bom. L.R. 803=31 B. 45.

——S. 59—Distress warrant—Costs.

Where a tenant has allowed his goods to be distrained upon and desires to get rid of the distress by complying with a notice in Form C, under S. 59, Presidency Small Cause Courts Act, he must also pay the costs of the distress, that is, he must pay the item under the head "commission," although if he had allowed the goods to be sold, he might have received some further services without making any additional payment. The Registrar will be acting properly in declining to remove the distress except on the terms of receiving payment for the item of affidavit and warrant to distrain and for the item of commission. A. I. R. 1937 Bom. 196=39 Bom. L.R. 152=I.L.R. (1937) Bom. 320=169 Ind. Cas. 365.

——S. 60—Ground on which application under S. 60 can be made.

Applications under S. 60, Presidency Small Cause Courts Act are generally made on the ground that the debtor is not justly indebted for the rent claimed from him, or that the rent claimed is excessive, or that it has not become due and payable or that it was not payable for the period for which it was claimed. A.I.R. 1941 Bom. 286=43 Bom. L.R. 546= I.L.R. (1941) Bom. 521=196 Ind. Cas. 385.

——Ss. 60 and 61—Scope of—Proceedings under S. 61 — Summons not served in prescribed manner—Trial, if vitiated.

S. 60, Presidency Small Cause Courts Act, provides for summary and immediate relief against distraint. It allows a debtor to come in and to obtain time and an owner to procure immediately a release of the property upon terms; S. 61, on the other hand, provides for adjudication of the claimant's right and title to the property. The only method specified for initiating proceedings under S. 61 is that described in Cl. (1) of S. 61. But the mere fact that the summons or notice did not proceed in the peculiar way prescribed in the first portion of S. 61 does not, where a trial takes place in a regular way otherwise, deprive the Court of jurisdiction or vitiate the trial. A.I.R. 1932 Cal. 441=59 C. 311 =36 C.W.N. 530=138 Ind. Cas. 96.

——S. 66—Landlord applying for distress warrant—Practice of requiring him to pay costs in advance is illegal.

Where a landlord applies for a distress warrant, there is no justifiscation for requiring payment of the costs in advance by the landlord. The costs are dealt with by the Act and the scheme is to get them either under a notice in Form C from the tenant or on a sale under S. 66, and the practice of requiring the landlord to pay them in advance is illegal. A. I. R. 1937 Bom. 196=39 Bom. L.R. 152=I.L.R. (1937) Bom. 320=169 Ind. Cas. 365.

——S. 68—On important points, Act is exhaustive — Distress warrant for only one month's rent, legality.

The Presidency Small Cause Courts Act is, on all important points, exhaustive, as it is provided by S. 68 that no distress shall be levied for arrears of rent except under the provisions of Chap. 8.

Distress warrant in respect of arrears of rent due for one month only is not illegal. The practice of the Small Cause Court not to levy distress for arrears of rent for less than two months unless special cause is shown cannot make the distress for a month's rent illegal. The practice is irrelevant to the issue. A.

I. R. 1941 Bom. 286=43 Bom. L.R. 546=I.L.R. (1941) Bom. 521=196 Ind. Cas. 385.

——Ss. 68 and 53—Wrongful distraint — Suit for damages — Essentials — Landlord executing distress warrant against tenant's property under S. 53—Distrained property released on payment of arrears of rent by tenant — No steps taken by tenant to have warrant discharged by Court—Proceedings, if could be said to have terminated in tenant's favour so as to sustain action for damages against landlord.

In an action for damages for wrongful distraint, constituting abuse of civil proceedings, in order to succeed, the plaintiff has to prove that the proceedings were instituted by the defendant, that the defendant acted without reasonable and probable cause, that the defendant also acted maliciously and that in certain classes of cases the proceedings have come to a proper or legal end, *i.e.*, terminated in the plaintiff's favour.

But in some cases of action for damages for abuse of civil proceedings, it is not necessary that the proceedings should have terminated in the plaintiffs' favour, if from their nature, they are incapable of so terminating.

Where, therefore, the landlord distrains his tenant's property for arrears of rent due under a distress warrant duly issued under S. 53 and the distraint is removed on payment of the rent due by tenant but the tenant has taken no steps to have the warrant discharged by the Court issuing the same, the proceedings cannot be said to have terminated in the tenant's favour so as to sustain an action for damages against the landlord.

There is no cause of action in respect of the doing of a legal act, even if it is done with malice and without reasonable and probable cause. If a person has done what he was justified in doing according to the law, the law will not permit an enquiry into his motive. No action can, therefore, lie if an execution creditor, acting under an order of the Court or a creditor executing a distress warrant under an order of the Court, acts with malice or improper motive unless the order of the Court is first vacated. A. I. R. 1941 Bom. 286=43 Bom. L.R. 546=I.L.R. (1941) Bom. 521=196 Ind. Cas. 385.

——S. 69—Conditions imposed upon Judge of Small Cause Court in stating case for opinion—C. P. Code, Ss. 617 and 621—Power of High Court to remand for amendment.

Under S. 69 read with S. 617 of Civil Procedure Code, three conditions should be complied with: (1), the court referring the matter entertains a reasonable doubt on some question of law; (2) it should state the point on which there is doubt: (3) it should give a statement of the facts with its opinion on the point. If the reference does not fulfil these conditions, the High Court can return the case for amendment under S. 621 of the Civil Procedure Code. 30 C. 458.

——S. 69—Construction of document — Difference of opinion—Reference—S. 622, C.P.C, applicable. 18 M.L.J. 480=31 M. 490.

——S. 69—Procedure.

Small Cause Court is competent to make a reference under S. 69 on an application under S. 38 as an application under S. 39 is a stage in the suit which is not necessarily terminated by the decree.

The first step, when a reference is to be made under S. 69 is to draw up a statement of the facts of the case, to be signed by the Judges. They must then formulate the point on which there is a difference of opinion. This statement of facts and of the point on which there is difference of opinion is to be accompanied by statements of the reasons assigned by each Judge in support of his view. 80 Ind. Cas. 419=50 Cal. 919=38 C.L.J. 275=27 C.W.N. 883=A. I. R. 1924 Cal. 446.

——S. 69—Reference — Contents and form of.

A reference by the Presidency Small Cause Court must state only the facts of the case as found by the Judges as shortly and concisely as possible and the questions on which they differ. (1915) M.W.N. 785=32 Ind. Cas. 610.

——S. 69—Reference of a question of fact—Question whether cheque was presented within reasonable time a question of fact and cannot be referred. 18 M.L.J. 465=4 M.L.T. 89=31 M. 364.

——S. 69—Scope of — Reference to High Court.

S. 69 permits a reference to the High Court only when the referring Court entertains a reasonable doubt on the point referred. 17 Ind. Cas. 93 (Mad.).

——S. 69—Whether reference can be made when application under S. 38 is pending.

The Judges of the Presidency Small Cause Court can make a reference to the High Court under S. 69 though an application under S. 38 has not been disposed of. 19 M.L.T. 165=30 M.L.J. 207=33 Ind. Cas. 929.

——S. 69, R. 428—Rule 428 of the Rules of Procedure of the Presidency Small Cause Court is not *ultra vires*. 24 M. 654.

——S. 70—'At once' — Deposit nearly six months after judgment—Strict compliance — Power of Court to extend time for depositing security.

It is very important that in cases of references from the Small Cause Court to the High Court that the provisions of the statute which governs the matter should be strictly complied with. In this case the deposit was not made for nearly six months after judgment. *Held*, that the party should be taken to have submitted to the judgment. The Small Cause Court has no power to extend time of depositing.

Per *Maclean, C. J.*,—*Quaere*: Whether the High Court has power to extend the time for depositing security. 28 C. 260.

——S. 70—Reference to High Court—Deposit of decree amount—Ownership of.

Money deposited in Court, by the Judgment-debtor does not become the decree-holder's property, though the money is deposited pending the decision of the High Court. 33 Mad. 467=7 M.L.T. 207=(1910) M.W.N. 558=5 Ind. Cas. 379.

——S. 72-A (as modified by Beng. Act 20 of 1932)—Process of High Court sent for service to Calcutta Small Cause Court—Conveyance charges—If payable.

Under S. 72-A of the Presidency Small Cause Courts Act (as modified by Bengal Act 20 of 1932), conveyance charges are not payable on processes of the High Court sent for service to the Calcutta Small Cause Court, as such processes are not in suits or proceedings under that Act. Further, in view of S. 20 of the Court-Fees Act read with R. 687 of Process Fees Rules (Bengal), no conveyance charge —which is a further charge—can be levied on a pro-

cess bearing a certificate that proper fee has been levied. An administrative order to the contrary cannot legalise a demand for conveyance charges for processes in suits or proceedings under the Presidency Small Cause Courts Act. I.L.R. (1948) 1 Cal. 438.

——S. 80—Burden of establishing that leave under S. 80 had not been obtained, not discharged —Court, if can rely on presumption under S. 114, Evidence Act.

When the burden of establishing that the leave of the Court of Small Causes under S. 80 had not been obtained prior to the institution of suit in that Court has not been discharged the Court is right in relying upon the presumption under S. 114, Evidence Act, that judicial and official acts have been properly performed, and in holding that the presumption that leave had been granted had not been rebutted. A. I. R. 1940 Cal. 536=41 C.W.N. 999=191 Ind. Cas. 535.

——S. 92—Receiving plaints in vacation.

When a Court is adjourned for the vacation but the notification states that the Court will be open on certain days for the reception of plaints, petitions and other papers, the Court cannot be treated as closed on those days when it was open for the above purpose. 5 M. 189 (F.B.), Foll.

As a matter of practice, it is well understood that plaints, which are not presented in the Presidency Small Cause Court on the days when the office is open for receiving them during the vacation, become time-barred after the expiration of the period of limitation appropriate to such suits and plaintiffs cannot claim to exclude the whole of the Small Cause Court's vacation. The words "other papers" are very wide and must include applications for retrial of the suit. 70 Ind. Cas. 888=17 M.L.W. 705=46 Mad. 938=A.I.R. 1923 Mad. 435=44 M.L.J. 100.

——S. 97—False affidavit filed in case before Chief Judge—On orders of Chief Judge, Registrar making enquiries and filing complaint before Chief Presidency Magistrate:

Held, filing of a sworn statement was not something purporting to be done under the Act, and hence S. 97 was not applicable to the case. A.I.R. 1942 Mad. 326=55 M.L.W. 321=(1942) 1 M.L.J. 105 =1942 M.W.N. 126=43 Cr.L.J. 738=201 Ind. Cas. 437.

——Sch. II, Art. 1—A suit by sahukar for refund of *haisiat* tax does not fall within the scope of Art. 1. A.I.R. 1933 Lah. 124=34 P.L.R. 219=141 Ind. Cas. 378

——Sch. II, Art. 11—Suit for contribution of land revenue paid by one joint khata holder. 4 Bom. L.R. 90=26 B. 437.

PRESIDENCY TOWNS INSOLVENCY ACT (3 of 1909)—Amendment suggested.

Desirability of amending the Presi. Towns Insol. Act so as to include in it a provision similar to S. 78 (2), Prov. Insol. Act, pointed out. A.I.R. 1933 Bom. 91=35 Bom.L.R 12=58 B. 505=143 Ind. Cas. 698.

——Interpretation of Act—English Law —Intention of Legislature.

The Courts are not entitled to go outside the words of the Act and import into it words which are in the English Act for the purpose of limiting the scope of the section. Nor are they concerned with the intention of the Legislature when there is no expression of that intention to be gathered from the words of the Act. They are not entitled to make guesses and to say that the Legislature intended to do what the English Bankruptcy Act has done. A.I.R. 1936 Mad. 789=1936 M.W.N. 690=44 M.L.W. 328= I.L.R (1937) Mad. 178=166 Ind. Cas. 427.

——Interpretation of Act — Applicability of English decision to cases under Presidency Towns Insolvency Act.

The provisions of the Presi. Towns Insol. Act, (1909) are in terms similar to those of the English Bankruptcy Act and hence, the principles of the English decisions are as valid in India as in England. A.I.R. 1943 P.C. 130=56 M.L.W. 423=(1943) 2 M.L.J. 160=10 B.R. 57=1943 A.L.J. 357=1943 M. W.N. 494=47 C.W.N. 914=70 I.A. 93=1943 A.W. R. 67=I.L.R. (1943) Kar. (P.C.) 135 (Sup.)=I. L.R. (1943) 2 Cal. 517=208 Ind. Cas. 351 (P.C.).

——Interpretation of Act—Duty of Courts.

Decisions in cases under S. 60, C. P. Code (1908) are likely to mislead a Court which has to construe the Presidency Towns Insolvency Act, 1909, A sale under S. 266 of the Code of Civil Procedure 1882 or under S. 60 of the present Code as a sale by a Court in execution of a decree which until the contrary is shown can be executed against the property which has been attached. 84 Ind. Cas. 883=1925 M.W.N. 1=23 A.L.J. 85=6 L.R.P.C. 1=6 Lah. 1 =21 M.L.W. 375=27 Bom.L.R. 135=52 I.A. 22 =29 C.W.N. 797=26 P.L.R. 81=A.I.R. 1925 P. C. 18=47 M.L.J. 857.

——Purpose of Act.

The purposes of the Act are wider than those of the Court of Wards Act. A.I.R. 1941 Cal. 505=I. L.R. (1941) 1 Cal. 318=196 Ind. Cas. 170.

——Purpose of Act.

The Presi. Towns Insolvency Act has for its object, not so much the relief of insolvent debtors as the prevention of insolvent trading and the protection of the public. 164 Ind. Cas. 627=39 C.W.N. 324.

——Purpose of Act.

The object for which the law relating to insolvency was enacted was to provide a scheme under which an insolvent debtor's estate should be distributed, so far, at any rate, as unsecured creditors were concerned, *pari passu* among the creditors of his estate. A.I.R. 1935 Rang. 61=12 Ran. 577= 154 Ind. Cas. 221.

——S. 1—Applicability of Act.

Where an adjudication has been made under the old Insolvency Act (11 & 12, Vic. C. 21), all questions arising in the course of the insolvency except questions of pure procedure, will be governed by the old Act. 15 Bom.L.R. 113=19 Ind. Cas. 57.

——S. 2 (a)—Creditor — Assignee of creditor of insolvent.

An assignee of a creditor of a bankrupt has no *locus standi* and cannot claim as of right to be treated as a creditor. It is, however, open to the assignee to apply to be accepted as a creditor in the place of the original creditor, his assignor. If the Official Assignee thinks fit to recognize him, it is open to him to do so. It is also open to him to refuse to do so if it should seem to him that he is being used as an instrument for perpetrating fraud. A.

I.R. 1939 Mad. 811=1939 M.W.N. 573=189 Ind. Cas. 406.

——S. 2 (a)—'Creditor', if includes his benamidar.

The term 'creditor' in the Act does not include his *benamidar*. 20 C.W.N. 995=37 Ind. Cas. 71.

——S. 2 (b)—Debtor.

Person to be a "debtor" within S. 2 (*b*) must be either a subject of British India or who has committed or suffered within British India an act of insolvency. A.I.R. 1938 Bom. 161=40 Bom.L.R. 33=I.L.R (1938) Bom. 301=174 Ind. Cas. 361.

——S. 2 (b)—Debts—Book debts, value of.

A Judge sitting in the exercise of thh insolvency jurisdiction of the High Court cannot close his eyes to the common experience as to the nebulous character of old book debts of the debtor. A.I.R. 1935 Rang. 343=13 R. 192=159 Ind. Cas. 217.

——S. 2 (e)—Power of disposal.

It is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interests in the joint property and from the female members their right to maintenance and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors. The father's power to dispose of the joint property is not absolute but conditional on his having debts which are liable to be satisfied out of that property; and S. 2 seems to contemplate an absolute and unconditional power of disposal. 84 Ind. Cas. 883=52 I.A. 22=29 C.W.N. 797=26 P.L.R. 81=1925 M.W.N. 1=23 A.L.J. 85=6 L.R.P.C. 1=6 Lah. 1=21 M.L.W. 375=27 Bom.L.R. 135=A.I.R. 1925 P.C. 18=47 M.L.J. 857 (P.C.).

——S. 2 (e)—'Property' — If includes credit and reputation.

Insolvent's credit and reputation are not part of the insolvent's property within S. 2 (*e*). 8 Rang. 441 =128 Ind. Cas. 369=A.I.R. 1930 Rang. 289.

——S. 2 (g) — Secured Creditor — Mortgagees of leasehold—When not a secured creditor.

A creditor was a mortgagee of a lease-hold belonging to an insolvent and another. The Official Assignee disclaimed the lease. The creditor then reconveyed the leasehold to the co-mortgagors of the insolvent for consideration received from a person who had stood surety for the mortgagors. By this the co-mortgagors and the surety were alone discharged from all liability. On being invited to prove their claims to the insolvent's estate the mortgagees submitted their proofs as unsecured creditors.

Held, that the Official Assignee having disclaimed the lease and the mortgagees not having obtained a vesting order under S. 66 (*i*) the security of the mortgagees in the lease-hold property so far as regards the interest of the insolvent in it was concerned, was extinguished and the mortgagees became unsecured creditors. 117 Ind. Cas. 440=53 Bom. 290=31 Bom.L.R. 35=A.I.R. 1929 Bom. 107.

——S. 2 (g) — Secured Creditor — Definition—Not exhaustive.

The definition of 'secured creditor' is not exhaustive and as the Act largely adopts the wording of the English Bankruptcy Acts, the definition of 'secured creditor' in those Acts may be accepted as intended equally to apply under Indian Act. 117 Ind. Cas. 440 =53 Bom. 290=31 Bom.L.R. 35=A.I.R. 1929 Bom. 107.

——S. 6—Discharge — Registrar — No power when opposed.

The Registrar in insolvency has no jurisdiction to entertain an opposed application for the discharge of an insolvent, but he has jurisdiction to pass an order of discharge upon an unopposed application. 106 Ind. Cas. 326=54 Cal. 858=A.I.R. 1928 Cal. 50.

——S. 6—Powers of registrar—S. 36—Registrar can deal with application.

The Registrar has power under S. 6 (2) (*d*) and (*c*) to deal with an application made *ex parte* on behalf of the Official Assignee for the examination of any individual under S. 36. 66 Ind. Cas. 715 =48 Cal. 1089=25 C.W.N. 750=A.I.R. 1921 Cal. 58.

——S. 7.

Synopsis.

1. Claim to goods seized by Official Assignee.
2. Discretion.
3. Effect of decision on minors.
4. Fraudulent sale by insolvent.
5. Fraudulent transfer.
6. Insolvency of Hindu father.
7. Interpretation.
8. Jurisdiction.
9. Order under—Res judicata.
10. Order under—Suit to set aside.
11. Scheme of composition.
12. Scope.
13. Stranger to insolvency.
14. Witnesses.
15. Proviso—Applicability.

(1) Claim to goods seized by Official Assignee.

——S. 7—Claim to goods seized by the official Assignee after adjudication — Order disallowing claim—Suit to set aside order.

No suit lies to set aside an order made by the Insolvency Court disallowing a claim made to goods seizd by the Official Assignee after adjudication. 40 Mad. 1173=44 Ind. Cas. 847.

(2) Discretion.

——S. 7—Discretion—Interference with in appeal.

Where the Judge has exercised his discretion under S. 7 in a proper and judicial manner, it would be wrong for the High Court on appeal to interfere with his exercise of that discretion. A.I.R. 1941 Rang. 250=1941 Rang.L.R. 268=197 Ind. Cas. 513.

(3) Effect of decision on minors.

——S. 7—Effect of decision on minors.

A Hindu father (insolvent) who sold a portion of the family property gave some other portion to the vendee as security, in case his minor sons should contest the sale. The Official Assignee sought a decision of the question whether the sale was binding on the minors so that the security property might pass to him unencumbered, the security becoming useless in the sense that it was unnecessary.

Held, that the question could be decided under S. 7 and that the decision was binding on the minors.

66 Ind. Cas. 244=15 M.L.W. 368=1922 M.W.N. 77=A.I.R. 1921 Mad. 456=42 M.L.J. 141.

(4) Fraudulent sale by insolvent.

——S. 7—Fraudulent sale by insolvent—Application to set aside and for declaration that he has disposing power over share belonging to insolvent's sons.

An application by the Official Assignee for a declaration that the sale of a share of his property, by the insolvent in favour of his wife is void on the ground that it was made with the intention of delaying or defrauding creditors is entertainable under S. 7 as he claims a higher title than the insolvent in such a case, but an application for a declaration that he has a disposing power over the remaining share belonging to the insolvent's sons in the said property does not lie under S. 7 as he does not claim in this respect a higher title than the insolvent. A.I.R. 1932 Sind 50=25 S.L.R. 521=135 Ind. Cas. 269.

(5) Fraudulent transfer.

——S. 7—Fraudulent transfer—Transfer set aside—Application for mesne profits—Limitation.

Where a mortgage effected by an insolvent was set aside by the Official Assignee under S. 55 and the Official Assignee made a further application under Ss. 7 and 36 of the Act to call upon the mortgagee to account for the rents and profits which he had received from the mortgaged property:

Held, that the proceedings under S. 7 were equivalent to a suit for the purposes of S. 3 of the Limitation Act and the Official Assignee could recover *mesne profits* only for a period of three years before the date of the application:

Held, also that in the proceedings, the official Assignee was claiming the rents and profits as representing the insolvent's estate and was not putting forward any claim hostile to the insolvent. A.I.R. 1936 Mad. 778=1936 M.W.N. 609=44 M.L.W. 280=71 M.L.J. 289=59 M. 1020=164 Ind. Cas. 660 (F.B.).

——S. 7—Fraudulent transfer by Assignee—S. 36—Powers of Court in cases of.

If a Court of Bankruptcy finds property of the bankrupt in the hands of a purchaser with notice of fraud to whom it has come by a fraudulent conveyance from an assignee in bankruptcy, it may well hold that it has power under Ss. 7 and 36 to order such purchaser to reconvey and revest in a substituted assignee the property so fraudulently acquired. 79 Ind. Cas. 910=A.I.R. 1926 Mad. 141.

(6) Insolvency of Hindu father.

——Ss. 7, 46 (3), 52 (2) (b)—Insolvency of Hindu father—Suit by sons for partition—Official Assignee's right to get declaration of liability of sons' shares to be sold for just debts of insolvent—Jurisdiction of Insolvency Court — Limitation of debt against sons, effect of.

Though, owing to the division of status brought about by a suit for partition instituted by the sons after their father's insolvency, the father and the Official Assignee lose the right of private sale of the family property including the shares of the sons, yet it is open to the Official Assignee, during the pendency of the suit for partition, to obtain in proceedings under S. 7, a declaration that the debts of an insolvent father are binding upon the sons to the extent of their shares in the family property. Section 7 gives the widest powers to the Insolvency Court to go into such a question and to declare the liability of the sons' shares in the family property for the proved and just debts of the father insolvent and make all necessary orders for their realisation. A.I.R. 1931 Mad. 317 =33 M.L.W. 323=61 M.L.J. 66=54 Mad. 739 =1931 M.W.N. 1085=131 Ind. Cas. 481.

(7) Interpretation.

——S. 7—Interpretation.

The words which follow "all other questions whatsoever, whether of law or fact," in S. 7, have the same meaning in substance, as the words in S. 48, Lunacy Act, "any matter whatsoever." The words in the former section "whether of law or fact" do not give any extended meaning to the words "all other questions whatsoever" which words would mean the same, if reference to law and fact were omitted. S. 48 is not mandatory but is permissive, as is also the case in regard to S. 7, Presidency Towns Insolvency Act. A.I.R. 1939 Mad. 224=48 M.L.W. 856=1938 M.W.N. 1143=(1938) 2 M.L.J. 102=183 Ind. Cas. 300.

(8) Jurisdiction.

——S. 7—Jurisdiction—Garnishee outside jurisdiction.

S. 7 confers jurisdiction on the High Court in garnishee proceedings where the garnishee lives outside the jurisdiction; 40 Mad. 810, Foll.; 37 Cal. 418 (P.C.), Rel. on (F.B.). 112 Ind. Cas. 149=51 Mad. 540=28 M.L.W. 285=A.I.R. 1928 Mad. 732 =55 M.L.J. 171 (F.B.).

——Ss. 7 and 36 (5)—Jurisdiction—Property outside the ordinary original jurisdiction of High Court.

The Insolvency Court in Madras can adjudicate upon claims of third parties relating to immoveable properties which are outside the limits of the ordinary original jurisdiction of the High Court—S. 36 (5) of the Act providing summary procedure in undisputed cases does not curtail the wide jurisdiction conferred by S. 7 to deal with cases of disputed title under the ordinary procedure though that jurisdiction is discretionary and the Insolvent Court would seldom try difficult questions of the title itself instead of referring the Official Assignee to an ordinary civil suit. 40 Mad. 810=20 M.L.T. 311=4 M. L. W. 425=36 Ind. Cas. 524.

(9) Order under—Res judicata.

——S. 7—Order under—Res-judicata.

Odgers, J.:—Decision under S. 7 of the Act is *resjudicata*. 65 Ind. Cas. 244=15 M.L.W. 368=1922 M.W.N. 77=A.I.R. 1921 Mad. 456=42 M. L. J. 141.

(10) Order under—Suit to set aside.

——S. 7—Order under—Suit to set aside.

No suit lies to set aside an order passed under S. 7 of the Presidency Towns Insolvency Act. The proper remedy for the party aggrieved is to appeal against the order. 40 Mad. 1173, Foll. 40 Mad. 1173 (Foot Note)=47 Ind. Cas. 298.

(11) Scheme of composition.

——S. 7—Scheme of composition—If can be enforced in Civil Court.

An agreement which forms part and parcel of a scheme of composition, cannot be enforced by a suit in a civil Court, and the only Court which can deal with it is the Insolvency Court. 77 I.A. 143=29 Pat. 564=63 L.W. 1166=52 Bom. L.R. 488=1950 M.W.N. 178=A.I.R. 1950 P.C. 75=(1950) 1 M. L. J. 423 (P.C.).

(12) Scope.

——Ss. 7 and 85 (2)—Scope—Sale of property of insolvent with the consent of the mortgagee—Default in paying full amount—Application for order cancelling sale—Consent order passed by Court—Sale by Official Assignee in lots—Execution of several conveyances—Application by Official Assignee for directions — Maintainability—Claim of intending purchaser to specific performace if barred by time—Effect.

The property of an insolvent was the subject of a mortgage and with the consent of the mortgagee there was an order by the Insolvency Court to dispose of it in favour of the appellant for a certain amount. The appellant paid a portion of the said amount as advance but defaulted in paying the balance. The Official Assignee thereupon applied to the Court for an order cancelling the contract of sale in favour of the appellant. An order was made therein by consent of parties and it provided that in spite of default the property might be treated as sold to the appellant for the sum originally fixed and that portions of the property might thereafter be sold by the appellant and that the Official Assignee might execute a conveyance on receipt of a certain amount as the price of each ground of land sold. A third person guaranteed the performance by the appellant of the conduct of the sale and the conditions of the order passed by the Court. The property was subsequently disposed of in lots and the Official Assignee executed conveyances. The guarantor on behalf of the appellant entered into an agreement with another person for sale of a certain lot and made a part payment to the Official Assignee. Subsequently the intending purchaser paid the balance of the consideration and called on the Official Assignee to execute the conveyance first in favour of his nominee and on his refusal to do so, in his own favour. The appellant having opposed the execution of the conveyance, the Official Assignee sought the directions of the Court. On a contention as to the maintainability of such an application,

Held, that the application was maintainable as it was merely intended to obtain directions regarding the previous order passed by the Court about the conduct of the sale of the property of the insolvent.

Held, also, that the application of the Official Assignee was not rendered incompetent by reason of the fact that the claim of the intending purchaser to enforce specific performance of the agreement of sale in his favour was barred by limitation. 61 M.L.W. 632=A.I.R. 1949 Mad. 289=1948 M.W.N. 566=(1948) 2 M.L.J. 274.

——S. 7—Scope.

S. 7 is very wide in its language. It gives the Insolvency Court jurisdiction to decide all questions whatsoever, whether of law or fact, which may arise in any case of insolvency. S. 7 is not limited in its scope to matters in which the Official Assignee by the operation of the Insolvency law claims a higher title than what the insolvent himself would have had. A. I. R. 1941 Rang. 250=1941 Rang. L.R. 268=197 Ind. Cas. 513.

——S. 7—Scope—Administration under S. 108—S. 7, if applies.

It was not intended by the use of the words "in any case of insolvency" in S. 7, to include the exercise of the powers of the Insolvency Court in cases of administration in insolvency. S. 7 was only intended to apply to cases where there had been an adjudication in insolvency. The Official Assignee has no power to examine under S. 36 the representatives of a deceased debtor who has not been adjudicated insolvent. Nor has he the power to take proceedings under S. 7. A.I.R. 1933 Mad. 74=36 M.L.W. 703=1932 M. W. N. 259=63 M.L.J. 810=56 Mad. 273=143 Ind. Cas. 265.

——S. 7—Scope—Administration under S. 108.

S. 7 does not apply to cases where the estate of a deceased person is administered in insolvency. Whatever rights a creditor may have must be enforced by a regular suit. 104 Ind. Cas. 89=5 Rang. 375=A. I. R. 1927 Rang. 284.

——S. 7—Scope—Administration under S. 108.

Cases of administration of the estate of persons dying insolvent are not cases of insolvency within the meaning of S. 7.

Per *Heald, J.*—The words "case of insolvency" in S. 7 are sufficiently wide to cover a case of administration in insolvency, and there is nothing in the wording of S. 7 which precludes the exercise of the powers specific therein in the administration of an estate in insolvency. 97 Ind. Cas. 224=4 Rang. 157 =A.I.R. 1926 Rang. 157 (F.B.).

——S. 7—Scope—Payment to creditor after order of adjudication—Official Assignee's application to set aside payment.

The Insolvency Court has very wide powers of entertaining an application by the Official Assignee for recovery of money paid to a creditor after the order of adjudication has been passed, although in the circumstances of any particular case, the Court may refuse to exercise its discretion. The question is one which should be properly decided by the Insolvency Court and not by a separate suit. A.I.R. 1934 Sind 44=148 Ind. Cas. 941 (2).

——S. 7—Scope.

Although the jurisdiction given by S. 7, Presidency Towns Insolvency Act is extensive, only those orders can be made under the section which are necessary for the purpose of the insolvency, that is to say, for facilitating the distribution of the assets among the creditors. A.I.R. 1940 Cal. 192=43 C.W.N. 1194=I. L. R. (1939) 2 Cal. 434=187 Ind. Cas. 699.

——S. 7—Scope of — Stranger claiming lien as given by insolvent.

An application by a third party by which he claims a lien on certain property on the ground that he was given a lien on the same by the insolvent, does not lie under S. 7.

The question of the Official Assignee's title by reputed ownership is one to be decided under S. 7. A.I.R. 1932 Sind 207=143 Ind. Cas. 204.

——S. 7—Scope.

Where the official assignee claims to set aside a mortgage affecting the property of the insolvent the

matter can properly be brought by way of motion in bankruptcy. 53 Ind. Cas. 175 (Cal.).

——S. 7—Scope—Question of title.

Title to an estate cannot be decided in insolvency proceedings. A.I.R. 1937 Cal. 532=174 Ind. Cas. 220.

——S. 7—Scope.

Where the case is one in which the Official Assignee's claim is higher than the claim of the insolvent himself could have been against a third party, the Insolvency Court has jurisdiction to deal with the Official Assignee's claim against such third person. A.I.R. 1937 Rang. 214=14 Rang. 652=169 Ind. Cas. 491.

(13) Stranger to insolvency.

——S. 7—Stranger to insolvency — Money claim against.

The Official Assignee is entitled to proceed by way of motion under S. 7 in those cases where he has a money claim against a stranger to the insolvency. The Court then has to determine whether having regard to the convenience of all concerned it is reasonable to deal with on a motion or whether it should be dealt with in a regular suit. No money claim in which a difficult question arises should be dealt with by way of motion nor should large claims. Only simple cases capable of easy and speedy proof should be so dealt with. 118 Ind. Cas. 506=52 Mad. 717 =30 M.L.W. 159=A.I.R. 1929 Mad. 705=57 M. L. J. 145 (F.B.).

——S. 7—Stranger to insolvency — Question of title.

As a rule, proceeding against a mere third person as against whom the Official Assignee claims no higher title than the insolvent's is not brought in the insolvency jurisdiction, and in any ordinary case, any such motion brought in that jurisdiction unfairly and unreasonably would be refused as the High Court is in no way obliged in the insolvency jurisdiction to try such a question. A.I.R. 1941 Rang. 250=1941 Rang. L.R. 268=197 Ind. Cas. 513.

——S. 7—Stranger to insolvency — Question of title.

The Insolvency Court will refuse to exercise jurisdiction as against a stranger to the insolvency unless he submits to its jurisdiction, when the Official Assignee claims only the same right as the insolvent would have had, and will only exercise jurisdiction when the Official Assignee claims by a higher title. Insolvency Court will refuse to exercise jurisdiction where the question is whether the minor was a member of the joint Hindu family and if so, whether the firm was a contractual firm or a joint family firm and whether the Official Assignee could alienate the minor's share as representing the *karta* of the joint family. A. I. R. 1942 Bom. 118=44 Bom. L.R. 171=200 Ind. Cas. 584.

——S. 7—Stranger to insolvency — Questions of title.

The Civil Court can try a suit for possession by a stranger against the Official Assignee of the Insolvent who claims that the property is his. S. 7 is an enabling section and S. 36 does not take away the jurisdiction of existing Court. In the course of insolvency does not mean that Insolvency Court can decide questions of title. 35 Bom. 473=13 Bom. L. R. 900=12 Ind. Cas. 391.

(14) Witnesses.

——S. 7—Witnesses — Privileges of.

The person examined as witness under Ss. 7 and 36 is entitled to all the privileges conferred on a witness by the Evidence Act and he cannot be compelled to answer any question which the Evidence Act allows him not to answer. 114 Ind. Cas. 836=29 M. L. W. 40=A.I.R. 1929 Mad. 183.

——S. 7—Witness claiming property — Can be subpoened—When, need not be refused.

Ss. 7 and 36 give the Court power to examine any person touching the property of the insolvent and the mere fact that the witness says that the property belongs to him, is no ground for refusing to subpoena him for examination. And the fact that the Court cannot adjudicate on the question of the ownership of the property later on will be no ground for refusing the examination of a witness under these sections. 114 Ind. Cas. 836=29 M.L.W. 40=A.I.R. 1929 Mad. 183.

(15) Proviso—Applicability.

——S. 7, Proviso—Applicability.

Proviso to S. 7 is no bar to an application by creditor to avoid the transfer by the insolvent under Ss. 55 and 56 if the Official Assignee refuses to do so. A.I.R. 1934 Cal. 232=60 Cal. 1367=149 Ind. Cas. 995.

——S. 7, Proviso—Applicability—Petition under against insolvent's wife who was examined under S. 36 for deciding the question of title—Maintainability. *See* PRESIDENCY TOWNS INSOLVENCY ACT (3 OF 1909), SS. 36 AND 7, PROVISO. (1950) 1 M.L.J. 123=A.I.R. 1950 Mad. 410.

——S. 7, Proviso—Applicability—Effect of.

The effect of addition of a new proviso to S. 7 in 1927 is that when a person who is examined under S. 36 denies the claim of the Official Assignee with regard to any property in his possession, the Official Assignee can proceed against him only by way of suit unless he submits to the jurisdiction of the Insolvency Court. But, the new proviso only applies where there is an examination under S. 36. When there is no such examination, the discretion of the Court is entirely unfettered by the provisions of the proviso to S. 7. A.I.R. 1942 Bom. 118=44 Bom. L. R. 171=200 Ind. Cas. 584.

——S. 7, Proviso — Applicability—Question of title, if falls under S. 36.

The only matters which arise under S. 36, Presidency Towns Insolvency Act are alleged indebtedness to the insolvent by a third party and alleged possession by a third party of any property belonging to the insolvent. Therefore, the proviso to S. 7 does not come into operation unless the proceedings under S. 7 involve the decision of such a matter arising under S. 36. If the person summoned under S. 36 denies his indebtedness to the insolvent or denies that he has in his possession or power any property belonging to the insolvent, the Court under S. 36 as amended in 1927, has no power to deal further with that person under S. 36 and is precluded from deciding such matters in its insolvency jurisdiction by the proviso to S. 7. A matter can be said to arise under S. 36 although no person may have been summoned and examined under that section. Even if a person has been summoned and examined under S. 36, the mere fact of his examination does not bring into operation

the proviso to S. 7 unless the matter of the examination is such as arises under S. 36.

The question was whether the third party had a title to the property for which the Municipal Corporation paid Rs. 6,555 as compensation for compulsory acquisition by way of equitable mortgage and if not, whether the payment of the compensation money to the third party by the insolvent was not liable to be set aside under Ss. 55 and 56, Presidency Towns Insolvency Act:

Held, that the proviso to S. 7 was no bar to the jurisdiction of the Insolvency Court dealing with and disposing of the matters involved:

Held, also that the Insolvency Court should, in the circumstances of the case, itself in the exercise of its discretion dispose of the question under S. 7 instead of referring the Official Assignee to a regular suit. A.I.R. 1942 Sind 21=I.L.R. (1941) Kar. 455=199 Ind. Cas. 641.

——S. 7, proviso—Applicability.

Where the insolvent's debtor, in satisfaction of the debt, transfers immovable property at the request of the insolvent to the wife of the insolvent, and the Official Assignee applies under S. 55 of the Act, the matter is not one "arising under S. 36" and the jurisdiction of the Insolvency Court under S. 7 is not asked to decide the issue between the wife and the Official Assignee. A.I.R. 1941 Rang. 250=1941 Rang. L.R. 268=197 Ind. Cas. 513.

——S. 7, proviso—Applicability.

There is nothing in Proviso to S. 7 limiting its application only when the third party has been actually examined under S. 36. But its application is restricted to the two matters arising under sub-Ss. (4) and (5) of S. 36, that is, under sub-S. (4) the question whether the third party is indebted to the insolvent, or under sub-S. (5) the question whether the third party is in possession of property belonging to the insolvent. Unless all parties agree, if such indebtedness or such possession is denied by the third party, the jurisdiction of the Insolvency Court to try the matter is wholly excluded and it does not matter whether the denial has been made in the course of examination under S. 36 or at any other time. But sub-S. (5) of S. 36 has in view only the case of property admittedly belonging to the insolvent and the object of the sub-section is to enable the Official Assignee to discover its whereabouts; it relates to possession only and not to title. Where the ownership of, or title to the property, is in dispute, this sub-section has no application, and consequently, the jurisdiction of the Insolvency Court under S. 7 is not barred to such cases by the proviso to the section. A. I. R. 1940 Rang. 39=1939 Rang. L.R. 731=187 Ind. Cas. 45.

——S. 7, proviso—Applicability.

S. 7, Rangoon Insolvency Act is not limited in its scope to matters in which the Official Assignee, by the operation of the Insolvency law, claims a higher title than that which the insolvent himself would have had.

Where the Official Assignee, standing in no higher position by reason of the special provisions of the Insolvency law than the bankrupt himself, seeks to recover a debt which is not admitted, it is a matter of discretion for the Judge sitting in insolvency whether in any given case he should deal with such a claim in the Insolvency Court or refer it to the machinery of the ordinary Court. A.I.R. 1940 Rang. 39 =1939 Rang. L.R. 731=187 Ind. Cas. 45.

——S. 7, proviso—Applicability.

Proceedings under S. 7 are not barred by reason of the examination under S. 36 of the Act of a person in possession of property the ownership of which is disputed. A.I.R. 1937 Mad. 775=46 M.L.W. 327=I.L.R. (1938) Mad. 72=(1938) 2 M.L.J. 377 =172 Ind. Cas. 346.

——S. 7, proviso—Applicability.

The questions whether the insolvent is a member of a joint family or whether the business carried on by the insolvent is a business of the joint family are not matters arising under sub-Ss. (4) and (5) of S. 36 and they can be decided by the Insolvency Court in the exercise of its power under S. 7 even though the insolvent and the members of the family had been examined at an earlier stage and had denied that there was a joint family or a joint family business. A. I. R. 1932 Mad. 167=34 M. L. W. 849=1931 M.W.N. 1253=62 M.L.J. 103= 55 Mad. 385=135 Ind. Cas. 585.

——S. 7, proviso—Applicability.

The Inslovency Court has jurisdiction under S. 7 to decide disputes falling within the purview of the section between the Official Assignee and third parties even though the Official Assignee does not claim a higher and better title than the insolvent.

In such a case, the question as to the propriety of exercise of jurisdiction by the Insolvency Court or otherwise, depends upon the facts of the particular case.

The proviso to S. 7 was not intended to limit the scope of the section to matters in which the Official Assignee claimed a higher title than the insolvent would himself have but was intended only to prevent a stranger to the insolvency from being first examined under S. 36 and then to have his deposition taken under that section used against him on an application made under S. 7 of the Act. A.I.R. 1932 Sind 208=27 S.L.R. 275=143 Ind. Cas. 205.

——S. 8.

Synopsis.

(1) General.
(2) S. 8 (1)—Powers under.
(3) S. 8 (1)—Rescinding by Registrar.
(4) S. 8 (1)—Review.
(5) S. 8 (1)—Review and Rescindings.
(6) S. 8 (2)—Appeal against adjudication.
(7) S. 8 (2)—Appeal on question of jurisdiction.
(8) S. 8 (2)—Order under.
(9) S. 8 (2)—"Person aggrieved".
(10) S. 8 (2) (b)—Appeal.
(11) S. 8 (2) (b)—"Judgment".
(12) S. 8 (2) (b)—Refused to issue Commission.
(13) S. 8 (2) (b)—Refusal to review.
(14) S. 8 (2) (b)—Refused to transfer case.

(1) General.

——S. 8—Adjudication of firm—Annulment—Re-adjudication.

When adjudication has been annulled as against some partners, another creditor seeking for readjudication must get rid of the order of annulment, and

proceed under S. 8 for review and not for an appeal by leave. 21 Bom. L.R. 190=50 Ind. Cas. 437.

——S. 8—Ex parte order—For appearance—Remedy.

When an *ex parte* order is made for the examination of a witness by the Registrar in Insolvency, if there are any grounds justifying an application to the High Court, the proper course is to move the Court to set aside the order which has been made by the Registrar in Insolvency. 66 Ind. Cas. 715=48 Cal. 1089=25 C.W.N. 750=A.I.R. 1921 Cal. 58.

——S. 8—Limitation—Power to extend.

There is no period of limitation prescribed for an application under Cl. (1) of S. 8, and the principles of English Law are to govern; and according to these principles, an application for review, rescission or variation should not be entertained to save the time provided for appeal when the application has been filed for the purpose of extending the time for appealing. A.I.R. 1941 Sind 1=I.L.R. (1940) Kar. 513=192 Ind. Cas. 721.

——S. 8—Limitation—Power to extend.

It is open to the High Court in its discretion to extend the time prescribed for appealing against an adjudication order if necessary. 89 Ind. Cas. 584=29 C.W.N. 884=A.I.R. 1925 Cal. 1215.

——S. 8—Limitation—Review.

An application to a High Court for a review of a judgment passed by it in its insolvency jurisdiction is not governed by Art. 162. 118 Ind. Cas. 615=7 Rang. 201=A.I.R. 1929 Rang. 229.

——S. 8—Scope of and power under.

Where Judge's view was that he was bound to treat the case on the footing that he was not hearing an appeal under Cl. (a), the question whether he should be given leave to appeal to the Division Bench could not arise. Where the Judge dealt with the matter as though he had power under sub-S. (1), and having dealt with the matter as a review on the merits he dismissed the application, the order which he made cannot be said to be an order of the character contemplated by Cl. (1), S. 8. If it were anything else it would fall under Cl. (b), sub-S. (2), S. 8 of the Act. Where the Judge had treated this as though he had jurisdiction to make an order on review, from such order an appeal lies to the High Court under Cl. (b), and Division Bench has jurisdiction to entertain an appeal from an order of the character which the judge passed. It cannot be said that it is necessary that the Division Bench should confine itself to a declaration that the Judge had no power to entertain an application for review of an order made by the Registrar or that it should leave the appellant to go back to the Registrar to have the order set aside or that it should send the case back to the Judge to be dealt with as an appeal. It is open to it to make the order which the Judge ought to have made. 115 Ind. Cas. 39=56 Cal. 667=33 C.W.N. 21=A.I.R. 1928 Cal. 786 (F.B.).

(2) S. 8 (1)—Powers under.

——S. 8 (1)—Power under.

Power granted under S. 8 (1) is not taken away by S. 23 (1). A.I.R. 1944 Mad. 129=56 L.W. 692 (2)=(1943) 2 M.L.J. 572=1943 M.W.N. 779 =I.L.R. (1944) Mad. 649=216 Ind. Cas. 93.

(3) Rescinding by Registrar.

——S. 8 (1)—Rescinding by Registrar—Of discinding by Registrar.

The Registrar in Insolvency has jurisdiction to pass an order rescinding the order of discharge that he himself has made whether the application is opposed or unopposed. 106 Ind. Cas. 326=54 Cal. 858=A.I.R. 1928 Cal. 50.

(4) Review.

——S. 8 (1)—Review, application for—Forum.

It is contrary to the notion of a re-hearing or of a review such as is contemplated is sub-S. (1) that the application should be made to any tribunal except the tribunal that made the order; but if an order is made by one Registrar, his successor could hear a motion to review, and if an order is made by one Judge, another Judge exercising the insolvency jurisdiction of the Court could hear the review. 115 Ind. Cas. 39=56 Cal. 667=33 C.W.N. 21=A.I.R. 1928 Cal. 786 (F.B.).

——S. 8 (1)—Review—Order of adjudication without hearing counsel—Judge ceasing to be Insolvency Judge and not authorised under S. 4—Whether can hear it.

S. 8 makes it clear that the Court has power to review an order of adjudication passed without hearing counsel, but the powers of the Court in such matters are vested in the Judge appointed by the Chief Justice under S. 4. Where the Judge who heard the application had ceased to be the Insolvency Judge and in the absence of authorization by the Chief Justice, should not have dealt with it, the hearing is without jurisdiction. A.I.R. 1937 Rang. 237=171 Ind. Cas. 666.

——S. 8 (1)—Review—Party aggrieved applying for review instead of appealing though it had notice of insolvency proceedings—Extension of time.

Where a person aggrieved by an order of the Insolvency Court applies for review of the same, instead of appealing against it, though he had notice of the insolvency proceedings, in the absence of sufficient grounds, the power of review under S. 8 cannot be exercised and extension of time cannot be granted under S. 90 (5). A.I.R. 1936 Sind 71=163 Ind. Cas. 122.

——S. 8 (1)—Review—Powers of—Application by person not party to proceedings.

Though the power of an Insolvency Court under cl. (1) of S. 8 to review rescind or vary any order made by it is not restricted as the jurisdiction conferred by O. 47, Civil P. C., but is far wider, yet review is not to be available to a person not a party to the proceeding sought to be rescinded. A.I.R. 1941 Sind 1=I.L.R. (1940) Kar. 513=192 Ind. Cas. 721.

——S. 8 (1)—Review—Powers of.

Larger powers are conferred on the Insolvency Court under S. 8 (1), in reviewing, rescinding or varying its orders than in proceedings which fall exclusively under O. 47, R. 1, Civil P. C. There would be sufficient cause for reviewing an order in insolvency if it could be shown that the order was made without jurisdiction. A.I.R. 1932 Bom. 569 =34 Bom. L.R. 1175=139 Ind. Cas. 587.

——S. 8 (1)—Review—Scope of.

The power to review under S. 8 extends to an order made under S. 22 of the Act. 83 Ind. Cas. 174=19 M.L.W. 316=34 M.L.T. 99=1924 M.W.N. 458=A.I.R. 1924 Mad. 662=46 M.L.J. 580.

——S. 8 (1)—Review—Scope of.

S. 8, (1) gives the Court an unlimited power to review, rescind or vary and S. 90 (1) of Act cannot act to limit that power by importing the provisions of Civil P.C., O. 47, R. 1. 118 Ind. Cas. 615=7 Rang. 201=A.I.R. 1929 Rang. 229.

——S. 8 (1)—Review—Scope of.

S. 8 gives wider powers of review than are conferred by C.P.C. 84 Ind. Cas. 128=19 M.L.W. 415=34 M.L.T. 335=A.I.R. 1924 Mad. 791.

(5) Review and Rescinding.

——S. 8 (1)—Review and rescinding—Power of Court of appeal.

The power to rescind, review or vary an order made in insolvency under S. 8 is not confined to the original Insolvency Court but it can be exercised also by the Court of appeal in regard to any order made by it. 83 Ind. Cas. 174=19 M.L.W. 316=34 M.L.T. 99=1924 M.W.N. 458=A.I.R. 1924 Mad. 662=46 M.L.J. 580.

(6) Appeal against adjudication.

——S. 8 (2)—Appeal against order of adjudication—Parties.

The Official Assignee should, in all cases, be made a party to an appeal against an order of adjudication A.I.R. 1931 Cal. 167=58 C. 624=34 C.W.N. 1051=130 Ind. Cas. 87.

——S. 8 (2)—Appeal against order of adjudication—Notice to Official Assignee—Necessary.

It is necessary and desirable that in appeals against an order of adjudication notice of the appeal should be served on the Official Assignee. Although there is no provision in the Presidency Towns Insolvency Act, or in the rules framed under the Act, which makes such service obligatory, but on general principles such a notice should be given. 89 Ind. Cas. 584=29 C.W.N. 884=A.I.R. 1925 Cal. 1215.

(7) Appeal on question of jurisdiction.

——S. 8 (2)—Appeal on question of jurisdiction only.

No appeal lies on a point of jurisdiction only against a mere declaratory order of the Insolvency Court directing that there is vested in the Official Assignee the capacity to make the joint Hindu family property available for the payment of all the debts of the insolvent except any of such debts as is tainted with immorality, as in such a case, even if the declaration which has been made is not binding on the appellants by reason of lack of juisdiction of the Insolvency Court it is admittedly within the jurisdiction of that Court, when considered as a direction to the Official Assignee as to his rights over the property of this joint Hindu family, and as such, it is admittedly a correct exposition of the law. The right time for the appellants to raise that question will arise if and when the Official Assignee proceeds through the Insolvency Court against the shares of the appellants for the payment of any specific debt of the insolvent and the Insolvency Court assumes jurisdiction to decide whether their shares are liable or not for the satisfaction of that particular debt. A.I.R. 1936 Rang. 525=166 Ind. Cas. 68.

(8) Order under.

——S. 8 (2)—Order under—Court moved by insolvent—Order, if can be challenged.

The Court having the necessary jurisdiction, the fact that it obtained the necessary information which induced it to rescind or vary its order from the insolvent can be no objection. The order of the Court is not open to challenge merely, on the ground that it was the insolvent who moved it. A.I.R. 1944 Mad. 129=56 M.L.W. 692 (2)=(1943) 2 M.L.J. 572=1943 M.W.N. 779=I.L.R. (1944) Mad. 649=216 Ind. Cas. 93.

(9) Person aggrieved.

——S. 8 (2)—Person aggrieved—Creditor without decree.

A creditor without a decree is an aggrieved person within S. 8 especially when he is made incapable of becoming a judgment creditor through the insolvent's opposition to the proceedings instituted by creditor for that purpose. An *interim* protection order made as an original order by judge exercising jurisdiction under the Act is appealable, as it is a judicial order. Legislature does not appear to impose any restriction on appeal from original orders of a judge except on orders regulating procedure. 40 Bom. 461=17 Bom. L.R. 983=31 Ind. Cas. 507.

——S. 8 (2)—Person aggrieved—Insolvent has no right to appeal.

Under the Presidency Towns Insolvency Act an insolvent has no right of appeal because he cannot be deemed to be a person aggrieved. Even assuming that the appeal is merely a continuation of the original proceedings properly instituted by the insolvent, he cannot himself continue them, for if the Official Receiver refuses or neglects to continue those proceedings, the Court may make an order dismissing the suit on the defendant's application. 97 Ind. Cas. 486=A.I.R. 1926 Mad. 1214.

——S. 8 (2)—Person aggrieved—Third persons whose title to property is affected by adjudication.

Third persons whose title to property is affected by the adjudication are 'aggrieved persons' and it is open to them to move the Court which passed the order of adjudication under S. 8, Cl. (1) of the Act, or if so advised, to appeal against that order to a higher Court under cl. (2), sub-Cl. (b) of the same section to review or rescind the order of adjudication. A.I.R. 1936 Sind 246=30 S.L.R. 281=166 Ind. Cas. 133.

——S. 8 (2)—Person aggrieved—Who is—Absence of notice by Court before adjudication.

A third person whose title to property is affected by an adjudication order is a person aggrieved and is entitled to appeal from it. He is, however, not entitled in any appeal under cl. (2), of S. 8 to succeed on the basis merely of absence of notice by the Insolvency Court before it passed the order appealed against. He can only urge that the circumstances of the case are such that it is highly inequitable and unjust that an order so vitally affecting his interests should have been passed behind his back and without notice to him and in circumstances when he had no

means of knowing of the existence of the proceedings in which that order was passed against him. A.I.R. 1938 Sind 82=32 S.L.R. 672=175 Ind. Cas. 214.

——S. 8 (2)—Person aggrieved—Who is.

A person whose right to recover his debt or part of his debt from the insolvents may seriously be affected, is a "person aggrieved" within the meaning of S. 8. 99 Ind. Cas. 736=53 Cal. 866=44 C.L.J. 454=A.I.R. 1927 Cal. 163.

(10) Appeal.

——S. 8 (2) (b)—Appeal.

An application to the Judge exercising insolvency jurisdiction to discharge an order made by the Registrar for the attendance of a witness under S. 36 is an appeal under Cl. (b), Sub-S. (2), S. 8. 66 Ind. Cas. 715: A.I.R. 1921 Cal. 58: 48 Cal. 1089, Overruled. 115 Ind. Cas. 39=56 Cal. 667=33 C. W. N. 21=A.I.R. 1928 Cal. 786 (F.B.).

(11) "Judgment."

——Ss. 8 (2) (b), 36—"Judgment"—Insolvency proceedings, whether "suits"—Decision whether witness should or should not be further examined under S. 36, if judgment—Refusal to exercise jurisdiction, if judgment.

For the purposes of appeals the various proceedings in an insolvency should be regarded as a series of "suits" arising out of one failure and that is a "judgment" for this purpose which finally determines the substantive rights of those concerned in any one such "suit". A decision, therefore, which finally determines the question whether a witness should or should not be further examined under S. 36 of the Presidency Towns Insolvency Act is a "judgment" within the meaning of Cl. 13 of the Letters Patent and is, therefore, appealable. A "judgment", properly so called must be an exercise of jurisdiction and, therefore, a refusal to exercise jurisdiction, at all events, if it be a lawful refusal cannot be a "judgment." A.I.R. 1941 Rang. 69=1940 Rang. L.R. 702=194 Ind. Cas. 250.

(12) Refusal to issue commission.

——S. 8 (2) (b)—Refusal to issue commission—No appeal.

Refusal to issue a commission is a matter within the discretion of the Insolvency Judge and no appeal lies under (Letters Patent Rangoon) S. 13. 93 Ind. Cas. 211=3 Rang. 605=4 Bur. L.J. 254=A.I.R. 1926 Rang. 64.

(13) Refusal to review.

——S. 8 (2) (b)—Refusal to review—If appealable.

The direction that an appeal in insolvency is to lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the exercise of original jurisdiction does not import that an appeal only lies if conditions exist which would make an Original Side order appealable.

An order made by a Judge refusing to review an order made by the Insolvency Judge is appealable under S. 8 (2) (b). It need not satisfy the conditions which would make an Original Side order appealable. A.I.R. 1936 Bom. 321=38 Bom. L.R. 575=60 B. 792=164 Ind. Cas. 1013.

(14) Refusal to transfer case.

——S. 8 (2) (b)—Refusal to transfer case—Appeal lies.

S. 8, cl. 2 (b) of the Presidency Towns Insolvency Act, provides for an appeal lying to the High Court against any order made by a Judge in the exercise of jurisdiction conferred on him by the Act and hence an appeal lies against an order refusing to transfer an insolvency petition to the High Court in its insolvency jurisdiction. 86 Ind. Cas. 1031=48 Mad. 514=21 M.L.W. 394=1925 M.W.N. 110=A.I.R. 1925 Mad. 569=48 M.L.J. 228.

——S. 9.

Synopsis.

(1) Act of insolvency by co-judgment-debtor.
(2) Construction.
(3) Foreigners—When can be adjudged.
(4) Partnership.
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(7) S. 9 (a).
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(10) S. 9 (e).
(11) S. 9 (f).
(12) S. 9 (g).
(13) S. 9, Explanation.
(14) S. 9 (i) (Inserted in Bombay).

(1) Act of insolvency by co-judgment-debtor.

——S. 9—Act of Insolvency by a co-judgment debtor if only by judgment debtor.

An act of Insolvency by a co-judgment debtor does not amount to one by the judgment-debtor himself. 16 C.W.N. 733=14 Ind. Cas. 576.

(2) Construction.

——S. 9—Construction.

Per *Rankin—C.J.* "If there is one thing more than another upon which the Court is obliged and entitled to treat the words of the statute with great strictness, it is the definition of the acts of insolvency in an Insolvency Act." A.I.R. 1931 Cal. 167=34 C.W.N. 1051=58 Cal. 624=130 Ind. Cas. 877.

(3) Foreigners—When can be adjudicated.

——Ss. 9, 11—Foreigner, when can be adjudged insolvent in British India—Act of insolvency must be committed during his personal residence in British India.

A person cannot be treated as being a debtor within the meaning of the Presidency Towns Insolvency Act unless he is either a subject of British India or has committed or suffered within British India an act of insolvency. Therefore, a foreigner, not committing any act of insolvency during his personal residence in British India cannot be adjudged insolvent by a Court in British India.

A foreigner not personally residing in Bombay but carrying on business through his agent or agents to Bombay within a year of the presentation of the peti-

tion for an adjudication order does not become a debtor within the meaning of the Presidency Towns Insolvency Act, even where his goods are seized in Bombay in execution of a decree, since he is not, when his goods are seized within the jurisdiction of the Bombay High Court. The Bombay High Court, therefore, has no jurisdiction to grant a declaration of insolvency against him. A.I.R. 1938 Bom. 161 =40 Bom. L.R. 33=I.L.R. (1938) Bom. 301= 174 Ind. Cas. 361.

(4) Partnership.

——S. 9—Partnership—Act of insolvency to be brought home to insolvent—Act of agent or partner.

In order that a man may be declared an insolvent, the act of insolvency relied upon must be some act which can be definitely brought home to him. It is impossible to say that there can be no case in which the act of an agent or partner in closing down the business and absconding from the creditors could be treated as an act of the principal or the other partners. There might be cases in which a Court would be justified in certain circumstances in holding that the act of the agent or partner in violation of the section might and should be treated as the act of the principal or the other partners. 23 Cal. 26 (P.C.), Rel. on. 91 Ind. Cas. 874=49 Mad. 189=A.I.R. 1926 Mad. 206=49 M.L.J. 709.

——S. 9—Partnership—Absence of one of two partners.

Where some of the partners of a firm absent themselves from the place of business, it is a question of fact whether an act of insolvency has been committed by the firm.

In the case of a firm with two partners the departing from the usual place of business, with intent to delay and defeat the creditors, must be a departure of both the partners and not merely the departure of one of them. 75 Ind. Cas. 203=24 Bom. L.R. 861=A.I.R. 1923 Bom. 107.

(5) Payment to creditor.

——S. 9—Payment to creditor by the debtor before his adjudication when the creditor has no notice of the insolvency petition does not amount to an act of insolvency. A.I.R. 1940 Rang. 168=1940 Rang. L. R. 366=189 Ind. Cas. 653.

(6) Petition for adjudication.

——S. 9—Petition for adjudication—Precise statements as to acts of insolvency—Necessity of.

If an act of insolvency, as defined in S. 9, Presidency Towns Insolvency Act, is not set out in the petition for adjudication the petition is not competent. It is not permissible for a creditor to make in his petition allegations which are not acts of insolvency as defined in the section and then endeavour to prove by evidence that as a matter of fact, an act of insolvency as defined in the section has been committed. Consequently, a petition for the adjudication of debtor by a creditor must be very definite and precise as to what available act or acts of insolvency as detailed in S. 9 were committed. A.I.R. 1934 Sind 177=153 Ind. Cas. 822.

——S. 9—Petition by creditor—Amendment.

Where a subsequent notice of suspension was wrongly referred to as the act of insolvency upon a misconception of law:

Held, that permission to amend the petition so as to base it on the prior notice could be allowed. A. I. R. 1933 Rang. 363=12 Rang. 64=149 Ind. Cas. 723.

——S. 9—Petition by creditor—Essentials.

The act of insolvency need not be stated verbatim in the words of S. 9: it will be enough if the petition and affidavit read together sufficiently disclose the meaning of the section. Omission to state the fact that petitioner is a secured creditor and the value of his security is a defect curable by amendment of the petition. In the absence of a subsisting order of adjudication, the petitioner might be allowed to amend the petition within 3 months of the act of insolvency. 37 Mad. 555=13 M.L.T. 275=(1913) M.W.N. 264=24 M.L.J. 562=19 Ind. Cas. 19.

(7) S. 9 (a).

——S. 9 (a)—Debtor transferring substantially whole of property for past consideration—Onus.

A transfer by a debtor of the whole or substantially the whole of his property in consideration of a past debt and in circumstances which are not satisfactorily explained is an act of bankruptcy under S. 9. Where a document is set up, which, upon the face of it is an act of bankruptcy, that is, an assignment of all a man's goods for a past consideration, if it is said that it is not an act of bankruptcy because it is warranted by a prior agreement, the *onus probandi* is always upon the person who sets up the prior agreement to prove, not only that the agreement did exist in fact, but that it was in all respects a *bona fide* agreement. It is the duty of the Court to satisfy itself that the agreement when made was *bona fide* in the sense that there was no express or secret bargain or understanding that the giving of the bill of sale or assignment should be delayed until the debtor had reached a state of insolvency, and there ought always to be a clear explanation of the delay in completing the transaction. A.I.R. 1935 Rang. 343=13 R. 192=159 Ind. Cas. 217.

——S. 9 (a)—Transfer by debtor of whole of his property, whether fraudulent.

A sale by a debtor of the whole or substantially the whole of his property for a present consideration is not necessarily fraudulent. The sale, however, will constitute an act of insolvency if the seller intends to defeat or delay his creditors. Whether he does or does not in fact entertain such an intention is a matter of fact which is not the subject of any immutable presumption of law; it must be inferred from the circumstances of each particular case. A.I.R. 1935 Sind 53=29 S.L.R. 265=159 Ind. Cas. 745.

(8) S. 9 (b).

——S. 9 (b)—Burden of Proof—Onus on party attaching.

The onus of proving the transaction to be fraudulent is on the person impeaching it, even if the debtor was insolvent at the time and knew himself to be so. The impeaching creditor has to prove that the dominant view of the alleged insolvent was to prefer the other creditor. If the dominant view of the insolvent was not to prefer the creditor but to escape from the pressure enforced by him, the transfer is not frau-

dulent. 86 Ind. Cas. 514=4 Bur. L.J. 13=A.I.R. 1925 Rang. 201.

——Ss. 9 (b) and 55—Mortgage by insolvent—Good faith—Absence of intention to delay or defeat creditors—Mortgage, if an act of insolvency.

As the Official Assignee claimed to set aside the mortgage affecting the property of the insolvent and this was a claim on a title higher than that ot the insolvent the matter was properly brought by way of motion to the bankruptcy. The intention to delay or defeat other creditors not having been established the mortgage was not an act of insolvency under S. 9 (b) of the Presidency Towns Insolvency Act. As there was no ground for disputing the good faith of either party the mortgage could not be said to be a voluntary transfer under S. 55 of the Act and as it was not established that the mortgage was executed with the object of giving the mortgagee a preference over other creditors could not be said to be inoperative against the Official Assignee. 53 Ind. Cas. 175 (Cal.).

——S. 9 (b)—Payment to some creditors soon after transfer—Whether an act of insolvency.

Where the debtor sold his property and soon after made payments to some creditors:

Held, that the sale and the payment together would fall within the meaning of S. 9, cl. (b) and constitute a transfer of property with intent to defeat or delay those creditors who did not receive any share in the sale price and as such, it was an act of insolvency. A.I.R. 1935 Sind 53=29 S.L.R. 265=159 Ind. Cas. 745.

——S. 9 (b)—Transfer of part of property—Burden of proof of intention.

A sale or mortgage by the debtor of the whole or substantially the whole of his property in consideration of a past debt, that is, a debt already incurred is an act of insolvency, whatever the motives of the parties may have been, as such a transfer has the effect of withdrawing all the debtor's property from the legal process which his creditors have a right to enforce against him.

Where a debtor transfers only a part of his property in consideration of a past debt, the transfer does not by itself amount to an act of insolvency, unless it is made with the intent to defeat or delay his creditors, and that intent must be proved. It may even be inferred from surrounding circumstances.

The burden of proving that a transfer is calculated to defeat or delay creditors lies upon the person who sets up the transfer as an act of insolvency. A. I. R. 1932 Bom. 580=34 Bom. L.R. 1162=141 Ind. Cas. 657.

(9) S. 9 (d).

——S. 9 (d)—Seclusion to defeat or delay ceditors—Criterion to decide.

In considering whether the insolvent secluded himself or departed from his usual place of business with intent to defeat or delay his creditors, the true method of approach to this question is to take the cumulative effect of all facts and to consider whether an inference can justifiably be drawn that in departing from his usual place of business or in concealing himself, the debtor did so with intent to defeat or delay his creditors. A.I.R. 1937 Rang. 16=167 Ind. Cas. 96.

(10) S. 9 (e).

——S. 9 (e)—Applicability.

S. 9, Cl. (e), is intended to apply to a person who is responsible for the payment of his own debts. It has no application to a person who has been adjudicated and to the acts of the Official Assignee in the process of the insolvency administration.

On 13th July, 1926, *A* made an application for the adjudication of *B*. The adjudication order was made on 23rd July 1926. But it was rescinded in March 1927 on the ground that no act of insolvency had been made. In the meantime on 20th January 1927 *A* got the property of *D* sold in execution of a decree for the payment of money. The Official Assignee had been added as a party to the proceedings. On 27th April 1927 *A* filed an application for the adjudication in insolvency of *D* alleging that *B* had committed an act of insolvency as he had allowed the property to be sold on 28th January 1927.

Held: that the sale was not an act of insolvency. 115 Ind. Cas. 356=32 C.W.N. 716=A.I R. 1928 Cal. 644.

——S. 9 (e)—Attachment before judgment—Subsequent application by decree-holder for sale of attached property—No order of Court necessary.

Where there is an attachment before judgment from the time the decree-holder applies for execution he elects to avail himself of the attachment before judgment and from that moment the attachment before judgment becomes an attachment available for purposes of execution. There is no necessity for an order of the Court. A.I.R. 1942 Mad. 512=55 M. L. W. 205=1942 M.W.N. 265=(1942) 1 M.L.J. 428=202 Ind. Cas. 429.

——S. 9 (e)—Attachment—Deposit by licensee with Government of India in connection with license for salt manufacture, if can be attached in execution of a decree.

In execution of a decree against a licensee, the money deposited by him with the Government of India in connection with the license for the manufacture of salt cannot be attached.

Where, upon an application by the judgment-creditor under O. 21, R. 52, the Court sends a request to the Superintendent, Salt and Excise Department, to hold a certain sum out of the deposit by the licensee judgment-debtor subject to further orders of the Court and issues a notice on the judgment-debtor why the execution should not be granted and subsequently the Court receives a reply to its letter from the Superintendent that the deposit could not be attached and no further action was taken by the Court:

Held, that even assuming that the deposit was attachable, on the facts, it could not be said that there was an attachment within the meaning of S. 9 (e), Presidency Towns Insolvency Act. A.I.R. 1941 Sind 193=I.L.R. (1941) Kar. 50=197 Ind. Cas. 347.

——S. 9 (e)—Attachment—Effect under.

S. 9 (e) merely lays down that if the property has been attached for 21 days or more there has been an act of bankruptcy. The act becomes complete at the conclusion of 21 days. Thus a creditor is not entitled to present a petition to adjudicate a person insolvent beyond three months after the person's property is attached for 21 days though the property is under attachment at the time of the presentation of

the petition. 121 Ind. Cas. 812=7 Rang. 815=A. I. R. 1929 Rang. 313.

——S. 9 (e)—Attachment in execution of award—Construction of S. 9 (e).

An attachment in execution of an award is not an attachment in execution of the decree of a Court within the meaning of S. 9 (e), for the purpose of creating an act of insolvency.

S. 9 (e), Presidency Towns Insolvency Act must be strictly construed in favour of the debtor to whom the matter of adjudication as an insolvent under the Insolvency Law is one of vital importance. Any inconvenience arising out of such a construction is for the Legislature to consider and remedy if they think proper by amendment; it is not for the Court to enlarge the meaning of the words used by the Legislature. A.I.R. 1938 Sind 220=178 Ind. Cas. 653.

——S. 9 (e)—Attachment—In execution of award—Not covered.

Attachment in execution of an award is not attachment in the execution of a decree within the meaning of S. 9 (e) for purpose of creating an act of insolvency. 115 Ind. Cas. 584=32 C.W.N. 608=A.I.R. 1928 Cal. 840.

——S. 9 (e)—Attachment.

Attachment of property in execution for more than 21 days is not a continuing act of insolvency. Once these days have elapsed, the act of insolvency is complete. A.I.R. 1931 Cal. 246=57 Cal. 1274=131 Ind. Cas. 590.

——S. 9 (e)—Attachment—For over 21 days not a continuing act of insolvency.

Attachment for more than 21 days is not a continuing act of insolvency, nor is there a repetition of the act of insolvency at the expiration of every period of 21 days. The act of insolvency contemplated is committed on the completion of the first 21 days; and the period of three months within S. 12 (c) dates from the day of completion of such 21 days.

In reckoning the 21 days, the day on which the attachment is levied is not to be computed. 106 Ind. Cas. 36=29 Bom. L.R. 1455=A.I.R. 1927 Bom. 633.

——S. 9 (e)—Charging order under O. 21, R. 49, whether 'act of bankruptcy'.

A charging order under O. 21, R. 49, Civil P. C., is not an attachment within the meaning of S. 9, and is not, therefore, an act of bankruptcy within that section. A.I.R. 1931 Cal. 167=34 C.W.N. 1051=58 C. 624=130 Ind. Cas. 877.

——S. 9 (e)—Scope.

A debtor can commit more than one act of insolvency. Therefore, even if there had already been an act of insolvency committed as the result of a previous attachment for more than three weeks, there can be a second act of insolvency of the same nature. A.I.R. 1940 Mad. 958=52 M.L.W. 474=(1940) 2 M.L.J. 495=1940 M.W.N. 990=191 Ind. Cas. 687.

(11) S. 9 (f).

(See also S. 10, EXPLANATION..))

——S. 9 (f)—Presentation of petition—Is an act of insolvency.

Provided certain other conditions such as in S. 11 and S. 14 are fulfilled, the mere fact of the presentation of a petition for adjudication is enough on which to make the order. 94 Ind. Cas. 793=30 C. W. N. 173=A.I.R. 1926 Cal. 640.

(12) S. 9 (g).

——S. 9 (g)—Distinction between S. 13 (4) and S. 9 (g)—Mere inability to pay, whether amounts to suspension of payment of debts.

S. 13 (4) (b) provides that the Court shall dismiss a petition for adjudication if the debtor appears and satisfies the Court that he is able to pay his debts. But S. 9 (*g*) contemplates something entirely different. Not only must the debtor be unable to pay his debts but he must also convey to the creditor his intention not to pay.

A declaration of inability by a debtor does not of itself and without reference to context or circumstances, constitute an act of insolvency. A. I. R. 1936 Cal. 269=166 Ind. Cas. 657.

——S. 9 (g)—Essentials—Temporary suspension—Form of notice—Speech to creditors—Power to amend petition—Dishonouring cheques.

The dishonouring of cheques upon perfectly solvent current account is a suspension of payment.

A suspension of payment can be either a permanent suspension or a temporary suspension. Whatever reason may be advanced as to the cause of a suspension and even when those reasons allege that payment will, in all probability, be renewed at some future date, there is no doubt that such action on the part of a Bank, or a Chettyar firm, taking deposits, which is in the position of a private Bank, must amount to a suspension.

Quite apart from the question of requisite notice, a stoppage of payment by a private Bank, when no justification for such stoppage can possibly be put forward except a temporary embarrassment must be a suspension within the meaning of the Act.

The dishonouring of the cheques by returning them to those who presented them is also a notice under S. 9 (g).

A speech to the creditors may amount to such notice even though all the creditors had not assembled at the meeting if it was intended to apply to all of them.

Where a notice of suspension has been given in a speech, it is a notice to all the world, and any other notice which follows upon such a statutory declaration is nothing but a mere repetition and has no statutory significance. A.I.R. 1933 Rang. 363=12 Rang. 64=149 Ind. Cas. 723.

——S. 9 (g)—Joint Hindu family—Managing member.

Where the members of a joint family firm instituted a suit for partition and the managing member who was appointed a Receiver stated to the creditors that the firm was unable to pay its debts:

Held, that there was an act of insolvency on the part of the firm sufficient to entitle the creditors to apply for adjudication of the firm as insolvent. A. I. R. 1931 Sind 179=25 S.L.R. 322=134 Ind. Cas. 996.

——S. 9 (g)—Notice of suspension by one partner—Absence of evidence as to authorisation by other partner—Whether act of insolvency as regards firm.

It is a fundamental principle of insolvency law that a person is not to be adjudicated insolvent except for an act of insolvency which he has personally committed, or which has been committed by his agent under such circumstances that it must be taken

that the act of insolvency by the agent has been expressly or impliedly authorized by the principal against whom an order of adjudication is sought.

Where one of the partners of a firm gave notice of suspension of payment to his firm's creditors:

Held, that in the absence of evidence that he was expressly or impliedly authorized by the other partner to cause the letter to be sent to the petitioning creditors, the letter could not be treated as a notice that the firm had suspended payment of its debts or as an available act of insolvency upon which a petition to adjudicate the firm could be based. A.I.R. 1932 Rang. 101=10 Rang. 215=138 Ind. Cas. 189.

——S. 9 (g)—Prayer for order under S. 55 (4), C. P. Code is notice of suspension of payment.

Where a judgment-debtor brought before the Court at the instance of the judgment-creditors under S. 55 intimates to the Court through his counsel that he intends to apply for an adjudication as an insolvent within one month and asks for an order of release under S. 55 (4) he thereby gives notice to that creditor, although he may not be present in person and be represented by his counsel, that he is about to suspend payment of debts. He commits, as such, an act of insolvency within the meaning of S. 9, Presidency Towns Insolvency Act, and petition in insolvency can be filed against him by another creditor. 34 C.W.N. 401=A.I.R. 1930 Cal. 555.

——S. 9 (g)—Statement by debtor that he is not in position to pay in full—Whether amounts to act of insolvency.

A statement by a debtor that he is not in a position to pay in full to his creditor may or may not amount to a notice that the debtor has suspended or was about to suspend payment of his debts within S. 9 (g). It depends on the circumstances in which the statement is made.

Where the debtor makes such a statement and his intention is to try to arrange with his more pressing creditors and to put off the evil day, he cannot be said to have suspended nor can be said to be about to suspend payment of his debt. A.I.R. 1935 Rang. 352=13 Rang. 686=159 Ind. Cas. 1055.

——S. 9 (g)—Strict proof, necessity of—Notice of suspension, what constitutes—Debtor's prayer for extension of time till trade conditions improve—Whether amounts to notice of suspension.

The proof of the commission of an act of insolvency must be strict and precise, and where it is alleged that a debtor has given notice that he has suspended or is about to suspend payment of his debts the time, place and particulars of the notice should be accurately specified. The suspension of payment of his debts is a specific and deliberate (in the sense of intentional) act of the debtor, and the suspension, actual or intimated, must apply to all the creditors. It is something different from and over and above inability to pay. It is one of the several courses among which a debtor may elect when he finds himself insolvent.

Where a creditor demanded from his debtor the immediate payment of a mortgage debt which the debtor owed him and in reply to the demand, the debtor, while admitting the debt, prayed that the creditor should give him time until better trade conditions might ensue when he would be able to pay the debt, and invited the creditor to assist him so far as he could in carrying on the business and thereby liquidating the creditor's debt:

Held, that the letter did not imply that the debtor had suspended or intended or was about to suspend payment of debts that were due to his creditors generally, and that it was not a notice of suspension of payment of debts. A.I.R. 1933 Rang. 41=11 Rang. 96=143 Ind. Cas. 775.

——S. 9 (g)—Suspension of payment.

Where a banking firm closes its doors and gives notice to its creditors that it is not going to make any further payments to its customers, this can be said to amount to an act of insolvency amounting to suspension of payment. But where a banker tells his customers, "I am unable to meet your demands owing to the peculiar circumstances, *viz.*, that you are all demanding instant payment of your dues, but give me time to satisfy you that I am perfectly solvent," that cannot amount to a suspension of payment. A.I.R. 1933 Rang. 280=149 Ind. Cas. 1036.

——S. 9 (g)—Suspension of payment of debts generally—Whether act of insolvency—Debtor and creditor agreeing to treat non-payment of instalment under mortgage as act of insolvency—Debtor, if estopped.

The law of estoppel does not operate and cannot operate to prevent the provisions of the Insolvency Act, having effect. It is an act of insolvency if a debtor gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts but it must be noticed that he is suspending the payment of his debts generally and not that he is suspending the payment of a particular debt. The fact that the insolvent and his creditor had agreed that default in payment of an instalment under the mortgage should be treated as an act of insolvency, does not make it incumbent upon the Court to regard it as an act of insolvency. What the Court has to consider is whether an act of insolvency as defined by the Act has been committed and in deciding the question it can only look at the provisions of the Act. A.I.R. 1937 Mad. 961=1937 M.W.N. 928=46 M.L.W. 515=I.L.R. (1938) Mad. 123=173 Ind. Cas. 689.

——S. 9 (g)—Suspension of payment of debt, notice of—Oral and written notices alleged—Written notice informal—Oral conversation, held not formal notice.

Where, under S. 9 (g), both written and oral notices of suspension of payment of debts were alleged, and the correspondence comprising of written notice was of an informal nature:

Held, that the conversation amounting to oral notice was not definite, formal and deliberate, or intended to be understood in that sense. A.I.R. 1936 Cal. 269=166 Ind. Cas. 657.

——S. 9 (g)—Suspension of payment—Petition and affidavit verifying same should be read together—Sufficient details of facts.

Where the petition for adjudication under S. 9 (g), states that the debtor has given notice to his creditors that he has suspended or that he is about to suspend payment of his debts and the affidavit verifying the petition shows that this is in fact the case, there is compliance with the law's requirements. The petition and the affidavit should be read together and if the petitioning creditor sets out in sufficient detail the facts on which he is relying, the debtor can have no complaint whether the information is con-

tained in the petition or the affidavit. The Court has to be satisfied that there has been notice of suspension of payment or that the debtor has intimated to his creditors that he is about to suspend payment and the supporting affidavit is filed for that purpose. A.I.R. 1942 Mad. 86=54 M.L.W. 438=1941 M. W. N. 916=(1941) 2 M.L.J. 598=200 Ind. Cas. 780.

——S. 9 (g)—Suspension of payment—Notice of time, place and particulars.

The proof of the commission of an act of insolvency must be strict and precise, and where it is alleged that a debtor has given notice that he has suspended or is about to suspend payment of his debts, the time, place and particulars of the notice should be accurately specified and the allegations in the petition cannot be supplemented by allegations in the verifying affidavit. A.I.R. 1935 Rang. 352=13 Rang. 686=159 Ind. Cas. 1055.

——S. 9 (g)—Test—At meeting of creditors, debtor saying that if his offer of composition was rejected, he had nothing to give to creditors—Statement, whether amounts to notice.

The test which is to be applied to a notice of suspending payment is whether the language of the notice, be the notice a written notice or a verbal notice, is such that it could only lead the creditors to infer that if the offer of composition made by the debtor is not accepted, suspension of payment is the only alternative. Where, therefore, at the meeting of the creditors, the debtor said that if his offer of composition was not accepted, he had no other assets whatever and there was nothing else that he could give to his creditors, even if there was no definite statement by the debtor that he would have to file his petition in insolvency, still his statement was a statement which could lead the creditors to infer only that he intended to suspend payment of his debts and, therefore, his statement amounted to an act of insolvency. A.I.R. 1938 Rang. 475=179 Ind. Cas. 526.

(13) S. 9, Explanation.

——S. 9—Explanation—Joint Hindu family—Managing partner making fraudulent transfer of firm's property to pay debts of firm—Whether act of insolvency on part of all partners.

Where a partnership business is carried on by the members of a joint Hindu family and the managing partner of the firm who is also a managing member of the joint family makes a fraudulent transfer of the firm property to pay off the debts due to the firm and commits an act of insolvency, such act of insolvency is also an act of insolvency on the part of other partners as the managing partner is an agent of other partners within the meaning of Explanation to S. 9. A.I.R. 1938 Sind 82=32 S.L.R. 672=175 Ind. Cas. 214.

——S. 9—Explanation—Act of agent—If can be deemed to be those of principal.

The mere fact of a person being an agent of a firm cannot, in law, entitled him to allow a creditor to obtain an order of adjudication because he, the agent, purports to commit an act of insolvency within the meaning of S. 9. It is incumbent on the Court to require proof from the adjudicating creditor that the agent who is alleged to have committed the act of insolvency was expressly or impliedly authorised to do so or that the ordinary course of the business that he carried on for his principal, or that the nature of such business was sufficient to justify the Court holding that the agent's acts should be considered, in the circumstances, to be the acts of his principal. This is especially so in the case of an act of insolvency under cl. (g) of S. 9. A I.R. 1933 Rang. 280=149 Ind. Cas. 1036.

——S. 9—Explanation—Position of agent of Chettyar Banks of Burma.

The agent of a Chettyar firm in Rangoon can give the necessary notice of suspension amounting to an act of insolvency. The position of an agent or Aiyar of a Chettyar private Bank is, in this respect, very similar to the position of a Bengal *gumashta*. A.I.R. 1933 Rang. 363=12 Rang. 64=149 Ind. Cas. 723.

——S. 9—Explanation—Act of agent—Cannot be an act of insolvency.

The mere fact that certain creditors went to the debtor's office, and were told by the agent that his master had stopped payment, would not be a notice of suspension by the debtor, since, in the ordinary course, an agent does not have an authority within the general scope of his agency, to commit an act of insolvency on behalf of his principal. 98 Ind. Cas. 431=28 Bom.L.R. 680=A.I.R. 1926 Bom. 383.

(14) S. 9 (i) (Inserted in Bombay).

——S. 9 (i) (inserted by Bombay Act (15 of 1939), and Bombay Insolvency Rules, R. 52-B: (3)—Validity of insolvency notice issued under S. 9 (i)—Default in compliance with terms of compromise decree—Notice of insolvency issued under Insolvency Rules fixing a shorter period than that provided in the Act for the filing of affidavit of counter-claim—If ultra vires—Bombay Ordinance (3 of 1948)—If cures the defect.

A compromise provided among other things for the payment by appellant, the judgment-debtor to the respondent, one of the plaintiffs in the suit, of a sum of money in certain instalments, the first two on specified dates and the rest payable annually. It was further provided that if default was committed in the payment of any instalment for a period of one month after the due date fixed in the decree, the full amount then outstanding would forthwith become due and payable. Another clause in the decree provided that on payment of the first instalment, the respondent would assign in favour of the appellant certain number of debentures of a particular company. The appellant failed to pay the first instalment on or before the specified date and thereupon the respondent applied to the Bombay High Court for the issue of an insolvency notice against the appellant under S. 9 (*i*) inserted in the Presidency Towns Insolvency Act by Bombay Act 15 of 1939. The notice which was in the form prescribed by S. 52-B of the Bombay Insolvency Rules required the debtor to pay the entire sum due and gave him notice that if he so failed to pay he would have committed an act of insolvency on which insolvency proceedings may be taken against him and that if he had a counter-claim or set-off which equals or exceeds the amount claimed and which he could not set up in the suit in which the consent decree was obtained, he must within *seven* days apply to the Court to set aside the notice of insolvency by filing with the Insolvency Registrar an affidavit to that effect. The insolvency

notice was impugned by the appellant on the following grounds:

Held: (1) That the contract contained in the consent decree did not consist of reciprocal promises to be simultaneously performed. The words in the consent decree did not necessarily show that it was within the competence of the parties that in the event of any challenge being thrown on the title of the debentures in future no matter how futile it may be, the judgment-debtor was relieved of the payment of the first instalment. The natural meaning of the clause was that it was for the judgment-debtor to pay the first instalment in the first instance and it was only after such payment was made that the creditor was to assign the debentures to him.

(2) That the decree so far as the payment of the amount was concerned was a decree in favour of the creditor applicant only and it could not be construed as a decree in favour of the several persons because those persons also were co-plaintiffs.

(3) That telling a judgment-debtor that he can benefit by a certain defence is not casting any extra burden or extra weight on him and it is not a requirement of the notice in question. The period of *thirty* days provided in the Act for raising the defence was not cut down by R. 52-B (3) of the Bombay Insolvency Rules in compliance with which the notice was issued to the judgment-debtor calling upon him to file the affidavit of counter-claim or set-off within *seven* days. The rule only prescribed the procedure for facilitating the hearing of the counter-claim, if up to a particular stage that defence was available to the debtor. The notice as issued under the law prevailing at the time it was *issued* was a good notice. Even otherwise, Bombay Ordinance III of 1948 cured any defect, if any existed in the notice.

(4) That in the circumstances, the notice did not embarrass or perplex the judgment-debtor.

Patanjali Sastri, J.—I reserve my opinion on the question as to the validity of R. 52-B (3) of the Bombay Insolvency Rules. It cannot be said that after the passing of the Bombay Ordinance III of 1948 validating certain rules and notices, the question as to the validity of R. 52-B (3) can never arise. 1949 F.C.R. 501=52 Bom.L.R. 189=A.I.R. 1950 F.C. 8=1949 F.L.J. 407 (F.C.).

——S. 10—Adjudication by agreement.

An order of adjudication passed in pursuance of an agreement between the parties without giving any opportunity to the debtors to adduce evidence to rebut that of the petitioning creditor cannot stand. A.I.R. 1939 Mad. 603=49 M.L.W. 627=(1939) 1 M.L.J. 907=1939 M.W.N. 573.

——S. 10—Appeal—Parties.

The Official Assignee ought to be made a party to an appeal from an order of adjudication. 34 C.W.N. 1051=58 Cal. 624=130 Ind. Cas. 877=A.I.R. 1951 Cal. 167.

——S. 10—Concurrent petitions by creditor and insolvent—Procedure.

There is no legal bar to two separate adjudications of the same person in respect of same debts when there is a creditor and also a petition by the debtor himself. The only result of this double adjudication is that the Court must, after the adjudication, make up its mind and make a definite order as to the particular proceeds in which the insolvency shall proceed and the assets of the insolvent shall be realised. A.I.R. 1938 Rang. 475=179 Ind. Cas. 526.

——S. 10—Contents of petition—Act of insolvency not stated in petition but stated in verifying affidavit.

Petition of adjudication of an insolvent under S. 10, must contain clear and precise allegations of fact upon proof of which the Court would be enabled and entitled to adjudge a person insolvent. The act of insolvency must be referred to clearly and without ambiguity in the petition itself. Where it is not so stated in the petition but is stated in the verifying affidavit, the affidavit in verification of the petition cannot be regarded as part of the petition itself and the petition must fail. A.I.R. 1937 Rang. 53=167 Ind. Cas. 585.

——S. 10—Contents of petition—Act of insolvency.

If an act of insolvency, as defined in S. 9 is not set out in the petition, then the petition is incompetent. It is not correct for a creditor to make various allegations of acts which are not acts of insolvency as defined in the section, and then endeavour to prove by evidence that, as a matter of fact, an act of insolvency as defined in S. 9, had been committed. It is not a question of mere verbal defects coming in the way of a petitioning creditor.

A man may suspend payment, but if he does not give notice to his creditors, then that is not an act of insolvency. Again, a man may declare his inability to meet his creditors, but unless he declares such inability to one of his creditors, that is not a notice that he has suspended, or is about to suspend, payment of his debts. 96 Ind. Cas. 435=50 Bom. 624 =28 Bom. L.R. 677=A.I.R. 1926 Bom. 405.

——S. 10—Contents of petition—Act of insolvency must be definitely specified.

It is absolutely necessary that an application for the adjudication of a debtor by a creditor, on the ground that an available act of insolvency had been committed must definitely allege what available act or acts of insolvency were committed as detailed in that section. It is not sufficient to make some vague allegations in the petition, and then endeavour by means of evidence to prove that certain available acts of bankruptcy have been committed. 98 Ind. Cas. 431=28 Bom. L.R. 680=A.I.R. 1926 Bom. 383.

——S. 10—Creditor's petition—Decree obtained as trustees—Insolvency notice omitting to mention character of decree—Notice invalid.

Where a decree is obtained by the decree-holders as trustees, while the insolvency notice requires the debtors to pay to the decree-holders in respect of the decree obtained by them and neither, in the title nor in the body of the notice, it is stated or suggested that the decree-holders had not obtained their decree in their own personal right but in their capacity as trustees, the notice is calculated to perplex the debtors and is invalid. A.I.R. 1945 Bom. 165=46 Bom. L.R. 871=I.L.R. (1945) Bom. 395.

——S. 10—Representative capacity—Decree—No adiudication.

A Hindu had incurred certain liabilities and died and his son succeeded to the assets of his father. The petitioning creditor having obtained a decree against the son as representing his father applied to have him adjudicated as insolvent.

Held: that the debt is not personally enforceable and so the son cannot be adjudicated an insolvent; 41 Mad. 824, Rel. on.; A.I.R. 1926 Mad. 133, Expl.

104 Ind. Cas. 642=26 M.L.W. 400=50 Mad. 981=A.I.R. 1927 Mad. 922=53 M.L.J. 403.

——S. 11—Business contemplated.

The business contemplated by S. 11, cl. (b) is not by a general agent who carried on business in his own name for diverse constituents on payment to him of a commission.

A certain business which was carried on at Karachi was not a business of a firm outside British India but of the commission agents who *inter alia* made transactions on behalf of the firm of the opponents and all the transactions were invariably made by the commission agents in their own respective names and they were personally responsible to the local dealers:

Held, that under the circumstances, the mere fact that the opponents' firm employed the services of these agents to sell goods sent to them from up country or to enter into forward contracts of sale and purchase on behalf of the opponents' firm, would not by itself be sufficient to give jurisdiction to the Court at Karachi. A.I.R. 1933 Sind 202=27 S. L. R. 298=144 Ind. Cas. 885.

——S. 11—Business contemplated—Not that is carried on by general agent.

The business contemplated by the section should be carried on within the limits of the Court either personally by the defendant or by his agent properly and strictly so-called and under his effective control, but not by a general agent who carries on business in his own name for diverse constituents on payment to him of a commission. 112 Ind. Cas. 134=23 S.L.R. 229=A.I.R. 1929 Sind 24.

——S. 11—"Carrying on business."

"Carrying on business", though a very indefinite term, means, entering into transactions which may result in personal liabilities. 164 Ind. Cas. 627=39 C.W.N. 324.

——S. 11—Carrying on business—Test.

S. 11 (d), is applicable where the application is against a firm of debtors and not against an individual debtor. It is necessary in order to give the Court jurisdiction to pass an order of adjudication that the firm of debtors carried on business within a year of the date of the application within the Court's jurisdiction. The onus is on the applicant to prove the fact.

The question for determination in such a case indicated.

The debtor firm had a servant permanently employed within the jurisdiction of the Court. The servant used to watch over the interests of his master, give directions for sale when instructed to do so, bring brokers to the general agent, check weighments, hand over railway receipts and see that the goods were sold at the best available price make entries in his books and keep his master informed and one of the partners of the firm used to come every few months for a few days in connection with business of the firm:

Held, that the debtor firm carried on business within the jurisdiction of the Court. A.I.R. 1933 Sind 250=27 S.L.R. 157=150 Ind. Cas. 453.

——S. 11—Carrying on business.

So long as there are debts of the business being discharged and assets being got in, a business must be regarded as still being carried on. The appointment of a Receiver cannot prevent the order of adjudication being made. The legislature could not have intended that an insolvent firm should be allowed to evade its responsibilities and obligations by the device of one member of the firm bringing a suit against another member and applying to the Court to appoint a Receiver. 91 Ind. Cas. 127=22 M. L. W. 411=1925 M.W.N. 749=48 Mad. 795=A.I.R. 1925 Mad. 1249=49 M.L.J. 457.

——S. 11—Confinement of person in jail for 18 months prior to filing of petition—Jurisdiction of Court within whose jurisdiction jail is situated.

Confinement of a person in Rangoon jail for 18 months prior to the institution of the petition for his insolvency is sufficient to constitute him a resident in Rangoon for over 12 months for purposes of S. 11, Presidency Towns Insolvency Act, and the Rangoon Court has jurisdiction to entertain it. A. I. R. 1935 Rang. 343=13 Rang. 192=159 Ind. Cas. 217.

——S. 11—Debtor found "working for gain" within jurisdiction of Court but not "carrying on business"—Petitioning creditor, if should be relegated to fresh application—Jurisdiction.

A debtor is adjudicated for his own demerits, or it may be his misfortune, and the merits of the petitioning creditor are not material. Therefore, the principle that if the defendant in a civil suit is not prejudiced, a defect in the pleadings ought not to be allowed to defeat a just claim, applies to the insolvency proceeding, at least to applications for adjudication, for the protection of public interest is a consideration in such cases.

Consequently, where, on an insolvency petition, it is found that the debtor does not carry on business within the Court's jurisdiction but works for gain, the Court should assume jurisdiction and grant the relief instead of relegating the petitioning creditor to a fresh application. 164 Ind. Cas. 627=39 C. W. N. 324.

——S. 11—Distinction between "carries on business" and "works for gain."

In the Act, a distinction has been drawn between "carrying on business" and "working for gain".

Where the debtor merely manages a business under a power-of-attorney given to him by his son, who owns the business, the debtor technically works for gain. 164 Ind. Cas. 627=39 O.W.N. 324.

——S. 11—Dwelling house.

It is sufficient for the requirements of S. 11 (b) that the debtor has had a dwelling house, within the High Court's original jurisdiction limits, available for his occupation as a dwelling house should he choose to dwell there, although he has ordinarily resided elsewhere and has not actually dwelt in the house within the year previous to the presentation of the insolvency petition. 31 M.L.W. 229=1930 M. W. N. 99=A.I.R. 1930 Mad. 544=58 M.L.J. 189.

——S. 11—Delling house—What does not constitute.

The debtor was an engine driver in the employment of the M.S.M. Ry. Co. and for the four years immediately preceding the presentation of his insolvency petition he had been engaged in the work of engine driver in Nellore district, where he ordinarily resided during that period. The debtor had a house within the ordinary original civil jurisdiction. But it appeared from evidence that this house was the dwelling house of his mother, his sisters and their

children to whom he contributed money for the rent with the object of helping them.

Held: that his providing money to enable his mother and sisters to live in this house could not make it his establishment or his dwelling house and, therefore, the house could not be regarded as the debtor's dwelling house within the meaning of S. 11 (b). 31 M.L.W. 315=1930 M.W.N. 406=A. I. R. 1930 Mad. 354=58 M.L.J. 187.

——S. 11—Foreigner.

A foreigner not committing any act of insolvency during his personal residence in British India cannot be adjudged insolvent by a Court in British India. A.I.R. 1938 Bom. 161=40 Bom. L.R. 33=I.L.R, (1938) Bom. 301=174 Ind. Cas. 361.

——S. 11—Interpretation—Agent.

The words "either personally or through an agent" were introduced for the purpose of removing a doubt which might otherwise have existed as to the jurisdiction of the insolvency Court over foreigners carrying on business within the jurisdiction of the insolvency Court by the employment of agents or managers properly and strictly so-called, and not for including purchases and sales made by employing a commission agent. 112 Ind. Cas. 134=23 S.L.R. 229=A.I.R. 1929 Sind 24.

——S. 11—Motive for residence—Immaterial.

A debtor's motive in taking up his residence in a particular place does not affect the question whether he is to be deemed to have "ordinarily resided" there. 31 M.L.W. 229=1930 M.W.N. 99=A.I.R. 1930 Mad. 544=58 M.L.J. 189.

——S. 11—Working for gain—Place of payment, whether the test—Occasional visits to a place—Sufficiency.

Under S. 11 (c), a person may be working for gain in more than one place. The place where payment is made to person is not the test but one of the ingredients which has to be considered in determining where a person works for gain and the important point to be considered in this connection is the place where the money is actually paid and not the place where the pay-sheets are made out or where payment may be regarded as notionally made. Occasional visits would not constitute what is required under S. 11 (c) as personally working for gain. A.I.R. 1932 Bom. 432=34 Bom. L.R. 844=56 Bom. 530=139 Ind. Cas. 591.

——S. 12—Unliquidated sum.

It is only when the account is of a simple nature that it can form the basis of insolvency proceedings. If there are entries in the accounts which are open to serious disputes, and the account is subject to counter-claims and an enquiry is necessary to ascertain which items and which counter-claims are true, then it is not a claim for a liquidated sum and the Insolvency Court cannot accept such a claim as the basis for adjudicating a person insolvent. A.I.R. 1943 Mad. 766=56 M.L.W. 538=(1943) 2 M.L.J. 361=1943 M.W.N. 573=210 Ind. Cas. 640.

——S. 12 (1) (c)—Amendment application filed beyond three months—When can be allowed.

S. 12 (1) (*c*) makes the occurrence of an act of insolvency within three months from the date of the presentation of the petition one of the three conditions precedent to a lawful presentation. If any of these conditions are unfulfilled, the petition is incompetent. Where an application for amendment is filed more than three months after the alleged act of insolvency is committed, and the effect of granting as amendment would be to give the petitioning creditor rights which they would not have had, had they sought to file their petition on the date when they applied for the amendment, the amendment should not be permitted in such circumstances. A.I.R. 1934 Sind 177=153 Ind. Cas. 822.

——S. 12 (1) (c)—Attachment for more than 21 days, whether continuing act of insolvency—Petition more than three months after 21 days, competency of.

Attachment of property in execution for more than 21 days is not a continuing act of insolvency. Once these days have elapsed, the act of insolvency is complete and no petition can be founded upon it after the expiration of three months from the completion of the period of 21 days. A.I.R. 1931 Cal. 246=57 Cal. 1274=131 Ind. Cas. 590.

——S. 12 (1) (c)—Date of transfer.

Where the mortgage was executed beyond three months but mortgagee took possession within three months of the application. *Held*, that there was no transfer by the insolvents in law or in equity within the meaning of the Act at any time within three months before the presentation of petition, 75 Ind. Cas. 203=24 Bom.L.R. 861=A.I.R. 1923 Bom. 107.

——Ss. 12 (1) (c), 9—Mortgage and subsequent transfer of possession—The two transactions should not be considered as separate in considering act of insolvency.

Transfer of possession in pursuance of a mortgage should not be severed from the original transaction from which it ensued, in considering whether there was an act of insolvency. The transaction must be taken as a whole because the transfer of possession is only a necessary corollary of the mortgage. In such case, a mortgage executed more than three months before the presentation of the petition cannot be an available act of insolvency on which a petition by a creditor can be founded. A.I.R. 1937 Rang. 16=167 Ind. Cas. 96.

——S. 12 (1) (c)—Transfer—When operates.

Where there are certain properties of the insolvents assigned absolutely by way of mortgage and certain other properties charged by way of floating security the fact that these other properties are charged by way of floating security, does not prevent there being any 'transfer' of their property until the mortgagee takes possession. 75 Ind. Cas. 203=24 Bom.L.R. 861=A.I.R. 1923 Bom. 107.

——S. 12 (2)—Estimate of security—Enquiry into.

Where a creditor gives an estimate of his security, the Court will not enquire into its correctness, if it is a genuine estimate. 107 Ind. Cas. 860=5 Rang. 685=A.I.R. 1928 Rang. 36.

——Ss. 13 and 12 (1) (a)—Right of insolvent after petition by Creditor is presented.

An insolvent can question the right of the petitioning creditor to figure as creditor, and the official assignee after insolvency, can enquire and strike out his name if necessary from the creditor's list. 20 C.W.N. 995=37 Ind. Cas. 71.

——S. 13 (1)—Mere allegation as to notice of suspension—Sufficiency of—Evidence of acts of insolvency not mentioned in petition—Whether can be adduced.

A creditor has not only to put forward in his peti-

tion a specific act of involvency as contained in S. 9 of the Act, but he has also to prove that an act of insolvency has actually been committed. The creditor's petition also according to S. 13, Presidency Towns Insolvency Act, must be verified by an affidavit or affidavits of some person on his behalf having knowledge of the facts. After an order of adjudication has been made on specific acts of insolvency contained in affidavit filed in support of the creditor's petition, the Court is not empowered to allow evidence to be given of acts of suspension of payment other than those contained in the petition and the affidavits filed. A.I.R. 1933 Rang. 280=149 Ind. Cas. 1036.

——S. 13 (2)—Decree against one of two parties trading together—Application for adjudication of both as insolvents—Maintainability of—Partnership debt—Sufficiency to support adjudication order against both—Judgment against one joint and several promisor, whether bars suit against the others.

A judgment against one joint and several promisor is no bar to a subsequent suit on the contract or obligation against the other or others. There can be no *res judicata* upon a cause of action against a co-promisor.

Where a father and son were conducting business together and a decree was passed against the son alone, but both the father and son were sought to be adjudicated as insolvents:

Held, that if it is proved that the debt in dispute is a partnership debt, its existence will suffice to support an adjudication order against both the father and son. A.I.R. 1933 Bom. 407=35 Bom. L.R. 881=145 Ind. Cas. 619.

——S. 13 (2)—Facts under S. 13 (2) made out—Onus of proof—Motive of petitioning creditor.

When the necessary facts under S. 13 (2) have been made out, the petitioning creditor is entitled to an order and it is for the debtor to satisfy the Court that that right should be taken away under S. 13 (4) (*b*). When a creditor is entitled to file a bankruptcy petition, his motive in doing so is immaterial. A.I.R. 1936 Mad. 27=70 M.L.J. 545=43 M.L.W. 280=162 Ind. Cas. 722.

——S. 13 (2)—Mere existence of decree, if sufficient—Court, whether estopped from disputing decree.

In insolvency, the question which arises is not merely one between the petitioning-creditor and the judgment-debtor. The rights of other creditors of judgment-debtor have to be considered. If an order of adjudication is made, the rights of those creditors to recover payment independently of their own debts are taken away. Therefore, the Court must consider whether the petitioning creditor in fact has a good debt, and it is not bound by any decree as between the creditor and the debtor. The debtor may be estopped from disputing the decree but the insolvency Court is not estopped; the Court must be satisfied about the validity of the debt in the interests of the other creditors. A.I.R. 1941 Bom. 62=I.L.R. (1941) Bom. 156=42 Bom.L.R. 1078=193 Ind. Cas. 54.

——S. 13 (3)—Creditor's application—Examination of insolvent, necessity for. 5 C.W.N. 91.

——S. 13 (3)—Notice—Non-service not formal defect.

The omission to serve the notice contemplated by S. 13 (3) is not a formal defect or irregularity within S. 118. It is of fundamental importance that an adjudication order should not be made to the prejudice of an alleged insolvent till notice of the institution of the proceedings has been served on him. The burden lies upon the creditor to establish that the insolvent has waived the defect caused by the non-service of the notice. 66 Ind. Cas. 886=34 C.L.J. 349=A.I.R. 1921 Cal. 106.

——S. 13 (4)—Scope of inquiry—Confined to the acts of insolvency alleged.

Under S. 13 the Court ought to confine itself to the particular act of insolvency alleged on the petition and it is not incumbent upon the Court to embark upon a long and roving enquiry into the general financial condition of the judgment-debtors; the language of S. 13 (4) is against the contention that the Court is bound to look into anything outside the act of insolvency alleged in the petition. 83 Ind. Cas. 941=39 C.L.J. 512=A.I.R. 1924 Cal. 964.

——S. 13 (4) (b)—"Ability to pay".

What is meant by "ability to pay" is not merely that the man has assets, if liquidation proceeds, might in the result provide sufficient money to discharge his debts. The expression means that he is not so embarrassed that he could not meet his debts in the ordinary way. When assets are not liquid assets, and therefore, debts cannot be paid, that is a circumstance in favour of liquidation. A.I.R. 1939 Rang. 150=181 Ind. Cas. 917.

——S. 13 (4) (b)—"Ability to pay debts"—Onus of proof.

What the Act means by "ability to pay debts" in S. 13 thereof is not merely that the man has assets which, if liquidation proceeds, may, in the result, provide sufficient money to discharge his debts. It means that he is not so embarrassed that he cannot meet his debts in the ordinary way by making legal tender and discharging his debts.

The circumstance that a man has assets and the assets are not liquid assets and therefore, he cannot pay his debts is a circumstance which stands in favour of having a liquidation and not against having a liquidation.

The burden of proof of ability to pay the debts in order that the creditor's petition may be dismissed is on the debtor himself. A.I.R. 1933 Cal. 417=60 Cal. 345=144 Ind. Cas. 142.

——S. 13 (4) (b)—"Other sufficient cause"—Deposit by debtor of whole amount due to petitioning creditors before adjudication, if sufficient cause.

A deposit in Court by the debtor made long before the date of adjudication of the whole amount due to the petitioning creditors for withdrawal by the creditors conditionally cannot be considered as "sufficient cause" within the meaning of S. 13 (4) (*b*) so as to refuse adjudication. A.I.R. 1938 Sind 82=32 S.L.R. 672=175 Ind. Cas. 214.

——S. 13 (4) (b)—"Other sufficient cause"—Interpretation.

The Act is based on the English Bankruptcy Act and the words "other sufficient cause" in S. 13 (4) (*b*) should not be construed as *ejusdem generis* in relation to the earlier part of the section. The widest possible interpretation should be put on the words.

Where a creditor's petition for adjudication is filed, the judicial discretion can be used in favour of debtors only on the principle of estoppel and on fraudulent or improper conduct on the part of the

petitioning creditor. A.I.R. 1936 Mad. 27=43 M. L.W. 280=70 M.L.J. 545=162 Ind. Cas. 722.

——S. 13 (4) (b)—Other sufficient cause—Spiteful conduct of petition.

A creditor, who has acted in any way which would be equivalent to an assent, recognition or approval of a certain arrangement or who had taken advantage or was willing to take advantage or an arrangement come to between him and the debtor in order to realise the moneys due to him without recourse in the first instance being had to the attached properties being put up for sale, should not be allowed to turn round and proceed in bankuptcy as if there had been a clean state from the start. A creditor who takes legitimat steps for enforcing payment of the debt due to him is entitled if his demands are not satisfied to proceed in bankruptcy; but, on the other hand, if as a matter of fact indications are not wanting on the affidavits on record, which show that the proceedings in bankruptcy and the persistence in them are spiteful, that in itself is a sufficient cause for refusing, on the petition of the creditors, to make an adjudication order. 83 Ind. Cas. 941= 39 C.L.J. 312=A.I.R. 1924 Cal. 964.

——S. 13 (4) (b)—Scope.

Distinction between S. 13 (4) (*b*) and S. 9 (*g*) pointed out. A.I.R. 1936 Cal. 269=166 Ind. Cas. 657.

——S. 13 (6)—Proceedings for postponement of question whether there was debt or not—Conditional adjudication order, if should be added to order for furnishing security.

The actual provision in sub S. (6), S. 13, contemplates that there should be a stay for such period as may be necessary for the determination of the other matters in issue between the paties and that ultimately there shall be a trial on the question relating to the debts. The sub-section does not contemplate that a conditional adjudication order should be added by way of sanction, to an order for furnishing security in connection with postponement of determination of the question as to whether or not there was a debt. A.I.R. 1935 Cal. 81=61 Cal. 924 =154 Ind. Cas. 524.

——S. 13 (6)—Stay of proceedings.

It is only when the petitioning creditor's debt is disputed that the Court can stay proceedings under S. 13 (6) of the Presidency Town Insolvency Act. 19 Bom.L.R. 365=40 Ind. Cas. 207.

——Ss. 13 (8), 15 (2), 21 (1)—Adjudicated insolvent—If can withdraw petition.

S. 13 (8) and S. 15 (2) apply to pending insolvency petitions before an order of adjudication is made, and therefore an adjudicated insolvent cannot be permitted to withdraw his petition on the ground that he has settled with the creditors. To bring the cases within S. 21 (1) the debts must have been paid in full and his antecedent conduct should justify the court to exercise its discretion in his favour. 38 Bom. 200=15 Bom.L.R. 748=20 Ind. Cas. 859.

——Ss. 14, 15 and 21—Adjudication when can be annulled—Rights of debtor to be adjudicated an insolvent.

An insolvency court can annul an adjudication order made by it if it thinks that it had been got by an abuse of the powers of court. Per *Mukerjee, J.*—It is not that a court must pass an order of adjudication merely because the conditions mentioned in Ss. 14, 15 exist in the case of the applicant. It is its duty to see whether the application constitues an abuse of powers of court. An adjudication order cannot however be legitimately annulled or refused on the ground that the applicant has shown undue preference to one creditor and is then guilty of misconduct. 44 Cal. 899=25 C.L.J. 83 =21 C.W.N. 298=39 Ind. Cas. 199.

——S. 14—Estate of debtor already under Court of Wards.

Debtor satisfying conditions must be adjudged insolvent although his estate may be already in hands of Court of Wards. A.I.R. 1941 Cal. 505=I. L. R. (1941) 1 Cal. 318=196 Ind. Cas. 170.

——S. 14—Indirect or malicious motive—Whether a ground for restraining person from exercising legal rights.

If a person is entitled to exercise a legal right, normally he is not to be restrained from doing that which the law allows merely because he is actuated by an indirect or malicious motive. At the same time, if insolvency proceedings are initiated or prosecuted not *bona fide* but with a view to extortion or fraud or oppression, it would be a shocking thing for any Court of Justice to be made an instrument of such a proceeding. A.I.R. 1934 Rang. 292=12 Rang. 355=156 Ind. Cas. 345.

——S. 14—Insolvency proceedings—Ex parte order—Setting aside of—Review.

S. 350 of the Civil Procedure Code contemplates that on the date fixed for hearing, the Court shall examine the judgment-debtor in the presence of the persons on whom notice has been served or their pleaders. This should be strictly carried out. If the objector had no notice of the application for insolvency, he is entitled to apply under S. 103 of the Civil Procedure Code to set aside an *ex-parte* order passed under S. 350 of the Code: but if notice had been served on him and he was prevented by any sufficient reason from appearing and if the case was heard *ex-parte* under S. 350 he is entitled to make an application under S. 623 of the Code to set aside the *ex-parte* order on the ground that it was in contravention of S. 305. 7 C.L.J. 268.

——S. 14—Insolvency, declaration of—Unfair preference—"Act of bad faith"—"Payment".

Assignments of actionable claims are "dispositions of property" within the meaning of S. 351, C.P.C. If a man on the eve of bankruptcy makes a payment to a particular creditor the presumption immediately arises that he makes that payment with the dominant view of giving a preference to that creditor over his other creditors. It is a presumption which would arise from the transaction. It is sufficient to constitute an unfair preference if the preference is the substantial, effectual or dominant view of the debtor, though not the sole view. A preference might be an "unfair, preference" even though the payment might, never have been made out for pressure, if it was also the fact that the payment would never have been made but for the desire to prefer in the sense that the desire was the dominant view of the debtor. *Held also*, that in the circumstances of the case there was no unfair preference. 18 M.L.J. 189=2 M.L.T. 57.

——S. 15—Fresh petition after discharge.

The petitioner who filed an insolvency case in 1904 and had been granted his personal discharge can again file a fresh petition of insolvency in respect of debts

contracted subsequent to his personal discharge. 4 Bur. L.T. 87=10 Ind. Cas. 792.

——S. 15—Interpretation.

The words "ought to have been presented before some other Court," in S. 15 mean "ought, as a matter of convenience, to have been presented before some other Court". A.I.R. 1932 Bom. 432=56 Bom. 530=34 Bom. L.R. 844=139 Ind. Cas. 591.

——S. 15—Inability to pay debts—Strict proof—Necessary.

The allegation by the petitioner-debtor of inability to pay his debts is not a mere matter of form, but goes to the foundation of the debtor's right to claim the benefit of the Insolvency Act. The Court, therefore, ought not to make an adjudication except upon a proper petition, and that when it appears that the adjudication has been wrongfully made, the Court ought to rescind it. 31 M.L.W. 229=1930 M.W.N. 99=A.I.R. 1930 Mad. 544=58 M.L.J. 189.

——S. 15—Inability to pay debts—Proof—Necessity.

Phillips, Offg. C.J.—The allegation of inability to pay the debts is a substantial part of the debtor's claim to be declared insolvent, and, if that fact is not proved, he would not be entitled to present a petition. 108 Ind. Cas. 208=1928 M.W.N. 62=A.I.R. 1928 Mad. 394.

——S. 15 (2)—Withdrawal of petition—S. 13 (8)—Impossible after adjudication.

A debtor who has been adjudicated insolvent on his own petition cannot, even with the leave of the Court, withdraw his petition. S. 15 (2) of the Act only applies to petitions that are pending before any order has been made, as also does S. 13 (8) dealing with petitions by creditors and that once an order of adjudication has been made the debtor becomes an insolvent and remains so until the order of adjudication is annulled or he obtains his discharge. 38 Bom. 200, Foll. 90 Ind. Cas. 969=3 Rang. 343 =A.I.R. 1925 Rang. 351.

——S. 17.

Synopsis.

(1) Adjudication by different Courts.
(2) Adjudication order—Effect.
(3) Adjudication pending suit.
(4) Adverse possession.
(5) After-acquired property.
(6) Applicability.
(7) Construction.
(8) Damages for breach of contract.
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(10) Discharge.
(11) Foreign firm.
(12) Partnership — Surviving partner insolvent.
(13) Property.
(14) Provident fund.
(15) Scope.
(16) Secured creditor.
(17) Son's interest.
(18) Official Assignee.
(19) Suit after adjudication.
(20) Vesting—Date of.
(21) Miscellaneous.

(1) Adjudication by different Courts.

——Ss. 17, 22 and 51—Adjudication by different Courts—Priority of—Vesting—Effect of later adjudication—Balance of convenience—Order of adjudication—Specification of acts of insolvency.

Where there are several adjudications by different courts all the properties of the insolvent vest in the Official Assignee of the Court which made the prior adjudication and will not be divested from him by the subsequent adjudication of another Court even though the later adjudication is based on earlier acts of insolvency. S. 51 of the Act has not the effect of divesting property vested in an Official Assignee under a prior adjudication. Where it is found that the estate should be administered by the Court in which the later adjudication was made, steps should be taken to annul the previous adjudication. An order of adjudication should specify the acts of insolvency on which it is made, as the insolvency relates back to the dates of the acts of insolvency which are found to have been proved. 42 Mad. 121=35 M.L.J. 533=24 M.L.T. 455=9 L.W. 36=49 Ind. Cas. 210.

(2) Adjudication Order—Effect.

——S. 17—Adjudication order—Effect.

When a person is adjudicated an insolvent, the whole of his property passes to the Official Assignee by virtue of the vesting order passed under the Presidency Towns Insolvency Act. Consequently nothing is left vesting in the insolvent which would give him a cause of action. So a suit by an insolvent in his own name, after his adjudication, cannot be maintained and the substituting the name of the Official Assignee later on is adding a new plaintiff within Limitation Act, S. 22. 95 Ind. Cas. 538=28 Bom. L.R. 554=A.I.R. 1926 Bom. 366.

——S. 17—Adjudication order—Effect of—Non-transferable occupancy—Does not vest.

Where an occupancy is not transferable, it cannot be sold in execution of a decree and accordingly does not vest in Official Receiver. 121 Ind. Cas. 876=A.I.R. 1930 Sind 75.

——S. 17—Adjudication order—Effect.

All transactions between the insolvent and the creditor conducted behind the back of the Official Assignee and without informing the Court, must be considered as null and void. 87 Ind. Cas. 929=27 Bom. L.R. 419=A.I.R. 1925 Bom. 346.

——S. 17—Adjudication order—Effect.

After the adjudication order, a proceeding for the arrest of the judgment-debtor cannot be commenced against the insolvent without the leave of the Insolvency Court, but there is no provision in that section expressly prohibiting the continuance or completion of a proceeding commenced before the adjudication order, except in so far as it may involve an application for a remedy against the property of the insolvent.

On production of the order the duty of the Judge is to require the judgment-debtor to give security that he would appear, when called upon, in any proceeding or upon the decree in the execution of which he was arrested. The object of this requirement is to compel the insolvent when he has obtained an adjudicating order to be also reasonably diligent in proceeding with his insolvency in a *bona fide* manner.

89 Ind. Cas. 381=3 Rang. 187=A.I.R. 1926 Rang. 305.

——S. 17—Adjudication, order—Effect.

The words "other legal proceedings" in S. 17 of the Presidency Towns Insolvency Act include an application for arrest in execution of a decree and no such application can be made against an insolvent after an order of adjudication has been made except with the leave of Court. 12 Bur. L.T. 218=55 Ind. Cas. 250.

——S. 17—Adjudication order—Effect—Does not prevent time running.

It cannot be said that when an adjudication order is made, there is any injunction or order against the institution of a suit by a creditor. Section 17 of the Insolvency Act does not present an absolute bar to the creditor's right to institute a suit but only prevents him from suing without the leave of the Court. And it is only when leave is refused that it can be said that there is an injunction or order staying the institution of the suit. The creditor cannot, therefore, claim a deduction of the time during which the insolvency was pending, in computing the period of limitation in any suit brought by the creditor after the insolvency proceedings are quashed. 67 Ind. Cas. 757=24 Bom. L.R. 509=47 Bom. 244=A. I. R. 1923 Bom. 33.

——S. 17—Adjudication order—Effect.

After an adjudication order all the property belonging to the insolvent vests in the official Assignee appointed under S. 17 and it cannot thereafter be controlled by any court except with the sanction of the Official Assignee. 3 Pat. L.W. 394=39 Ind. Cas. 884.

——S. 17—Adjudication order—Effect of—Leave to precede institution of suit against defendant.

The leave contemplated under S. 17, is leave which ought to be obtained before commencement of suit and cannot be granted after the same is filed. 40 Bom. 235=17 Bom. L.R. 925=31 Ind. Cas. 948.

——S. 17—Adjudication order—Effect.

Any person wishing to seek any remedy against the insolvent who is so adjudicated should apply for leave to do so to insolvency side of High Court; hence a Small cause court has no jurisdiction to entertain an application for execution after adjudication without High Court's leave. 39 Mad. 689=31 Ind. Cas. 192.

——S. 17—Adjudication order—Effect.

Under S. 17 of the Act the property of the insolvent situate in any part of British India vests in the official assignee on adjudication. 40 Cal. 78=18 Ind. Cas. 908.

——S. 17—Adjudication order—Effect—Right of insolvent to defend suit.

No cause of action survives against a person regarding his property who becomes an insolvent and whose property vests in the Official Assignee. If the Official Assignee refuses to defend a suit affecting the property of the insolvent the latter cannot defend the suit independently of the Official Assignee. 39 Bom. 568=17 Bom. L.R. 209=28 Ind. Cas. 506.

——S. 17—Adjudication order—Effect—Decree—Right to appeal.

When a person has been adjudicated insolvent, his right to set aside a decree for money passed against him on the ground of fraud passes to the Official Assignee. The right to appeal against a judgment passed against him ceases to be exercisable by the insolvent after his insolvency. A.I.R. 1934 Bom. 84=36 Bom. L.R. 79=149 Ind. Cas. 910.

(3) Adjudication pending suit.

——S. 17—Adjudication pending suit—Right of appeal not affected.

If during the pendency of a suit a party is adjudicated an insolvent, he is not disqualified by reason of his insolvency from appealing. After the annulment of the order of adjudication he is entitled to continue the appeal. A.I.R. 1921 Mad. 402, Rel. on. 118 Ind. Cas. 252=31 Bom. L.R. 357=A. I. R. 1929 Bom. 202.

(4) Adverse possession.

——S. 17—Adverse possession—Insolvent and Assignee—Official Assignee — After acquired property.

An insolvent, from the time of adjudication as an insolvent until his final discharge by the force of the statutory provisions of the Insolvency Act, holds the position of an express trustee for his creditors and he cannot plead adverse possession against the Official Assignee. On an application by the Official Assignee under S. 26 of the Indian Insolvency Act that the properties acquired by an insolvent in the name of his mother or wife after his adjudication are those of the insolvent and as such vest in him, (the Official Assignee), the Insolvent Commissioner has jurisdiction to adjudicate the claim as that was the only and proper procedure to be followed. The after-acquired property of the insolvent vests from the date of its acquisition on the Official Assignee and it is not necessary to have judgment entered up under S. 86; and the claim of the Official Assignee is not barred by Limitation. The jurisdiction of the insolvency court is exclusive and the remedy in the Civil Court is barred as between the Official Assignee and the insolvent. 17 M.L.T. 347=29 Ind. Cas. 168.

(5) After-acquired property.

——Ss. 17 and 52—After-acquired immovable property of insolvent—Whether vests in Official Assignee without intervention by him—Discharge of insolvent—Effect on Official Assignee's right to intervene — Rule in Cohen v. Mitchell—If applicable.

There is a good deal to be said for the proposition that the rule in *Cohen* v. *Mitchell* that until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee, should not be applied to immovable property in a case governed by the Presidency Towns Insolvency Act, as it stands at present. In any event, the rule does not apply as between the Official Assignee and the insolvent, and the after-acquired immovable property vests immediately in the Official Assignee without any intervention on his part.

As between the Official Assignee and the insolvent, an order of discharge of the insolvent even when it takes effect does not destroy the right of the Official Assignee to intervene as regards property acquired

by the insolvent prior to his discharge. I.L.R. (1947) 1 Cal. 394.

——Ss. 17 and 52—After-acquired property of undischarged insolvent—Vesting in the Official Assignee—Intervention of Official Assignee not necessary—Anomaly and differences in insolvency law between Presidency town and mofussil—Need for abolition.

The moment a property is acquired by or devolves on an undischarged insolvent, such property becomes *eo instanti* vested in the Official Assignee or Receiver. No distinction is made between property belonging to and vested in the insolvent at the commencement of the insolvency and property which may be acquired by or devolve on him subsequent to the adjudication and before discharge. Both kinds of property are comprised in the property of the insolvent divisible among his creditors. Both kinds of property vest in the Official Assignee or the trustee in bankruptcy and they vest in him in precisely the same manner.

The distinction between the real and personal property made in England in applying the rule of postponement of vesting of after-acquired property till intervention by the trustee cannot be properly applied in India.

There is no difference in India between movable and immovable property of an insolvent for the purpose of vesting in the Official Assignee.

Case-law discussed.

Difference between English and Indian law pointed out. Desirability of Legislature, intervening and abolishing anomalies and differences between the law of insolvency applying to Presidency towns and that applying to the mofussil stressed.

Per *Mack, J.*—The important differences between the policy of the English Bankruptcy Statutes and Indian Insolvency Legislation towards uncertified bankrupts and undischarged insolvents discussed. I. L. R. (1949) Mad. 693=A.I.R. 1949 Mad. 449= 1948 M.W.N. 791=(1948) 2 M.I..J. 656=62 M. L. W. 929.

——Ss. 17, 52—After-acquired property.

The principle is well settled that although property belonging to the insolvent at the commencement of the insolvency vests in the Official Assignee forthwith, after-acquired properties do not vest in him unless he chooses to intervene. 1946 M.W.N. 694= (1946) 2 M.L.J. 333=59 M.L.W. 620. 48 Cr.L. J. 705=231 Ind. Cas. 147=A.I.R. 1947 Mad. 187,

(6) Applicability.

——S. 17—Applicability—Suit against official Assignee or agent—Leave of Court of Assignee —Suit to set aside distraint—Agreement for setting off rent and debt.

S. 17 of the Act does not apply to a suit instituted in the Revenue Court to set aside an illegal distraint by the Official Assignee for rent due to the insolvent on the ground that under an agreement with the insolvent the plaintiff was entitled to apply the rent due by him by the latter. No leave of the Official Assignee on the Insolvency Court, before any suit against the former is instituted. The Insolvent's property vested in the Official Assignee is not in *custodio legis* and there is no contempt of court in instituting a suit against that officer with respect to that property. (1913) M.W.N. 287=13 M.L.T. 303=24 M.L.J. 350=18 Ind. Cas. 722.

——S. 17—Applicability—Provisions of S. 17 applies even after withdrawal of petition.

A mere withdrawal of the petition with the leave of the Court would not annul the application of the provisions of S. 17 of the Act, unless the adjudication were also annulled. S. 23 of the Act contains express provisions as to what shall happen on annulment and the reason for the absence of similar provisions in the case of a withdrawal is because they are not required in the case of a withdrawal before an adjudication order has been passed, and after the passing of the adjudication order, the right to apply for withdrawal is gone and the proper remedy is an application for annulment in a suitable case. 90 Ind. Cas. 969= 3 Rang. 313=A.I.R. 1925 Rang. 351.

(7) Construction.

——S. 17—Construction.

The words of the proviso to S. 17 can be amply satisfied by confining its operation to cases where the mortgagee can realise his security without the institution of the suit. 7 Rang. 201=118 Ind. Cas. 615= A.I.R. 1929 Rang. 229.

(8) Damages for breach of contract.

——S. 17—Damages for breach of contract—Right vests in Official Assignee.

On adjudication of insolvency the right to claim damages resulting from a breach of contract before the adjudication vests in the Official Assignee. A mere right to sue is restricted to damages arising from bodily or mental suffering or injury to the person or reputation of the bankrupt as distinguished from injuries to his estate. Both under the Presidency Towns Insolvency and Provincial Insolvency Acts right to damages for injuries to estate vests in the Official Assignee on the adjudication of insolvency. All property situate in any part of British India vests in the Official Assignee. 76 Ind. Cas. 657=17 S.L. R. 52=A.I.R. 1924 Sind 89.

(9) Damages for loss of credit and repudiate.

——S. 17—Damages for loss of credit and reputation—Insolvent can maintain suit for.

The damages caused by loss of credit and reputation do not vest in the Official Assignee but remain vested in the insolvents in spite of the bankruptcy. The insolvents therefore can maintain and carry on the suit for damages caused to their reputation and credit in their personal capacity. The principle applicable to the individuals is also applicable to two or three persons carrying on business under a firm name. 8 Rang. 441=128 Ind. Cas. 369=A.I.R. 1930 Rang. 289.

(10) Discharge.

——Ss. 17 and 45—Discharge of insolvent—Property vested in the Official Assignee—If automatically revest in the discharged insolvent.

On the discharge of an insolvent the property of the insolvent does not automatically revest in the insolvent and hence he has no right to sell the same without the permission of the Official Assignee. 1946 M.W.N. 342=A.I.R. 1946 Mad, 371=(1946) 1 M.L.J. 275.

——S. 17—Discharge.

Sale by insolvent after his discharge, of property abandoned by the Official Assignee will not pass a good title to the purchaser. I.L.R. (1937) 2 Cal. 386=41 C.W.N. 875.

——S. 17—Discharge—Refusal of—Bar of suit after.

The refusal of discharge to an insolvent is not necessarily a determination of the insolvency proceedings and therefore a suit against an insolvent after adjudication and after such refusal is also barred by S. 17. 84 Ind. Cas. 909=2 Rang. 643=A. I.R. 1925 Rang. 105.

——S. 17—Discharge, refusal of—Effect.

The refusal of a discharge is a final disposal of the insolvency proceedings. The protection order is vacated by such refusal and no leave is necessary under the section for an application to arrest an insolvent under a decree. 9 Bur.L.T. 252=38 Ind. Cas. 519.

——S. 17—Discharge—Suspension of discharge —Leave of Court.

The operation of an order suspending an insolvent's discharge is different from that of one refusing a discharge. The effect of the former is that permission of the insolvency Court is required to institute a suit against the minors. 64 Ind. Cas. 54=13 Bur.L.T. 192.

(11) Foreign firm.

——S. 17—Foreign firm.

Adjudicated firm having branches in India and Japan—Creditor in India paid dividends by Readjustment Committee in Japan is entitled to prove his claim and Official Assignee should consider it—Moveable property is subject to the law of the owner—As regards immovable property Indian Law will not operate unless given effect to by Japan law. 96 Ind. Cas. 459=43 C.L.J. 436=A.I.R. 1926 Cal. 898.

——S. 17—Foreign adjudication—International law—Duty of Courts.

The Straits Settlements Bankruptcy Ordinance which purports to vest the property of an insolvent 'whether situate in the colony or elsewhere' in the Official Assignee is *ultra vires* so far as it purports to cause a vesting of extra-territorial immovable property. Where a person is adjudicated as insolvent in Penang, his immovable properties situate in British India do not, therefore, vest in the Official Assignee of Penang by reason of that Ordinance.

But, by a rule of international law, after the date of a foreign adjudication order, that order will be recognised as effective and, if on the adjudication, the insolvent's power of disposal of the property was unaffected, then the rules of international law prevent any interference in the territory where the immovable property is, with the right of the Official Assignee to get hold of that property. The test in such cases is whether at the date of the adjudication the insolvent was free to dispose of his property.

There is no question of any fiction of vesting in such cases but the Court merely acts in aid recognising the foreign adjudication as effective from the date of adjudication by a rule of international law. A. I.R. 1934 Mad. 344=67 M.L.J. 59=1934 M.W.N. 81=39 M.L.W. 541=57 Mad. 616=151 Ind. Cas. 14.

(12) Partnership—Surviving partner insolvent.

——S. 17—Partnership—Surviving partner insolvent—Winding up—Official Assignee.

On the death of one partner, the surviving partner may apply to be declared insolvent, when the property would vest in the Official Assignee, and the latter has power to wind up the business so as to bind the representatives of the deceased partner. 32 Mad. 462=6 M. L.T. 188=3 Ind. Cas. 163.

——S. 17—Partnership—Insolvency of some partners—Assignment of joint debt by other partners—Validity—Annulment of adjudication, effect of—Official Assignee, rights of.

The Official Assignee as assignee of the insolvent partners of a firm has a right to come in on a winding up of the partnership and claim his share. His rights and liabilities are co-extensive with those of the insolvent partners, had they not become bankrupt. So when only a partner or some of the partners of the firm become insolvent, the Official Assignee becomes a tenant-in-common with the continuing partners from the date of the petition and the insolvent partners have the right to realize the partnership properties. The Official Assignee can claim nothing as the insolvent's share until all the joint creditors of the partnership are paid. A.I.R. 1931 Rang. 191=131 Ind. Cas. 62.

——Ss. 17 and 99—Partnership — Adjudication of firm—Rules of the Lower Burma Chief Court under the Insolvency Act.

An order of adjudication can be made against a firm in the firm's name and will operate on the property of each partner. Rule 83 of the rules of the Lower Burma Chief Court under Insolvency Act is *ultra vires*. 7 Bur.L.T. 304=25 Ind. Cas. 222.

(13) Property.

——S. 17—Property—Costs awarded to insolvent in suit based on tort.

Damages obtained by an undischarged insolvent in respect of a personal wrong and costs awarded to him in such a suit are property of the insolvent which is capable of passing to his assignee in insolvency under the Presidency Towns Insolvency Act.

But the property will not pass to Official Assignee until he has intervened and claimed it. A.I.R. 1934 Rang. 333=12 Rang. 428=154 Ind. Cas. 79.

——S. 17—Property — Property of insolvent outside British India—Whether vests in Official Assignee—Order in personam against person in possession—Enforceability of.

On passing of the adjudication order, the property of the debtor firm vests in the Official Assignee whether it is situate in British India or not and whether the Official Assignee is in a position to get possession of such property as is situate outside British India or not. The law with regard to movable property is that in a foreign country the basic principle is *mobilia sequuntur personam*. *Prima facie*, these are governed by the law of the insolvent's domicile.

The Indian Legislature has always the right to legislate in respect of such property, whether within or without British India which can be made liable for distribution amongst the creditors in accordance with the principles of International Law, provided such property can be made available by enforcing an order *in personam* against the possessor thereof. A.I.R. 1934 Sind 44=148 Ind. Cas. 941 (2).

——S. 17—Property—Property in foreign state.

An adjudication order does not operate to vest the insolvent's immovable property situated in a foreign state in the Official Assignee. A.I.R. 1932 Cal. 124 =35 C.W.N. 506=136 Ind. Cas. 141.

——S. 17—Property—Pension payable by Government.

A pension payable by Government is not property of the insolvent within the meaning of S. 17 which vests in the Official Assignee. A.I.R. 1940 Cal. 192=I.L.R. (1939) 2 Cal. 434=43 C.W.N. 1194 =187 Ind. Cas. 699.

——S. 17—Property.

The property of an insolvent which by S. 17 vests in the Official Assignee must mean only the property which by that section and by S. 52 is divisible amongst his creditors. 84 Ind. Cas. 883= 1925 M.W.N. 1=23 A.L.J. 85=6 L.R.P.C. 1=6 Lah. 1=21 M.L.W. 375=27 Bom. L.R. 135= 52 I.A. 22=29 C.W.N. 797=26 P.L.R. 81=A. I. R. 1925 P.C. 18=47 M.L.J. 857 (P.C.).

(14) Provident fund.

——Ss. 17, 52 (2)—Provident fund.

Where the rules of the Provident Fund of a Company provided, *inter alia*, that no member shall be entitled to transfer or assign his interest in the Fund during service and that if he purported to transfer or assign his interest, all moneys standing to the credit of such member shall be forfeited:

Held, that a petition by a member to adjudicate himself an insolvent amounted in law to a transfer of his rights to the Official Assignee within the meaning of the said rule; but the rule offended against the provisions of S. 12, T. P. Act, and was void, and on the adjudication of the member as insolvent, his contributions to the fund would, therefore, vest, in the Official Assignee.

Obiter.—If the debtor were adjudicated otherwise than on his own petition or if the adjudication was the result of collusion between the trustees of the Fund and the debtor to defeat the claims of creditors, the adjudication would not amount to a transfer. A.I.R. 1933 Cal. 701=60 Cal. 926=37 C.W.N. 1050=147 Ind. Cas. 422.

(15) Scope.

——S. 17—Scope—Operation of S. 17 is automatic.

The operation of S. 17 is automatic, and if the insolvent has an interest in certain properties at the date of his adjudication that interest vests in the Official Assignee by operation of law. A.I.R. 1939 Cal. 116=I.L.R. (1938) 2 Cal. 250=42 C.W.N. 695=180 Ind. Cas. 683.

——S. 17—Scope—Revocation of probate of person whose heir-at-law is adjudicated insolvent—Discharge of such insolvent—Creditor's right.

S. 17 contemplates direct proceedings against the insolvent. An application for revocation of a probate of a person whose heir-at-law is adjudicated insolvent does not come within those classes of proceedings. The discharge of the insolvents has no effect on the creditor's right to proceed on with his application for revocation. This is made all the more clear by the provisions of S. 18 of the Act. A.I.R. 1940 Cal. 296=I.L.R. (1940) 1 Cal. 33= 71 C.L.J. 25=44 C.W.N. 149=188 Ind. Cas. 787.

——S. 17—Scope and object.

The purpose of the Insolvency Act is to ascertain the debts owing by the debtor, take possession of all his assets and distribute them amongst all his creditors according to law with a view to satisfying as equitably as possible under the circumstances the claims of all the creditors, and so free the insolvent from his burden of indebtedness. A.I.R. 1941 Cal. 505=I.L.R. (1941) 1 Cal. 318=196 Ind. Cas. 170.

(16) Secured creditor.

——S. 17—Secured creditor seeking to realize security by suit.

The word "creditor" in Part 1 of S. 17 includes a secured creditor. The word "realize" in the proviso is not confined to a method of realization to which the secured creditor is entitled without the intervention of the Court. The proviso covers the case of a secured creditor who seeks to realise his security by the institution of a suit. Secured creditor is protected by S. 17 and no leave of the Court is required for the purpose of bringing a suit on his security and in such a suit asking for a sale. The view that the proviso only refers to a case in which the plaintiff is bound to come to Court where he has no other remedy open to him cannot be accepted. A.I.R. 1945 All. 299=1945 A.L.J. 144=I.L.R. (1945) All. 373=1946 A.W.R. (H.C.) 323.

——S. 17—Secured creditor—Execution by—Judgment-debtor becoming insolvent—Leave of the Court—Official Assignee, if necessary party —Security, if can be enforced in execution—Maintainability of suit under S. 67, T. P. Act.

The Official Assignee is a necessary party to proceedings taken in the course of execution of a money-decree against an insolvent. It is not necessary that leave of the Court has to be obtained and the earlier part of S. 17 applies only to such debts as are provable in insolvency. The earlier part of S. 17 applies to debts as are provable only in insolvency. A secured creditor, therefore need not take leave under S. 17.

A security bond executed by judgment-debtor in order to remove the attachment before judgment can be enforced in execution. It is not necessary to bring suit under S. 67, T. P. Act.

On the judgment-debtor becoming insolvent, the only person who has got an interest to contest the execution is the Official Assignee. A.I.R 1934 Cal. 64 =60 Cal. 1298=37 C.W.N. 973=149 Ind. Cas. 399.

——S. 17—Secured creditor.

Secured creditor—Application for personal decree under O. 34, R. 6 Civil P. C., against insolvent after discharge order is maintainable, secured debt not being a debt provable in insolvency. A.I.R. 1932 All. 336=1932 A.L.J. 237=54 All. 428=138 Ind. Cas. 361.

——Ss. 17, 45 (2)—Secured creditor—Application for personal decree against debtor after discharge—Maintainability.

Where, after an insolvent had been discharged, a secured creditor obtained a decree on his mortgage and after sale of the property, applied for a personal decree for the balance under O. 34 R. 6, Civil P. C., and the application was resisted by the debtor on the ground that the order of discharge had completely absolved him from all debts:

Held, that a debt due to a secured creditor not being a debt provable in insolvency, the order of adjudi-

cation and the subsequent order of discharge did not affect the mortgagor's rights and the mortgagor was entitled to a personal decree for the balance.

An order of discharge cannot take away the statutory right of a decree-holder which had materialised after the order of discharge. A.I.R. 1932 All. 336 =1932 A.L.J. 237=54 All. 428=138 Ind. Cas. 361.

——Ss. 17, 46 (3)—Secured creditor—Application for leave to sue—Order directing costs to be tacked on to debt—Suit on mortgage—Personal decree for costs after adjudication—Discharge of insolvent—Enforceability of order for costs—"Provable debt", meaning of.

The appellant was adjudicated a bankrupt in 1924. The respondent, a secured creditor, applied for leave to sue the Official Assignee and the appellant. The Court granted leave and ordered that the costs of the application for leave be tacked on to the mortgage debt. The respondent sued and obtained a decree in 1927. He was awarded also a personal decree in respect of balance due after sale of the mortgage property and in respect of costs of the application for leave to sue. The appellant was discharged in 1926. In 1929, an application was made for execution of the decree including the said costs. The appellant contended that the decree was a nullity so far as the said costs were concerned:

Held, (1) that this objection should have been raised in the suit itself and the executing Court had no power to go behind the decree;

(2) the order passed on the application for leave to sue did not necessarily preclude the Court from passing a personal decree with regard to the costs of the said application;

(3) that inasmuch as the order for costs was passed after the date of the adjudication and the obligation to pay the debt was incurred after that date, the debt with regard to the costs was not a provable debt within the meaning of S. 46 (3), and was enforceable against the insolvent after and notwithstanding the discharge. A.I.R. 1931 Bom. 554=33 Bom. L. R. 1101=55 Bom. 649=134 Ind. Cas. 1161.

——S. 17—Secured creditor.

Official Assignee is bound by all the equities which affect an insolvent: hence a valid charge, created by parol by a debtor in respect of a mortgage debt due to him, binds, on his insolvency, the Official Assignee. (1874) 9 Ch. App. Cases 609, Foll. 123 Ind. Cas. 297=A.I.R. 1930 Sind 77.

——S. 17—Secured creditor—Right to mesne profits in Receiver's hands.

Where in a suit for sale of property based on an equitable mortgage, the Court appoints a Receiver to collect the rents and profits of the property pending its sale and afterwards the mortgagor becomes insolvent and the Official Assignee in whom his estate vested claims the profits in the hands of the Receiver for the benefit of the general body of creditors in preference to the mortgagee, the mortgagee has a right to the mesne profits in the possession of the Receiver being paid to him in satisfaction of his mortgage in the event of his succeeding in the suit and the sale proceeds of property being insufficient to pay off his mortgage debt and the Official Assignee has no right to claim the rents and profits on behalf of the general body of creditors in preference to the mortgagee since his title cannot be superior to that of the insolvent. 115 Ind. Cas. 306=23 S.L.R. 200 =A.I.R. 1929 Sind 114.

——S. 17—Secured creditor—Rate of interest.

Paragraph 23 of the Second Schedule applies to unsecured debts. Therefore a secured creditor can claim interest at contract rate up to the time of realization. 83 Ind. Cas. 576=2 Rang. 197=A.I.R. 1924 Rang. 352.

——S. 17—Secured creditor—Right to sue without leave.

A secured creditor of an insolvent can institute a suit to realise his securities without leave of the Court. 45 Ind. Cas. 918 (L.B.).

——S. 17—Secured creditor—Suit to enforce rights under mortgage.

The power of a secured creditor to realise his security under the proviso to S. 17 of the Presidency Towns Insolvency Act covers his suit to enforce his right under the mortgage. The Official Assignee executing the decree assigned by the insolvent is a security in the position of the mortgagor selling his property and so until the mortgagee's claim is satisfied the Official Assignee has no right to the sale proceeds. 38 Bom. 359=15 Bom. L.R. 939=21 Ind. Cas. 714.

——S. 17—Secured creditor.

The proviso to S. 17 refers to the powers which mortgagee and pledgee have to sell the property mortgaged or hypothecated and the words "Deal with his security" refer to their powers of transfer or assignment. The leave to sue must be obtained prior to the institution of suit. 15 Bom. L.R. 944 (note)= 21 Ind. Cas. 689.

(17) Son's interest.

——S. 17—Son's interest—Father's power to sell devolves on Official Assignee.

On the adjudication of the father of a joint Hindu family as insolvent, the father's power to sell the interest of the sons vests in the Official Assignee subject to any contention on behalf of the sons that the debts of the father had been contracted for immoral or illegal purposes. A.I.R. 1944 Mad. 481=57 M.L.W. 451=(1944) 2 M.L.J. 52=I.L.R. (1945) Mad. 10=1944 M.W.N. 492 (F.B.).

——S. 17—Son's interest.

When a father who, together with his sons, constitutes a Mitakshara joint family, is adjudicated insolvent, the undivided interest of the sons in the joint estate does not vest in the Official Assignee as a property of the insolvent under S. 17. The power or authority of the father, however, to make the son's interest liable for his debts contracted not for illegal or immoal purposes, vests in the Official Assignee under S. 52 (2) (b) and the power can be exercised by the Official Assignee subject to all the limitations under which the father himself could exercise it. A.I.R. 1942 Cal. 533=I.L.R. (1942) 2 Cal. 413=46 C.W.N. 808=76 C.L.J. 333=203 Ind. Cas. 154.

——S. 17—Son's interest in share allotted to mother in partition.

Share gives to Hindu widow on partition amongst sons in lieu of maintenance goes back on her death to sons—Son's interest in such property during her life-time is not mere *spes successionis* but can vest in Official Assignee.

The fact that the interest awarded to the widow is described as that of a Hindu widow as also the fact that the Official Assignee makes no attempt to make the insolvent's interest in the share available to the creditors make no difference and does not indicate that she was judicially given more extensive rights than those to which she is entitled under the law. A. I. R. 1939 Cal. 116=I. L. R. (1938) 2 Cal. 250=42 C.W.N. 695=180 Ind. Cas. 683.

——S. 17—Son's interest do not vest in Official Assignee.

It is wrong to say that when a Hindu who happens with his sons to constitute a joint family subject to the law of the Mitakshara, is adjudged an insolvent under the Presidency Towns Insolvency Act, not only his own rights but all the rights and interests of his sons who are his co-parceners in joint family property vest in the Official Assignee by virtue of the adjudication alone.

It is quite clear that if the joint family could be treated as a firm carrying on its business in partnership, an order adjudging the father who managed the business or even an order adjudging the firm insolvent could not be made under that Act even if the firm consisted solely of a Hindu father and his two minor sons, which would affect the interests of a minor who happened to be a partner in the firm.

It may be that under the provisions of S. 52 or in some other way that property may in a proper case be made available for payment of the father's just debts ; but it is quite a different thing to say that by virtue of his insolvency alone it vests in the Assignee. 84 Ind. Cas. 883=1925 M.W.N. 1=23 A.L.J. 85=6 L.R.P C. 1=6 Lah. 1=21 M.L.W. 375=27 Bom.L.R. 135=52 I.A. 22=29 C.W.N. 797=26 P.L.R. 81=A.I.R. 1925 P.C. 18=47 M.L.J. 857 (P.C.).

——S. 17—Son's interest—Share of minors do not vest.

Where adult sons and minor sons and father constituting a joint Hindu family carried on business and the adult sons became insolvents,

Held, the shares of the minor sons did not vest in the Official Assignee nor could he get power to deal with them under S. 17. 84 Ind. Cas. 128=19 M.L.W. 416=34 M.L.T. 335=A.I.R. 1924 Mad. 791.

——S. 17—Son's interest.

When the estate of the insolvent vests in the Official Assignee, the right of the father to dispose of the son's interest in ancestral immoveable estate for the payment of his debts vests in the Official Assignee. Upon general principles of the Hindu Law governing the rights of the father and his son in the co-parcenary property an order of adjudication against the father has only the effect of replacing the father by the Official Receiver and the order does not by itself vest in the latter the interests of the son in the property. As the son's share is in certain cases liable for the debts of the father, the Official Receiver may be able to enforce that liability, provided that he takes appropriate proceedings for the purpose and satisfies the conditions which alone render the son's interest liable for the father's debts. The joint family property can be attached and sold in execution of a decree for money passed against the father, and the sale affects the interest of the son as well as that of the father, and in principle there is no real difference between an individual creditor realizing his debt from the co-parcenary property and an Official Assignee who represents the general body of the creditors seizing it for the satisfaction of their debts. S. 60, C.P. Code, mentions *inter alia* the property over which or the profits of which the judgment-debtor "has a disposing power which is he may exercise for his own benefit". And this is exactly the phraseology which has been used in the Insolvency Act, and it would be most undesirable that the same expression used in two enactments dealing with the rights of the creditors should receive two different interpretations. The son has his remedy, but the proper mode of asserting such equities is by suit or other proceeding against the Official Assignee. For instance, if the sons of an insolvent alleged that certain of his debts had been incurred for immoral purposes and were not binding upon their interests in ancestral immoveable estate, they might maintain these allegations in a suit against the Official Assignee and, in effect, seek to have the property marshalled so as to apply the property other than such interests of theirs to the payment of such debts. 7 Bom. 438 ; 21 Bom. 205 ; 19 Mad. 74 ; 158 P.R. 1919 ; A.I.R. 1922 All. 79, Foll. 49 Ind. Cas. 848 and 5 O.L.J. 665, Diss. 69 Ind. Cas. 486=3 Lah. 329=A.I.R. 1923 Lah. 1 (F.B.).

18. Status of Official Assignee.

——S. 17—Status of Official Assignee—Nature of his estate—Insolvent's right to surplus—Trust by insolvent—Validity of.

An Official Assignee takes all the bankrupt's property for an absolute estate in law, but for limited purposes, namely, for the payment of the creditors under that bankruptcy and that bankruptcy only—payment of debts in full together with administration charges, expenses, etc. Subject to that he is a trustee for the bankrupt of the surplus and the insolvent can demand the surplus. A trust created by the insolvent in respect of his property is valid to the extent of the surplus. 1937 M.W.N. 1097.

19. Suit after adjudication.

——S. 17—Suit after adjudication—Suit commenced without leave—Whether barred—Leave obtained after limitation—Effect—Annulment of adjudication after limitation for suit—Suit, if can be treated as a fresh one.

If any suit or proceeding is commenced after the adjudication and during the insolvency, without leave, then such suit or proceeding is altogether void, and leave obtained subsequently would not cure the defect where leave is granted after the period of limitation has expired. If adjudication is annulled after suit, though the creditor may not be bound to obtain leave for institution of suit, the subsequent annulment order has no retrospective effect and the suit cannot be treated as a fresh suit when limitation has already expired. A.I.R. 1937 All. 271=1937 A.W.R. 83=1937 A.L.J. 94=I.L.R. (1937) All. 344=168 Ind. Cas. 939.

——S. 17—Suit after adjudication—Leave—Necessity.

Leave to sue from the Insolvency Court should be obtained under S. 17 before a creditor of an insolvent can bring a suit against the insolvent. A.I.R. 1932 Bom. 338=34 Bom. L.R. 649=138 Ind. Cas. 788.

——S. 17—Suit after adjudication—Procedure—Discretion.

Where a suit is filed by a creditor against an insolvent after the order of adjudication and without leave of the Court to file the suit under S. 17, it is not obligatory on the Court to dismiss the suit as being barred but it has merely the option of staying it under sub-S. (3), S. 18. 120 Ind. Cas. 840=31 Bom.L.R. 981=A.I.R. 1929 Bom. 398.

——S. 17—Suit after adjudication—No leave—Decree—Not binding on Official Assignee.

A person by an agreement with his creditors authorized them to withdraw all sums then and thereafter to his credit and for the purpose gave them a general Power-of-Attorney. The person was adjudicated insolvent and on the next day the creditors brought a suit against him on the strength of the agreement to have a lien on money to his credit. No leave to institute the

suit was obtained. The creditors got decree declaring that they had lien on sums of money lying at the credit of insolvent.

Held, that leave of the Court was necessary and no leave having been obtained the decree was not binding on the Official Assignee or the estate of the insolvent. 38 Bom. 359, not Foll. 118 Ind. Cas. 615=7 Rang. 201=A.I.R. 1929 Rang. 229.

——S. 17—Suit after adjudication—Binding nature.

Unless the Official Assignee' is a party to the suit by creditors in which a decree is passed declaring a lien against the estate of an insolvent, he is not bound by it and he cannot be deemed to be party merely because he is given an opportunity to defend the suit and he elects not do to so. 118 Ind. Cas. 615=7 Rang. 201=A.I.R. 1929 Rang. 229.

——S. 17—Suit after adjudication—No absolute bar.

S. 17 does not contain an absolute prohibition against the filing of suits in respect of debts provable in insolvency It merely requires the would-be plaintiff to obtain permission from the Insolvency Court, to sue the debtor. 64 Ind. Cas. 50=13 Bur.L.T. 197.

20. Vesting—Date of.

——S. 17—Vesting—Date of.

Under sections 17 and 51, the insolvency commences on the commission of the act of insolvency and at that date, the property of the insolvent vests in Official Assignee. A.I.R. 1936 Bom. 130=38 Bom.L.R. 71=60 Bom. 444=161 Ind. Cas. 736.

21. Miscellaneous.

——Ss. 17, 49 (5)—Miscellaneous—Father's separate property, if to be used for payment to insolvent son's creditors.

Before any of the father's separate property can be applied in payment of any of the son's creditors in the insolvency proceedings, all creditors of the father must first have had their claims satisfied thereout. All that can vest in the Official Assignee under S. 17 is the property of the insolvents, and, therefore, as regards separate property of the father, all that can properly be dealt with in the insolvency proceedings for the benefit of the creditors of the insolvents, is the interest of the insolvents which will remain after the father's debts have been ascertained and paid. This may well necessitate some proceedings in the nature of a suit for administration. A.I.R. 1943 P.C. 15=56 M.L.W. 160=47 C.W.N. 298=(1943) 1 M.L.J. 239=1943 M.W.N. 197=9 B.R. 361=(1943) A.L.J. 265=45 Bom.L.R. 563=I.L.R. (1943) Mad. 603=I.L.R. (1943) Kar. (P.C.) 5 Sup.=69 I.A. 157=1943 A.W.R. 44=206 Ind. Cas. 482 (P.C.).

——S. 17—Miscellaneous.

Undischarged insolvent—Right to sue an administrator of his father. *See* I.L.R. (1946) Mad. 486=1945 M.W.N. 585=58 M.L.W. 462=A.I.R. 1946 Mad. 25=(1945) 2 M.L.J. 318.

——S. 17—Miscellaneous.

Transfer of property by insolvent avoided under S. 55—The property vests in Official Assignee under S. 17. A.I.R. 1943 Cal. 140=46 C.W.N. 510=I.L.R. (1942) 2 Cal. 222=206 Ind. Cas. 258.

——S. 17—Miscellaneous—Allowance out of trust.

One of beneficiaries of trust becoming insolvent—Trustee paying such money to him as would have been payable to him in ordinary course, instead of to the Official Assignee—Trustee should be directed to refund money to Official Assignee. A.I.R. 1939 Rang. 401=185 Ind. Cas. 352.

——S.17—Miscellaneous—Order disallowing arrest on condition that judgment-debtor paid Rs. 40 a month to decree-holder is contrary to S. 17—Personal income of insolvent is included in "property of the insolvent."

An order disallowing the judgment-debtor's arrest on condition that he paid Rs. 40 a month to the decree-holder is entirely contrary to the spirit of S. 17, Rangoon Insolvency Act, which directs that on the making of an order of adjudication, the property of the insolvent shall vest in the assignee, and become divisible amongst his creditors, and that thereafter no creditor shall, without the leave of the Insolvency Court, have any remedy against the property of the insolvent. The personal earnings or income of the insolvent are included in "the property of the insolvent." A.I.R. 1938 Rang. 477=178 Ind. Cas. 989.

——S. 17—Miscellaneous—Separation of Burma—Property in Burma, if can vest in Official Assignee in India.

An order of adjudication made in Calcutta after the separation of Burma is not sufficient to vest, under S. 17, in the Official Assignee of Calcutta immovable property of the insolvent in Burma. A.I.R. 1938 Rang. 324=1938 Rang. L.R. 166=178 Ind. Cas. 46.

——S. 17—Miscellaneous—Person creating trust adjudicated insolvent two years after—Suit by creditor for declaration that trust is void without leave of Insolvency Court.

Defendant made a trust-deed in favour of himself, his wife, daughter and four other relatives. More than two years after, he was adjudicated insolvent and one of the creditors on behalf of himself and other creditors instituted a suit against the defendant for a declaration that the trust-deed was void as against all the creditors under S. 53, T.P. Act, 1882. Leave of the Insolvency Court was not obtained.

Held, that the suit was not maintainable as no leave under S. 17 was obtained. A.I.R. 1938 Bom. 469=40 Bom.L.R. 935=178 Ind. Cas. 716.

——S. 17—Miscellaneous—Notice of application for leave granted to Official Assignee only—Leave granted, if can be construed as to authorise suit against insolvent—Distinction between suit relating to property of insolvent and suit against person of insolvent.

Where notice of application for leave is granted only to the Official Assignee and the insolvent is not either made a party thereto or served with notice thereof, it cannot be said that he has no interest to safeguard or that the appearance of the Official Assignee is sufficient to enable the Court to deal with the considerations applicable to the insolvent personally as well as with the application as against the Official Assignee. The leave granted against the Official Assignee cannot, therefore, be so construed as to authorize a suit against the insolvent.

It is not intended that except with the leave of the Court the insolvent should be sued in a Court of law in respect of a claim provable in insolvency. The latter portion of S. 17, Presidency Towns Insolvency Act, relating to "suits and proceedings," is quite general, and having regard to the principle underlying that section, there is no justification for drawing a distinction between suits relating to the property of the insolvent and suits against the person of the insolvent provided, of course, the suit or proceedings relate to any claim provable in insolvency. A.I.R. 1938 Mad. 643=(1938) 1 M.L.J. 467=47 L.W. 532=1938 M.W.N. 364=I.L.R. (1938) Mad. 897=182 Ind. Cas. 945.

——S. 17—Miscellaneous.

Property of the insolvent vesting in the Official Assignee under S. 17—Possession also taken by the Official Assignee :

Held, that the Official Assignee is liable to assessment. (1937) I.L.R. 2 Cal. 192=41 C.W.N. 683.

——S. 17—Miscellaneous.

Judgment-debtor adjudged insolvent—Adjudication subsequently cancelled—Time during which the insolvency proceedings were pending under the Presidency Towns Insolvency Act, cannot be deducted in computing the period of limitation for an application to execute the decree. 1937 M.W.N. 1182.

——S. 17—Miscellaneous—Land acquisition cases—Payment by mistake can be recovered.

Where the Land Acquisition Officer, after a person is adjudicated an insolvent, erroneously pays to his mortgagee a certain amount as compensation instead of paying the same to Official Receiver who has no notice under S. 31, Land Acquisition Act, of the proceedings, the Official Receiver has a right to sue for the recovery of the amount paid. A.I.R. 1922 Cal. 4, Rel. on. 121 Ind. Cas. 876=A.I.R. 1930 Sind 75.

——S. 17—Miscellaneous—Notice—Of leave to file suit.

There is no rule of law requiring notice to be given to an insolvent before leave to file a suit is granted, and whether it is necessary to issue a notice to the insolvent or not, must be decided on the facts of each particular case. 117 Ind. Cas. 570=6 Rang. 533=A.I.R. 1928 Rang. 326.

——Ss. 17 and 127 (2)—Miscellaneous—Order made before the new Act—Effect.

A vesting order made before 1st January, 1910, under the old Act is not an adjudication order under the new Act. 5 S.L.R. 4=12 Ind. Cas. 188.

——S. 18—Applicability.

S. 18 would be applicable to cases where the suit or proceeding is already pending and the case therefore, does not come under the prohibition contained in S. 17. A.I.R. 1937 All. 271=1937 A.W.R. 83=1937 A.L.J. 94=I.L.R. (1937) All. 344=168 Ind. Cas. 939.

——S. 18—Applicability.

The words of S. 18 (3) justify a stay of proceedings in an action which was not pending at the time of the order of adjudication. 41 Bom. 312=18 Bom.L.R. 198=33 Ind. Cas. 694.

——S. 18—Applicability—Foreign adjudication—Property in British India—If vests—Stay of execution in British India.

Adjudication in Penang—Extra-territorial immovable property does not vest in Official Assignee at Penang—But by rule of international law, the order will be recognized and given effect to from the date of the order.

A person was adjudicated an insolvent in Penang, in the Straits Settlements, on 9th January, 1931. One of his creditors filed a suit against him at Ramnad, in British India, on 15th March, 1931, and attached before judgment, the insolvent's properties in Ramnad on 24th July 1931. The properties were again attached in execution on 19th July, 1932. On 24th October, 1932, the insolvent executed a conveyance in Penang of his property in British India in favour of the Official Assignee of Penang. The Official Assignee of Madras, acting in aid of the Official Assignee of Penang, applied for an order staying the execution proceedings, and the Court made an order for stay. On appeal :

Held, applying the above test, that the order for stay was rightly made. A.I.R. 1934 Mad. 344=1934 M.W.N. 81=39 M.L.W. 541=67 M.L.J. 59=57 Mad. 616=151 Ind. Cas. 14.

——S. 18—Applicability.

S. 18 only applies to a case where the Judge exercising insolvency jurisdiction has already made an order of adjudication. 103 Ind. Cas. 754=31 C.W.N. 847=A.I.R. 1927 Cal. 629.

——Ss. 18 and 53—Execution sale—Subsequent insolvency of debtor—Purchaser's right—Official Assignee.

According to C.P. Code, an auction-purchaser's title dates from the date of sale if confirmed by the Court. Until conformation however he has an inchoate right which can be recognised and perfected. An order of adjudication passed against the judgment-debtor does not affect such right, as the Official Assignee takes the estate only subject to the rights of third person affecting the same and cannot claim to have the sale cancelled on the ground of any equity possessed by the general body of creditors at the time of the adjudication order 1 M.L.W. 1028=26 Ind. Cas. 421.

——S. 18—Limitation—Power to extend.

If the Limitation Act applies at all to the exercise of powers under the section, Court can extend the time. (1888) 21 Q.B.D. 21; (1890) 7 Moor. 71, Foll. 83 Ind. Cal. 174=19 M.L.W. 316=34 M.L.T. 99=1924 M.W.N. 458=A.I.R. 1924 Mad. 662=46 M.L.J. 580.

——S. 18—Other proceedings—Meaning.

Insolvency proceedings are not included under S. 18 and the expression "other proceedings" only refer to proceedings in the nature of suit, execution or other legal process. 49 Bom. 788, Foll. 113 Ind. Cal. 860=48 C.L.J. 298=33 C.W.N. 15=56 Cal. 712=A.I.R. 1928 Cal. 782 (F.B.).

——S. 18—"Other proceedings"—Meaning.

Under S. 18 a Judge of the High Court sitting in insolvency has no power to stay proceedings pending in respect of the same debtor in a District Court under the Provincial Insolvency Act. A.I.R. 1925 Bom. 543 Foll. 113 Ind. Cas. 860=56 Cal. 712=48 C.L.J. 296=33 C.W.N. 15=A.I.R. 1928 Cal. 782 (F.B.).

——S. 18—"Other proceedings"—Meaning.

S. 18 applies to a case where the Insolvency Court has power to stay some ordinary civil suit which may be pending at the date of the insolvency against the insolvent. It does not relate to some other insolvency pending in some other Court of another province or in any of the District Courts of the same Presidency. That other insolvency is not a "suit" pending against the insolvent. Nor is it an "other proceeding" pending against the insolvent. Such other proceeding should be *ejusdem generis* or analogous to a suit. 75 Ind. Cas. 61=24 Bom.L.R. 872=47 Bom. 275=A.I.R. 1922 Bom. 390.

——S. 18—Superintendence.

The District Court is not subject to the superintendence of the Commissioner in Insolvency by the High Court. Each Court can stay its own proceedings, but cannot interfere with another Court, unless it has superintendence over it. 75 Ind. Cas. 61=24 Bom.L.R. 872=47 Bom. 275=A.I.R. 1922 Bom. 390.

——S. 18—Transfer of suit—By High Court—Can be ordered.

A Judge of the High Court sitting on the Insolvency Side can under S. 18 transfer to the High Court a suit pending against the insolvent and his properties in a mofussil Court subordinate to the High Court. 90 Ind. Cas. 1054=22 M.L.W. 326=A.I.R. 1926 Mad. 150.

——S. 18—Withdrawal of proceedings—High Court in insolvency jurisdiction cannot withdraw insolvency proceedings pending with a Sub-Judge in the Presidency.

The High Court in the exercise of its insolvency jurisdiction has no power to order a withdrawal of the proceedings in insolvency from the Court of the Subordinate Judge in the Presidency to itself. 39 Bom. 604-

Appr. But in the exercise of the jurisdiction of the High Court in insolvency a Judge invested with that jurisdiction has power under S. 18 to stay any suit or other proceeding pending against the insolvent in a District Court or Subordinate Judge's Court in the Presidency which is subject to the superintendence of the High Court. 91 Ind. Cas. 160=27 Bom.L.R. 1207=49 Bom. 788= A.I.R. 1925 Bom. 543.

——S. 18-A—Adjudication in Mofussil Court—Power of High Court to stay proceedings.

Where a debtor was adjudicated insolvent by a *Mofussil* Court but a substantial creditor desired that the insolvency proceedings should proceed in the High Court and it appeared that such a procedure would cause no inconvenience to the other creditors or the debtor :

Held, that under S. 18-A, the Court could make an order of adjudication and stay further proceedings in the *Mofussil* Court after annulling the order of adjudication passed by that Court.

Per *Curiam*.—An insolvency debtor is not in the same position as a plaintiff as to the right of choice of the Court in which his insolvency should be conducted. A.I.R. 1931 Cal. 775=35 C.W.N. 566=135 Ind. Cas. 279.

——S. 21—Composition by insolvent—Creditor's right.

Once an act of insolvency has been committed, the insolvent cannot by forcing a compromise or adjustment upon his Creditors, escape the result of the adjudicating order and prevent the Court from enquiring into his affairs, unless he pays all his claims in full in cash since any composition or scheme of arrangement can be done only under the Act. A creditor is not entitled to use his petition for insolvency of his debtor as a means to secure preferential treatment for himself. 19 Bom.L.R. 365= 40 Ind. Cas. 207.

——S. 21—Court's inherent power to set aside insolvency order—Fraud and misrepresentation—Jurisdiction.

An insolvency order may be set aside if it was obtained by fraud or in the absence of jurisdiction on the part of the court making the order 5 C.W.N. 91 relied on. A Court has inherent power to set aside an insolvency order obtained from it by a fraudulent mis-representation of the residence of the judgment-debtors, such ader being one without jurisdiction. (1906) 8 C.W.N. 468.

——S. 21—Discretion.

The jurisdiction of the Court to annul or stay proceedings on an adjudication order is a discretionary jurisdiction. A.I.R. 1938 Rang. 324=1938 Rang.L.R. 166=178 Ind. Cas. 46.

——S. 21—Discretion of trial Court—Interference in appeal—Power of annulling Court to consider matters outside former petition.

A Judge in the position of considering an annulment is exercising a discretion whether his former order should be maintained. This discretion must be exercised upon certain material in the form of evidence. He should not conduct a roving inquiry into the financial position of the debtor but he should scrutinized closely the actual position of the adjudicated debtor at the time that the alleged suspension took place and, within limits, should also consider the surrounding circumstances of the suspension, and the manner in which the notice of suspension is alleged to have been given.

Where a subsequent notice of suspension was wrongly referred to as the act of bankruptcy upon a misconception of the law :

Held, that permission to amend the petition so as to base it on the prior notice could be allowed.

Per *Baguley, J.*—'May' in S. 21 does not mean 'must' and the annulment of an adjudication under that section is a matter of discretion.

If, in the opinion of the Court, on the date of the filing of the application for adjudication, there existed other good grounds for the adjudication, any such grounds may be gone into in the inquiry which is to be opened with regard to the annulment of the adjudication, and, if they are proved at the subsequent inquiry, there is no reason why the Court should not come to the conclusion that on the date of the filing of the application, the debtor ought to have been adjudged insolvent ; at any rate, the existence of perfectly good grounds for the debtor's adjudication, existing on the date of the filing of the application for adjudication, would be very good ground for the Court to refuse to exercise its discretion in favour of the debtor.

Where a trial Judge had overlooked the fact that he had any discretion, and he did not record anything to show that he was consciously exercising any discretion one way or the other being under the impression that if the particular act alleged in the original application had either not been proved or had been proved not to be an act of insolvency, he was bound to annul the order of adjudication, an order of annulment passed by him may be set aside in appeal. A.I.R. 1933 Rang. 363=12 Rang. 64=149 Ind. Cas. 723.

——S. 21—Essentials—Grounds for annulment—Dishonourable conduct no ground—Failure to comply with the Act—Good ground.

Reilly, J.—It cannot be said within the meaning of S. 21 that a person ought not to have been adjudged insolvent on the ground that his conduct has been dishonourable or dishonest or fraudulent or that he is a scoundrel who does not deserve the assistance of the Court, or that the debtor adopted a discreditable or even fraudulent way of defeating for the time being a judgment-debtor,

But if a petitioning debtor has not fulfilled any of the conditions required by the Act to enable him to present a petition, then he ought not to have been adjudged insolvent. If his application or his adjudication defeats some provision of the Act, or some order properly made under the provisions of the Act, then also he ought not to have been adjudged insolvent. 108 Ind. Cas. 208=1928 M.W.N. 62=A.I.R. 1928 Mad. 394.

——S. 21—Essentials for annulment—Payment of debts in full.

In an application to annul an adjudication the insolvent must satisfy the Court that he has completely satisfied the debts as they stood before bankruptcy, *i.e.*, he must have paid the principal and interest also on the interest-bearing sums. 60 Ind. Cas. 943=47 Cal. 914.

——S. 21—Essentials for annulment—Full discharge.

A full discharge of debts by payment of four annas in the rupee is not a full payment within the section and does not entitle the insolvent for an order annulling the order of adjudication. 43 Mad. 71=37 M.L.J. 244= 26 M.L.T. 221=10 M.L.W. 640=(1919) M.W.N. 795=52 Ind. Cas. 979.

——S. 21—Fresh adjudication—On same facts—Should be annulled.

On the 22nd February, 1919, an insolvent was adjudicated on his own petition. On the 12th May, 1919, he filed a schedule but failed to apply for his discharge within the time provided by the Act and his adjudication was annulled on the 9th May, 1922. His second adjudication took place on the 21st June, on the same facts and on the same materials, upon which the first order of adjudication had been made.

Held, that the second order of adjudication should be annulled. 21 C.W.N. 298, Foll. 80 Ind. Cas. 651=27 C.W.N. 739=A.I.R. 1923 Cal. 703.

——S. 21—Notice.

Appeal to Privy Council by judgment-debtor pending—Attachment of judgment-debtor's property in execution of decree—Decree not satisfied—Judgment-debtor adjudicated insolvent *ex parte*, under Ss. 9 (*e*) and 10.

Held, that such orders should not, in general, be passed *ex parte*, especially when a short delay caused by giving notice to the other side would not result in assets being mis-applied. (1932) 34 Bom. L.R. 1436.

——S. 21—Notice of motion by—Creditor for annulment—Chief Clerk, if can give certificate and take notice absolute.

There is no rule or any section of the Act which authorizes the Chief Clerk to issue a certificate and take upon himself the burden to say that the notice of motion was made absolute. The notice of motion could only be made absolute by the Judge himself; and a mere certificate by the Chief Clerk that the notice of motion is made absolute, when admittedly it was not made absolute cannot take the place of proper order on the notice of motion. A.I.R. 1935 Bom. 310=37 Bom. L.R. 449=59 Bom. 600=157 Ind. Cas. 930.

——S. 21—Object of annulment—Old insolvencies—Duty of Court.

Obiter.—In cases of old involvencies, the Court, should be very slow in making orders of annulment. An order of annulment is intended to be a penalty imposed upon a debtor who fails to obtain his discharge, the theory being that it will deprive him of the benefit of the Insolvency Act and render him liable to be attacked by his creditors; but it is plain that, where, in a case the insolvency has enured for fifteen years, an order annulling the insolvency confers a privilge upon the debtor, and does not impose any penalty upon him, the creditors are not likely to attack him, even if their debts are not barred, and he is relieved from the stigma of insolvency, though he may have paid only a very small dividend to the creditors, and unless an order is made under S. 23, he may get property returned to him. A.I.R. 1935 Bom. 310=37 Bom. L.R. 449=59 Bom. 600=157 Ind. Cas. 930.

——S. 21—Scope.

Reilly, J.—The occasions for exercising the power of annulling an adjudication under the Provincial Insolvency Act on the ground that it ought not to have been made appear to be even more restricted than under the Presidency Towns Insolvency Act. The provisions and procedure of the Provincial Insolvency Act are different from those of the Presidency Towns Insolvency Act; and when dealing with such questions under the Provincial Insolvency Act. 44 Cal. 535 (P.C.) must be followed. 108 Ind. Cas. 208=1928 M.W.N. 62=A.I.R. 1928 Mad. 394.

——S. 22—Discretion—Exercise of—No interference in appeal.

On the 6th August, 1924 the appellant was ajudicated insolvent by the Court of Birbhum. On the 15th September the respondent firm filed a petition in the High Court of Calcutta on the Original Side in Insolvency Jurisdiction, making a claim to money. On the 17th March, 1925 the High Court in its Insolvency Jurisdiction treated itself as having jurisdiction and made an order adjudicating the appellant insolvent. The appellant objected that having regard to S. 22, it was wrong to make the order that was made at Calcutta. It was suspected that the proceedings at Birbhum were not proceedings which were in the interest of the creditors and that it was better that the jurisdiction should be exercised by the Calcutta High Court and accordingly the High Court Judge exercised his jurisdiction, and on appeal to the Court of appeal, the view taken by him was affirmed.

Held, that the Court had a discretion; it had jurisdiction but might have had, at a subsequent stage, to restrain the exercise of that jurisdiction in any way which the circumstances required and the circumstances, in the opinion of the Court below, did not require that the jurisdiction should be restrained and therefore the Privy Council would not interfere with the discretion so exercised. 104 Ind. Cas. 1=29 Bom.L.R. 1179=46 C.L.J. 57=1927 M.W.N. 517=31 C.W.N. 1002=39 M.L.T. 50=26 M.L.W. 717=A.I.R. 1927 P.C. 162=53 M.L.J. 114 (P.C.).

——S. 22—Scope.

S. 22 enables the Court to stay its own proceedings and not to order some other Court to stay proceedings and the powers are exercisable on the Court being satisfied that insolvency proceedings are pending in any other British Court and that the property of the debtor could be more conveniently distributed by such Court among his creditors. 91 Ind. Cas. 160=49 Bom. 788=27 Bom. L.R. 1207=A.I.R. 1925 Bom. 543.

——S. 22—Substantial assets of firm in Rangoon—Bulk of business not established to be in Calcutta—Proceedings under Rangoon adjudication, if should be stayed—Persons trading in different firm-names, whether "same debtors".

The jurisdiction of the Court to annul or stay proceedings on an adjudication order is a discretionary jurisdiction. It is a jurisdiction which cannot be invoked as of right though no doubt there are settled principles upon which the discretion is either exercised or not. And assuming the matter to fall within S. 22, at all, then the dominating factor which decides the Court whether to exercise its discretion or not is whether the assets can be more conveniently and efficiently administered in the one Court than in the other.

Some partners in a certain firm were first adjudged insolvents in the Calcutta High Court and subsequently in the Rangoon High Court. The firm had substantial assets in Rangoon and it was not established to the satisfaction of the Ragoon High Court that the bulk of the business of the firm lay in India or that there were not considerable liabilities in Burma;

Held, that the proceedings under Rangoon adjudication order ought not to be stayed and the case was not a proper one to exercise discretion under S. 22.

Quaere.—Where certain persons carry on business at Calcutta under a certain firm-name and some of the partners of that firm are also partners of a firm trading under a different name in Rangoon, it is doubtful whether they constitute 'same debtors' within the meaning of S. 22. A.I.R. 1938 Rang. 324=1938 Rang. L.R. 166=178 Ind. Cas. 46.

——S. 22—Same debtors—Identity of debtors.

Under S. 22 the Court has no power to annul an adjudication on the ground of convenience unless the same debtor or debtors have been adjudged as insolvents in more than one Court. An adjudication against *A* and *B* in one Court and against *A* only in another is not against the same debtors. 83 Ind. Cas. 174=19 M.L.W. 316=34 M.L.T. 99=1924 M.W.N. 458=A.I.R. 1924 Mad. 662=46 M.L.J. 580.

——S. 23—Effect of annulment stated—Adjudication annulled—Order that assets to remain in hands of Official Assignee—Assets not in hands of Official Assignee, if affected.

The effect of the annulment is to divest the Official Assignee of the debtor's property, which reverts to the debtor unless the Court, by order, appoints some one in whom it shall vest, not necessarily the Official Assignee

Where, on annulment of an adjudication, the Registrar passed the order, " Annulled. The assets to remain in the hands of the O.-A. subject to the further order of the Court,' the order did not mean " remain vested in the hands '. Consequently, the effect of the order was that the property of the debtor reverted to him, but on condition that the assets already in the hands of the Official Assignee were to remain in his hands subject to the further order of the Court. The property neither in his (Official Assignee's) hands nor vested in him was not affected by the order. A.I.R. 1942 Cal. 150=I.L.R. (1941) 1 Cal. 509=200 Ind. Cas. 66.

——S. 23—Effect on Court's jurisdiction.

The jurisdiction of the Insolvency Court is not exhausted owing to the annulment of the adjudication. The Court has jurisdiction to give effect to the scheme it has approved under S. 30. A.I.R. 1932 Cal. 124=35 C.W.N. 506=136 Ind. Cas. 141.

——S. 23—Effect on suit instituted without leave under S. 17.

If the adjudication is annulled after the suit instituted without leave under S. 17, the annulment order has no retrospective effect and the suit cannot be treated as a fresh suit when limitation for the same has expired. A.I.R. 1937 All. 271=I.L.R. (1937) All. 344=1937 A.W.R. 83=1937 A.L.J. 94=168 Ind. Cas. 939.

——S. 23—Power granted under S. 8 (1) is not taken away by S. 23 (1).

S. 23 (1) does not take away the power expressly granted to the Court under S. 8 (1) in a case where the annulment of the adjudication had taken place. The object of S. 23 is to preserve accomplished acts. Where no property had vested in any body but had merely been directed to be sold because it was thought that a sale was necessary for the payment of the involvent's debts, which subsequently turned out to be wholly unnecessary, the Insolvency Judge should review that order by cancelling it. The fact that a sale might have caused the parties to cease quarrelling is relevant. A.I.R. 1944 Mad. 129=56 M.L.W. 692 (2)=(1943) 2 M.L.J. 572=1943 M.W.N. 779=I.L.R. (1944) Mad. 649=216 Ind. Cas. 93.

——S. 23—Scope.

Where a firm assigns a joint debt of the partnership after two of the partners are adjudicated insolvents but subsequently, the adjudication is annulled, the acts of the firm during the period they were insolvents are binding on them and the assignment is valid. A.I.R. 1931 Rang. 191=131 Ind. Cas. 62.

——Ss. 24 (3), 33 and 34—Bankrupt under examination as witness—Warrant of arrest, whether proper.

It is not open to the Court either under this Act or under C. P. Code to issue a warrant of arrest against a bankrupt who is in attendance in Court as witness but the proceedings need not be set aside for this reason alone. The rules under English Bankruptcy Act under which a committal order should be made without a formal adjudication heard three days after notice to the insolvent is a good guide to regulate the procedure of Courts in India. 24 Ind. Cas. 513 (Mad.).

——S. 25—Protection—If extends to—Proceedings under S. 488, Cr. P. Code.

Protection order under S. 25 does not protect debtor from being proceeded against in Criminal Court under S. 488, Cr. P. Code. A.I.R. 1940 Bom. 344=42 Bom. L.R. 742=42 Cr. L.J. 101=191 Ind. Cas. 198.

——S. 25—Trial Court exercising discretion—Interference by High Court.

The High Court as a Court of Appeal would be slow to interfere with the exercise of the discretion which is vested under the Act in respect of a matter concerning granting, refusing or cancelling protection under S. 25 in the trial Judge, where he has exercised that discretion according to principles laid down for the guidance and exercise of such discretion. A.I.R. 1936 Rang. 329=164 Ind. Cas. 364.

——Ss. 25, 17—Adjudication, whether *ipso facto* acts as protection—Protection, if and when should be refused—Creditor's allegation against debtor that he carried on business.

Having regard to the amendments that have been made in both Presidency Towns Insolvency Act and Provincial Insolvency Act, it was intended and enacted by the Legislature that an order of adjudication should not operate automatically as a protection against execution upon the person of an insolvent but that the insolvent should be compelled to apply to the Court to grant him the privilege of protection against arrest which the Court would do only if the circumstances of the case justified it. A protection order should not be refused, or if once granted, cancelled save on" exceptional grounds ", but at the same time whereas it was the policy of the Legislature to provide protection for honest debtors, the Legislature did not intend or enact that freedom from arrest should be granted to flagrant or dishonest insolvents.

An opportunity should be given to the debtor to admit, explain or deny the allegations in the petition by the creditors that the debtor carried on business. A.I.R. 1935 Rang. 415=13 Rang. 623=159 Ind. Cas. 936.

——S. 25—Protection under—Application for.

It must be judged on the merits where the insolvent on the day preceding his insolvency petition assigned a debt and property of considerable worth to creditors whom he had defrauded to cover defalcations, and where numerous facts falling within (*a*), (*b*), (*c*), (*d*), (*f*) and (*j*) of S. 39 (2) of the Act, had been proved against him, it was held that there was good cause for the Court to refuse an application for protection under S. 25.

A creditor can punish an insolvent, who has acted recklessly and dishonestly, by attachment and imprisonment according to law, even if the latter is unable to pay. 40 Bom. 461=17 Bom. L.R. 989=31 Ind. Cas. 507.

——S. 25—Insolvency—Remedy of decree-holder.

The pendency of an insolvency proceedings under the Act does not of itself, in the absence of a protection order under S. 25, bar the remedy of a decree-holder to execute the decree by arrest of the judgment-debtor. Limitation continues to run against the decree-holder even during the pendency of the insolvency proceedings. (1918) P.H.C.C. 357=47 Ind. Cas. 798.

——S. 25—Protection order—Insolvent Practice—Change effected by the new Act.

The Presidency Towns Insolvency Act, 1909, gives to the Court and its officers the fullest powers to investigate into the conduct and affairs of an insolvent; the Official Assignee conducts his public examination and reports on his conduct when he applies for his discharge, while the burden which has hitherto rested upon creditors of protecting commercial morality has been entirely removed from their shoulders. S. 24 of the Act clearly intends that while an insolvent diligently performs the duties prescribed by the Act he should not be harrassed by execution creditors, and should not be rendered liable to pressure whereby one creditor may get undue advantage over another. The section does not deprive the Court of its discretion in getting or refusing protection but sub-S. (4) indicates clearly the line along which that discretion should be exercised when a creditor opposes the grant. If an insolvent can produce the certificate referred to, the onus is thrown on an opposing creditor of showing cause why the protection order should not be granted but he is not entitled

to ask the Court to enter into an inquiry whether the insolvent has been guilty or not of commercial immorality or an offence under the Act. It is open to a creditor to show that an insolvent has imposed on the Official Assignee and that in spite of the certificate he has not conformed to the provisions of this Act, or that an insolvent has been guilty of delay in applying for his discharge, for the Court will not countenance an insolvent resting unreasonably beneath the shade of the protection order. It has never been the practice of the Commissioners in Insolvency under the Indian Insolvency Act to consider themselves bound by their previous decisions on applications for the interim orders when it has been a matter for their discretion. 12 Bom. L.R. 517=7 Ind. Cas. 448=35 Bom. 47.

——S. 25—Protection—When granted.

A Co-operative Credit Society, having obtained an award against a debtor under S. 54, Bombay Act (7 of 1925) adopted the alternative course of recovering through the Collector as arrears of land revenue under S. 59 of the Act. The Collector ordered the detention of the debtor in civil prison who as a counter-move filed a petition for insolvency under Presidency Towns Insolvency Act.

Held, that it would be an improper exercise of discretion to refuse to grant interim protection to the debtor against arrest or detention for a debt due to the Society, and to permit his being detained in prison, and at the same time to take possession of his property for rateable distribution amongst his creditors, merely and solely because the Society has chosen the alternative remedy of enforcing the claim by approaching the Collector. 24 S.L.R. 396=126 Ind. Cas. 751=A.I.R. 1930 Sind 263.

——S. 25—Protection—When not granted—Non-production of account books.

The Registrar in insolvency is justified in refusing to pass a protection order in favour of the insolvent on the ground of failure to produce books before the Official Assignee when the books were in the possession of Receivers appointed in a partition suit between insolvent and other members of the family and it is not shown that the insolvent had himself taken all steps that were in his power to effect the production of the books before the Official Assignee. 91 Ind. Cas. 975=30 C.W.N. 112=A.I.R. 1926 Cal. 260.

——S. 27—Copy of notes of insolvents' examination.

A copy of the notes of the insolvent's examination under S. 27 is a copy of proceedings before the Court. A.I.R. 1938 Cal. 755=42 C.W.N. 1146=I.L.R. (1939) 1 Cal. 56=178 Ind. Cas. 797.

——S. 27—Public examination of debtor—Whether can be dispensed with.

The public examination of a debtor in Court is not a thing to be lightly dispensed with, though the Court may have power to do so under the Act. A composition in the absence of public examination, when the debts are large, is not consistent with the efficient administration of the Act. A.I.R. 1933 Cal. 129=59 Cal. 1436=141 Ind. Cas. 860.

——S. 27—Public examination after application for discharge.

An order for the public examination of an insolvent will not be made after the insolvent has applied for his discharge except in very special circumstances. A.I.R. 1931 Cal. 801=35 C.W.N. 564=135 Ind. Cas. 874.

——Ss. 27, 193—Adjudged insolvent—"Suit or other legal proceedings" against the insolvent—Penal Code (Act 45 of 1860), S. 421—Fraudulent transfer of property—Magistrate's jurisdiction to try the offence.

M applied to the Insolvent Debtor's Court at Bombay for relief under the provisions of the Presidency Towns Insolvency Act, 1909, and adjudicated an insolvent the same day. Ten days later, a creditor of his filed a complaint in the Magistrate's Court against him for an offence under S. 421 of the Indian Penal Code and against two others for abetment of the offence. *M* contended that the Magistrate's jurisdiction to entertain the complaint under S. 421 was excluded by the provisions of of the Presidency Towns Insolvency Act, 1909 and that only the Insolvency Court at Bombay has jurisdiction to entertain the complaint :

Held, that the Magistrate's jurisdiction to try an adjudged insolvent for an offence under S. 421 of the Indian Penal Code was not taken away by the Presidency Towns Insolvency Act, 1909. The expression "or other legal proceedings" in S. 15 of the Presidency Towns Insolvency Act, 1909, following as it does the word "suit" a word of more limited application, must be construed on the principle of *ejusdem generis*. Where the Presidency Towns Insolvency Act, 1909, creates an offence, it is the Insolvency Court which has jurisdiction as to it. But as to offences under the Indian Penal Code, the ordinary jurisdiction of the Criminal Courts cannot be held to be excluded unless expressly or by necessary implication the Act repeals the Code for the purposes of those offences. S. 103 of the Act does not substantially interfere with S. 421 of the Code. As its essential ingredient shows, it is more or less an offence, created by the Act in addition to the offence under the Code. One statute may be impliedly repealed by a subsequent statute necessarily inconsistent with it ; but the inconsistency must be so great that they cannot both be to their full extent obeyed. 12 Bom. L.R. 750=7 Ind. Cas. 963=35 Bom. 63.

——S. 27—Record of examination under—Admissibility in evidence.

Deposition under S. 36 cannot be admitted in evidence but the record of insolvent's examination under S. 27 is evidence which can be taken into consideration against him in proceedings under S. 104 of the Act, as criminal proceedings in the Presidency Magistrate's Court are, under S. 103, proceedings under the Act. 113 Ind. Cas. 851=48 C.L.J. 531=32 C.W.N. 1140=30 Cr. L.J. 241=A.I.R. 1929 Cal. 80.

——S. 27—Record of deposition of examination—Admissibility in evidence.

The deposition of the insolvent taken on his public examination is not admissible against a third party on question of title. 93 Ind. Cas. 834=54 Cal. 251=30 C.W.N. 346=A.I.R. 1926 Cal. 597.

——S. 27 (6)—Record of examination—Admissibility against him but not his creditor.

The notes of the public examination of the involvent, though admissible against him under S. 27 (6) are not admissible against a creditor who had no opportunity to cross-examine him. 24 C.L.J. 149=36 Ind. Cas. 689.

——S. 28—After adjudication debtor can settle with his creditors only by composition under Act.

A debtor after adjudication cannot settle with his creditors out of Court. Such settlement is possible only by a composition or scheme under the Presidency Towns Insolvency Act. A.I.R. 1942 Cal. 79=74 C.L.J. 338=45 C.W.N. 1124=43 Cr.L.J. 402=I.L.R. (1941) 1 Cal. 278=198 Ind. Cas. 602.

——S. 28—Private payments irregular.

Any payments made by insolvents or by persons on behalf of the insolvent behind the back of the Official Assignee are entirely irregular. No insolvent or anybody on his behalf has any right whatever to make any payments at all to creditors. The insolvent's estate vests in the Official Assignee and the only person who can discharge debts of the insolvent is the Official Assignee. 98 Ind. Cas. 799=24 M.L.W. 653=1926 M.W.N. 784=A.I.R. 1926 Mad. 1166.

——S. 28—Adjustment by insolvent—Official Assignee taking action on—Not illegal.

It is customary to allow insolvents to adjust matters with the creditors and then to report the settlement to the Official Assignee to enable him to take action. The procedure may be irregular, but there is nothing illegal ; when subsequently the Official Assignee, in pursuance of the insolvent's act, summons the creditors and submits a report on which the final order is passed by the Judge, the proceedings are perfectly validated. 63 Ind. Cas. 173=44 Mad. 381=1921 M.W.N. 281= A.I.R. 1921 Mad. 236=40 M.L.J. 404.

——S. 28—Composition deed, essentials of.

A composition means an agreement between the compounding debtor and all or some of his creditors by which the compounding creditors agree with the debtor and with each other to accept from the debtor payment of less than the amounts due to them in full satisfaction of the whole of their claims. An agreement in which every possible kind of agreement is made including a final residuary right of suit to ensure that the creditor shall be paid in full cannot be held to be an instrument to secure the payment of a composition. A.I.R. 1934 Mad. 697=40 L.W. 615=67 M.L.J. 836=153 Ind. Cas. 541.

——S. 28—Proceeding for composition, nature of—Use by debtor of false affidavit, in such proceeding, with knowledge of its being false, if offence within S. 195 (1) (b), Cr. P. Code.

The proceeding for a composition or scheme is in relation to the insolvency proceeding itself. The fact that the initiation of the proceeding is required to be before the Official Assignee whose primary function is administrative does not in the lease affect its relation to the main proceeding. Insolvency proceeding is a proceeding in a Court within the meaning of S. 195 (1) (*b*), Cr. P. Code. Hence the use by the insolvent of an affidavit showing a person as his creditor in a composition which to his knowledge, was false, is an offence committed in relation to a proceeding in a Court within the meaning of S. 195 (1) (*b*), Cr. P. Code. A.I.R. 1942 Cal. 79=74 C.L.J. 338=45 C.W.N. 1124=43 Cr. L.J. 402= I.L.R. (1941) 1 Cal. 278=198 Ind. Cas. 602.

——S. 28—Scheme of composition—In accepting or rejecting proof of debt for purposes of S. 28 (2), Official Assignee acts as chairman of meeting of creditors and is not a Court.

In an insolvency proceeding, the function of the Official Assignee is chiefly and primarily administrative. At the same time it cannot be denied that the Official Assignee is given judicial powers also in certain respects along with his administrative powers. He, for example, is given judicial powers in the matter of proof of debts. While exercising such judicial powers, the Official Assignee discharges the functions of a Court and becomes a Court within the meaning of S. 195 (1) (*b*), Cr. P. Code. But at the meeting of creditors convened and conducted by the Official Assignee for considering the proposal for a composition or scheme, he, while accepting or rejecting the proof of debt for the purposes of S. 28 (2), Presidency Towns Insolvency Act does only discharge his function as the chairman of the meeting and is, consequently, not a Court within the meaning of S 195 (1) (*b*), Cr. P. Code . A.I.R. 1942 Cal. 79=74 C..L.J. 338=45 C.W.N. 1124=43 Cr. L.J. 402=I.L.R. (1941) 1 Cal. 278=198 Ind. Cas. 602.

—— S. 28—Scheme of composition—Interpretation—Variation by agreement—Enforcement of—Jurisdiction of civil Court—Act of Official Assignee, if ultra vires—Agreement, if new debt.

Scheme of composition under S. 28, approved by Court—Debt due to bank included in scheme to carry 12 per cent. simple interest—Subsequent agreement by Official Assignee to pay to bank on its debt 12 per cent. compound interest in variation of scheme—Insolvency Court refusing to enforce agreement—Suit in Civil Court by bank to enforce agreement as to compound interest—Agreement, held was part of scheme and could be enforced only by Insolvency Court—Ordinary civil Court has no jurisdiction—Act of Official Assignee in entering into agreement, held *ultra vires*—Agreement, held did not create new debt but debt which was merely accessory to old debt which was provable in insolvency and hence could not be enforced by civil Court. The fact that the agreement to pay compound interest was supported by good consideration, held could not validate the agreement. A.I.R. 1942 Pat. 493=21 Pat. 397=9 B.R. 111=204 Ind. Cas. 48.

——S. 28—Scheme of composition—Essentials.

A composition in the absence of public examination in a case where the debts are large is not consistent with an efficient administration of the Act.

The duty of the Official Assignee and of the Court is to see that adjudications are not annulled unless the conduct of the debtors has been such as to entitle them to such a course, and the Court is satisfied that it knows what the assets and liabilities really are.

In a scheme of composition presented by debtors, they should set out in the scheme itself what their assets are and what their scheme of composition is; and if the assets are to be vested in a trustee or trustees, there must be a statement to that effect and, if the trustee or trustees are to guarantee so much money to the creditors, there must be a proper statement to that effect also. A.I.R. 1933 Cal. 129=59 C. 1436=141 Ind. Cas. 860.

——S. 28—Creditor sending voting letter to Official assenting to composition—Power to withdraw—Karachi Towns Insolvency Rules of 1927, Form No. 82.

It is competent to a creditor of an insolvent to withdraw the voting letter sent by him to the Official Assignee assenting to a composition proposed by the insolvent before the proposal comes up for consideration at a meeting of the creditors convened for that purpose. A.I.R. 1932 Sind 216=26 S.L.R. 339=140 Ind. Cas. 764.

——S. 28—Approval of scheme—Interest of creditors not sole test.

The interests of the creditors is not the sole concern of the Court in question of approving schemes of composition. If the Court comes to the conclusion that, however, beneficial to the creditors the scheme may be, yet it is not to the interest of the public or of commercial morality, it is their duty to refuse the discharge. 103 Ind. Cas. 181=5 Rang. 241=A.I.R. 1927 Rang 176.

——S. 29—Approval of scheme—Court is not bound to accept.

The composition scheme proposed by the debtor had been accepted by a majority in number and three-fourths in value of the creditors who proved their claims and had the support of the Official Assignee. In answer to the notices issued by the Court under S. 29, Cl. (1) of the Act none of the creditors appeared to oppose its approval by the Court.

Held, that even under these circumstances the Court was not bound to accept it. 107 Ind. Cas. 433=23 S.L.R. 192=A.I.R. 1928 Sind 90.

——S. 29—Composition before proof—S. 28—Secured creditor—Enforcement of rights.

Before a secured creditor of the insolvent attempted to prove for the balance of what was due to him, the adjudication was annulled in consequence of a composition arrived at between the debtor and the creditors. Under the composition, the creditors agreed to receive 8 annas in the rupee. But there was no scheme provided for the enforcement of the composition.

Held, that the secured creditor above referred to was bound by the composition but that even after the annulment of the adjudicated he was entitled to sue for the balance of the debt due to him after deducting the value of the securities but that he could claim only at the rate of 8 annas in the rupee.

Held, further, that he need not apply for the remedy in the bankruptcy Court but could maintain a suit in the ordinary Court. (English case-law fully discussed).

Per *Srinivasa Aiyangar, J.*—Though a composition sanctioned by the Court is binding on all the creditors of the insolvent including the creditors who were not parties to the composition, the composition takes effect and operates to discharge the insolvent from his liability on the debt only if the compensation agreed to is paid or else a scheme is outstanding under which the creditors are required to proceed and obtain relief. The obligation is laid on the insolvent-debtor to pay to all the creditors whose debts are provable in insolvency, the amount or the balance of their debt according to the composition. In default of any such payment and in the absence of any such scheme of trust for payment, the insolvent-debtor is not entirely discharged from all liability merely on the Court approving of a composition and annulling the adjudication. 90 Ind. Cas. 92= 1925 M.W.N. 148=21 M.L.W. 733=48 Mad. 521= A.I.R. 1925 Mad. 593=48 M.L.J. 252.

——S. 29—Official Assignee and Trustee—Rangoon R. 154.

The substitution of the Official Assignee for the trustee proposed for the scheme is an alteration in the substance of the scheme which the Court is not entitled to make under R. 154. In such a case the Court should adjourn the matter to enable the creditors to put up a new composition scheme to be administered by the Official Assignee. 103 Ind. Cas. 181=5 Rang. 241=A.I.R. 1927 Rang. 176.

——Ss. 29 (2) and 30—Order without public examination.

An order of adjudication passed without a public examination of the insolvent or without an express grant of leave to dispense with such examination is bad in law and could not be pleaded in trial to regular suit by a creditor who was not a party to the adjudication proceedings. 8 Bur. L.T. 259=8 L.B.R. 258=33 Ind. Cas. 559.

——S. 30—Agreement amending scheme of composition—Enforceability.

An agreement which constitutes an amendment to a scheme of composition, cannot be enforced without the consent of all classes of creditors and the approval of the Insolvency Court. 77 I.A. 143=29 Pat. 564= 63 M.L.W. 1166=52 Bom.L.R. 488=1950 M.W.N. 178 =A.I.R. 1950 P.C. 75=(1950) 1 M.L.J. 423 (P.C.).

——S. 30—Agreement with one of creditors to scheme in variation of scheme without leave of Court.

Where the Official Assignee, without the leave of the Insolvency Court, enters into an agreement with one of the creditors who were parties to the scheme, in variation of the scheme, in favour of that creditor, the agreement is *ultra vires* especially when the Official Assignee was constituted a trustee under the scheme because the scheme is varied in a manner not contemplated by the Act. Hence, the fact that no appeal was filed against the act of the Official Assignee is immaterial. A.I.R. 1942 Pat. 493=21 Pat. 397=9 B.R. 111=204 Ind. Cas. 48.

——Ss. 30 and 28—Agreement varying scheme—Undue preference to one of several creditorts—Not enforceable.

An agreement between the insolvent the Official Assignee and one of the creditors, to which the other creditors who were parties to the scheme were no party, entitling the creditor to charge 12 per cent. compound interest on his debt in variation of the scheme under which he was entitled to only 12 per cent. simple interest cannot be enforced. A.I.R. 1942 Pat. 493=21 Pat. 397= 9 B.R. 111=204 Ind. Cas. 48.

——Ss. 30 and 32—Approval of scheme—Effect—Discharge of insolvent for all provable debts.

The approval of a scheme of composition operates as a discharge of the insolvent for all debts provable in insolvency which has not been brought before the Insolvency Court. 50 C.W.N. 307.

——S. 30—Approval of scheme—Effect—Discharge of all provable debts.

Reading the two sections together it appears that the acceptance of a scheme of annulment operates as a discharge of the insolvent from all debts which were provable in insolvency but which have not been brought before the Insolvency Court. 92 Ind. Cas. 535= 24 A.L.J. 283=A.I.R. 1926 All. 293.

——S. 30—Contents of order—Proposals not embodied—Formal defect.

The section requires the terms of a proposal if approved to be embodied in the order with a view of making it executable as a decree as provided in sub-section (2), but the non-compliance with this provision is a mere formal defect which may be amended at any time and in no way affected by the Court's approval of the terms of the composition and the consequent annulment of the insolvency. 63 Ind. Cas. 173=44 Mad. 381=1921 M.W.N. 281=A.I.R. 1921 Mad. 236=40 M.L.J. 404.

——S. 30—Non-fulfilment of composition—Guarantor under a composition should not be proceeded against under S. 30 (2).

Where the scheme of composition was made on the 10th December, 1910 and by its terms the composition was to be paid within a month from the date of the order annulling the adjudication order, and the adjudication was annulled on the 14th September, 1921, and it was not until the 29th July, 1922, that the respondents (one of the creditors) applied for the covenant to be enforced against the appellant, and this long delay was not explained,

Held, that under these circumstances the peculiar jurisdiction under S. 30 (2) of the Presidency Towns Insolvency Act should not be exercised against the appellant, in his capacity as guarantor, even assuming that the Court has jurisdiction to deal with such a matter under that section. 80 Ind. Cas. 849=27 C.W.N. 908=A.I.R. 1924 Cal. 176.

——S. 30—Scope.

Cl. 2 of S. 30 is merely enabling and does not exclude the jurisdiction of the ordinary Courts. Further the clause refers only to cases where there is something in the provisions of the composition or scheme which are capable of being enforced in the Bankruptcy Court. 90 Ind. Cas. 92=1925 M.W.N. 148=21 M.L.W. 733= 48 Mad. 521=A.I.R. 1925 Mad. 593=48 M.L.J. 252.

——S. 30—Karachi Rules under S. 112, R. 151-A—Creditors' only remedy is application under S. 30 (2)—"May be enforced"—Court has no discretion.

Both under the rules framed under S. 112, Presidency Towns Insolvency Act for the Karachi Court and under the scheme of the Presidency Towns Insolvency Act itself, a suit to recover from the debtor or the turustee if any, under a scheme or composition is barred and the creditors' only remedy is by application under S. 30 (2). Consequently, the words "may be enforced" in S. 30 (2) are to be construed as "shall be enforced". On a proper application made to it by a person interested within the meaning of S. 30 (2), Presidency Towns Insolvency Act, the Court has no discretion in the matter

of enforcing payment. A.I.R. 1943 Sind 228=I.L.R. (1943) Kar. 305=210 Ind. Cas. 202.

——S. 30—Creditor firm proving debt—B and C partners—B applying under S. 30 (2)—C explicitly assenting—B, if "person interested".

The claim of *B* was proved by *J & Co.*, before the Official Assignee. The only possible persons interested in the claim were *B* and *C* partners of *J & Co.* *B* applied for order for payment, *C* explicitly assented to the payment being made :

Held, that *B* was a "person interested" within the meaning of S. 30 (2), Presidency Towns Insolvency Act, and entitled to obtain an order under this sub-section. A.I.R. 1943 Sind 228=I.L.R. (1943) Kar. 305=210 Ind. Cas. 202.

——S. 30—Scheme approved and adjudication annulled—Jurisdiction of Court, if terminates.

The proceedings in insolvency do not terminate even on the approval of a composition or scheme. Though the adjudication is annulled, the composition is made with the approval of the Insolvency Court and the Court retains jurisdiction to give effect to it. A.I.R. 1942 Cal. 79=74 C.L.J. 338=45 C.W.N. 1124=43 Cr.L. J. 402=I.L.R. (1942) Cal. 278=198 Ind. Cas. 602.

——S. 30—Creditor obtaining award against debtor and sureties after debtor's insolvency—Contract of suretyship merges into award—Rights of creditor against surety, whether affected by subsequent composition or annulment of insolvency—Creditor, if can execute award against surety.

Where a creditor, after the insolvency of the debtor, proceeds against him and the sureties for the realisation of the debt and an award is drawn up without any objection from the debtor, the contract of suretyship is, by the award, merged into the award so that as and from the date of the award, the rights which the creditor has against the sureties are rights under the award and not under the contract of suretyship. Anything done subsequently in the way of composition between the debtor and his creditors or the annulment of the insolvency proceedings makes no difference to those rights nor does it operate to absolve sureties' liability under the award. They are rights which were vested in the creditor quite independently of the insolvency proceedings and are not affected by the provisions of S. 30, Presidency Towns Insolvency Act and if the debt under the award has been duly proved in the insolvency proceedings, the creditor is entitled to put the award into execution and have it executed against the sureties. A.I.R. 1939 Cal. 352=183 Ind. Cas. 766.

——S. 30—Composition deed entered into by debtor, creditors and surety—Surety cannot resile from composition.

As soon as a composition entered into by the debtor and his creditors supported by the guarantee of surety is sanctioned by the Court it becomes binding on the creditors, the debtors and the surety. Consequently the surety cannot say that he is not bound by his promise and he is not relieved of his liabilities although he does not execute a bond as ordered by the Court. A.I.R. 1934 Sind 134=151 Ind. Cas. 791.

——S. 30—Property in foreign state—If vests in trustee on approval of composition—Annulment of adjudication order—Effect on jurisdiction.

Composition scheme approved of by the Court does not vest the insolvents' immovable property situated in foreign state in the trustees of the composition under the order approving the scheme.

Jurisdiction of Insolvency Court is not exhausted owing to the annulment of the adjudication, the Court has jurisdiction to give effect to the scheme it has approved. A.I.R. 1932 Cal. 124=35 C.W.N. 506=136 Ind. Ca . 141.

——S. 31—Creditor denied participation in dividend by reason of fraud practised on Court by insolvent—Payment of dividend to other creditors is not duly made.

Where a creditor has been denied participation in the dividend by reason of a fraud practised upon the Court by the insolvent, the payment of dividends to the other creditors cannot be held to have been duly made within the meaning of the expression in S. 31, Presidency Towns Insolvency Act. A.I.R. 1942 Mad. 103=54 M.L.W. 560=1941 M.W.N. 928=(1941) 2 M.L.J. 847=201 Ind. Cas. 30.

——S. 31 (1)—"Interested persons".

Debtor owing debt jointly to two brothers—Part of debt secured—Names of brothers mentioned as joint creditors in insolvency petition—Unsecured part mentioned in list of unsecured debts but inadvertently in name of one brother only—Debts not formally admitted by Official Assignee under Sch. II, Cl. 25—Composition scheme sanctioned—Assignee of unsecured debt from decendant in interest of one of brothers, held not "interested person" and not entitled to apply for re-adjudication. A.I.R. 1939 Cal. 119=I.L.R. (1938) 1 Cal. 493=180 Ind. Cas. 947.

——S. 31—Order under—Effect—Trustees, if released from their bond.

Where an order under S. 31, Presidency Towns Insolvency Act, is passed, the trustees are released from their bond. A.I.R. 1937 Cal. 532=174 Ind. Cas. 220.

——S. 31—Re-adjudication—Proceedings to recover insolvent's property—Act of insolvency and adjudication originally made are available.

When debtor is re-adjudged insolvent under S. 31, the second insolvency is linked up with the first insolvency and the insolvency proceedings become one so that the acts of insolvency and the adjudication originally made are available for purposes of any subsequent proceedings which may be brought in insolvency for the recovery of property belonging to the insolvent. A.I.R. 1943 Cal. 511=I.L.R. (1943) 1 Cal. 75=209 Ind. Cas. 352.

——S. 31—Re-adjudication—Effect of.

When a debtor is "adjudicated" or "re-adjudicated" or "freshly adjudicated" under S. 31, such adjudication is not independent of the original insolvency. 105 Ind. Cas. 90=54 Cal. 650=A.I.R. 1928 Cal. 21.

——S. 31—Re-adjudication—Considerations.

In considering whether it ought to re-adjudge the debtor under S. 31 the Court in the first instance should have regard to the position of the creditors, and if the Court is of opinion that the creditors will not be benefited by an order annulling the scheme and re-adjudicating the debtor, in ordinary circumstances the Court will not make an order of re-adjudication under S. 31. 105 Ind. Cas. 90=54 Cal. 650=A.I.R. 1928 Cal. 21.

——S. 32—Annulment of adjudication—Scheme of composition agreed upon—Official Assignee admitting claim of secured creditor at certain amount before composition—Paragraph in scheme clearly stating such amount to be subject to new mode of payment—Official Assignee subsequently denying that creditor's claim was adjusted—Order of High Court directing Official Assignee to admit claim as mentioned in scheme :—

Held, on construction of the scheme that interest was to be paid on amount of claim mentioned in paragraph 12 of scheme—Official Assignee held could not re-open question as to principal amount on which interest was to be paid, having admitted claim before composition. 180

Ind. Cas. 353=1939 A.W.R. 54=41 Bom.L.R. 1023=1939 A.L.J. 273=5 B.R. 473=43 C.W.N. 483 (P.C.).

——S. 33—Scope.

S. 33 (4) cannot be extended so as to enable the Court to punish for contempt any agent of an insolvent who at the instigation of the insolvent, obstructs the realization of the insolvent's property. Nor does S. 58 (5) cover such a case. A.I.R. 1938 Mad. 175=46 M.L.W. 900=1937 M.W.N. 1251=175 Ind. Cas. 543.

——S. 33—Official Assignee directing insolvent to pay provident deposit to Official Assignee directly he receives it.

In the case, of a provident fund deposit, when once the money is paid to the depositor, it ceases to be exempt from attachment or the claim of the Official Assignee, but the Official Assignee is not entitled to an order under S. 38, Presidency Towns Insolvency Act, from the Insolvency Court directing the insolvent to hand over the money to the Official Assignee directly he receives it, inasmuch as if an anticipatory order can be made ordering the insolvent to hand over the money directly he receives it, the beneficent provision of the Act is entirely destroyed. A.I.R. 1936 Mad. 855=44 M.L.W. 286=71 M.L.J. 415=167 Ind. Cas. 155 (2).

——S. 33 (2) (c)—Order under—If to be in writing—Contempt of Court.

The Official Assignee's order to insolvent to attend his office in pursuance of S. 33 (2) (*c*) need not necessarily be in writing, even a verbal order is valid and there is a duty upon the insolvent to comply therewith. Non-compliance with such order will render the insolvent guilty of contempt of Court. Affidavits in support of the application for contempt may be served at the same time as the notice of application.

Per Curium. In future if the Official Assignee intends to apply for committal order for contempt of Court he should put his order into writing and have it served on the persons intended to be proceeded against, with a notice that if the order is not complied with proceedings for contempt will be taken. Further it is eminently desirable that the procedure laid down by the rules should be strictly followed. 47 Cal. 56=56 Ind. Cas. 337.

——S. 34—Applicability.

A man who is adjudicated insolvent and whose property vests in the Official Assignee or Receiver, need not be sent to jail in execution of a decree against him in which he has already furnished security for his appearance, although he might not have disclosed his books or might have been refused the protection order. 113 Ind. Cas. 854=48 C.L.J. 531=A.I.R. 1929 Cal. 144.

——S. 36. *See also* PRESIDENCY TOWNS INSOLVENCY ACT, S. 7.

Synopsis.

——S. 36.

1. **Applicability.**
2. **Costs.**
3. **" Court ".**
4. **" Creditor who has proved his debt ."**
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6. **Duty of Court.**
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16. **Debtor disputing liability.**
17. **Question of conflict as to title.**
18. **Scope of S. 36 (5).**

1. Applicability.

——S. 36—Applicability.

Proceedings initiated by Hindu joint family business under S. 36 are a nullity and liable to be vacated. 164 Ind. Cas. 428=39 C.W.N. 275.

——S. 36—Applicability—Enquiry, if debt is binding on son.

Although, on the insolvency of a Hindu father, the father's power to sell the son's share for debts binding on the family may vest in the Official Assignee such power of sale terminates with the severance of the joint family status and after such severance, the Insolvency Court has no jurisdiction under S. 36 to summon the son to decide the binding nature of the debt between the father and the son. Consequently, no questions between the Official Assignee and the son can be decided by the Insolvency Court but they must be decided in a partition suit to which the Official Assignee is a party. A.I.R. 1932 Mad. 381=35 L.W. 592=63 M.L.J. 37=55 M. 558=138 Ind. Cas. 225.

——Ss. 36, 55 and 56—Applicability.

The questions under Ss. 55 and 56 are not matters arising under S. 36 simply because the respondents have been examined under that section. A.I.R. 1934 Cal. 232=60 C. 1367=149 Ind. Cas. 995.

——S. 36—Applicability.

Official Assignee seeking to set aside transfer by insolvent as being void under S. 56—High Court can exercise discretion whether the matter should be tried on notice of motion in Insolvency Court or to relegate the Official Assignee to a suit in Civil Court where the matter is not covered by S. 36. A.I.R. 1932 Bom. 566=34 Bom.L.R. 1166=141 Ind. Cas. 664.

——S. 36—Applicability.

Ss. 36, 55 and 56 of the Act do not apply to cases where the estate of a deceased is being administered in insolvency. 104 Ind. Cas. 89=5 Rang. 375=A.I.R. 1927 Rang. 284.

2. Costs.

——S. 36—Costs.

A witness who is legally represented at an examination under S. 36 is not entitled to costs of such representation. It is a measure of prudence which he takes at his own expense. A witness who is, rightly or wrongly made a respondent to an appeal from an order under S. 36 and served as such but against whom no substantive relief was asked for and who would not have been out of pocket by reason of the appellate decision, has it gone against him, if he had not contested the appeal, is not entitled to costs. A.I.R. 1941 Rang. 69=1940 Rang.L.R. 702=194 Ind. Cas. 250.

——S. 36—Costs.

Witness is not entitled to get costs of his attorney or counsel. 46 Cal. 795, Foll. 115 Ind. Cas. 39=58 Cal. 667=33 C.W.N. 21=A.I.R. 1928 Cal. 786 (F.B.)

——S. 36—Costs.

A witness examined under S. 46 of the Presidency Towns Insolvency Act is not entitled to the costs of employing attorney or counsel. This is so even if the witness was a mortgagee from the insolvent and his mortgage was sought to be impeached by his creditors. 46 Cal. 795=24 C.W.N. 68=53 Ind. Cas. 362.

3. " Court ".

——S. 36—" Court ".

The Registrar if empowered under S. 6 is a Court for the purpose of S. 36. 115 Ind. Cas. 39=56 Cal. 667=33 C.W.N. 21=A.I.R. 1923 Cal. 786 (F.B.).

4. "Creditor who has proved his debt".

——S. 36 (1)—"Creditor who has proved his debt"—Meaning.

The expression "creditor who has proved his debt" means a creditor who has lodged the necesssary proof of his debt and is entirely independent of the question either of acceptance or rejection of that proof by the Official Assignee. 33 C.W.N. 709=A.I.R. 1929 Cal. 703.

——S. 36 (1)—"Creditor who has proved his debt."

The words in S. 36 "any creditor who has proved his debt" mean not merely a creditor who has lodged proof of his debt but a creditor whose proof has been admitted by the Official Assignee under the provisions contained in S. 25 of the 2nd schedule to the Insolvency Act. The mere fact that his name was included in the schedule filed by the insolvent and that so far his claim has not been challenged does not assist him if his debt has not been admitted by the Official Assignee. 70 Ind. Cas. 468=28 C.W.N. 744=A.I.R. 1923 Cal. 305.

5. Depositions under.

——S. 36—Depositions under — Admissibility against transferee after adjudication.

Where the person in whose favour the insolvent originally made transfers is examined under S. 36, the deposition may be used against him, but not against his transferee though he had taken the transfers after the order of adjudication. A.I.R. 1932 Cal. 621=36 C.W.N. 337=138 Ind. Cas. 741.

——S. 36—Depositions under—Private examination of witness—Is evidence against him.

The answers given by a witness at the private examination are evidence against him. They are not merely evidence against him in any bankruptcy proceedings; they are evidence against him in any civil proceedings, whether in insolvency or whether in a civil suit on exactly the same principle. 93 Ind. Cas. 834=53 Cal. 251=30 C.W.N. 346=A.I.R. 1926 Cal. 597.

——S. 36—Depositions under—S. 56—Limits of admissibility.

In an enquiry under S. 56, the deposition of the preferred creditor before the Registrar of Insolvency, in an enquiry under S. 36, is admissible against him, at least to show the circumstances under which he took the transfer from the insolvents.

Quaere.—Whether the deposition of the insolvent is admissible? 85 Ind. Cas. 984=27 C.W.N. 611=A.I.R. 1923 Cal. 631.

——S. 36—Depositions under—Admissibility.

The general practice is to examine the accused under S. 36, but the Court can also examine though S. 36 does not apply. Examination of an insolvent under S. 36 of the Act and without any objection on his part, is voluntary and is admissible under S. 103 of the Act. 47 Cal. 254=24 C.W.N. 425=21 Cr.L.J. 522=31 C.L.J. 209=56 Ind. Cas. 778.

——S. 36—Depositions under—Admissibility in proceedings under Ss. 103 and 104.

The deposition of an insolvent examined under S. 36 of the Act and reduced to writing is admissible as evidence against him in a criminal charge. 46 Cal. 996=54 Ind. Cas. 478.

6. Duty of Court.

——S. 36—Duty of Court—Exercise of caution—Affording of facilities.

An order for discovery made under S. 36 may, if disobeyed, involve the person concerned in grave consequences. Wilful disobedience of such an order may be followed by an order of commitment for contempt of Court. In view of such possibilities, the Court should act with great caution and afford all possible facilities to the person concerned to satisfy the Court that at the time of the order the books were either not in existence or were not under his control. 66 Ind. Cas. 890=34 C.L.J. 351=A.I.R. 1921 Cal. 150.

7. Examination under.

——S. 36—Examination under—Discretion to refuse to permit examination of person summoned to be conducted by creditors.

The Registrar has discretion to refuse to permit the examination of a person summoned under S. 36, to be conducted by the creditors.

The creditor can, if he pleases place all the materials, before the Official Assignee so that the latter may assist the Court (or Registrar) in conducting the examination. The Official Assignee has a discretion in the matter. If he decides not to make use of the materials, the creditor may then apply for leave to appear at the examination and assist the Registrar with the materials at his disposal. 164 Ind. Cas. 415=40 C.W.N. 12=63 C. 88.

——S. 36—Examination under—Grounds for refusal.

The Court ought not to make an order for the examination of a witness under S. 36 unless there is ground for thinking that the order is likely to be of some use. Sub-sections (4) and (5) of S. 36 make it quite clear that the mere fact that the litigation against the witness may ensue cannot be a ground for refusing the examination. A.I.R. 1941 Rang. 69=1940 Rang. L.R. 702=194 Ind. Cas. 250.

——S. 36—Examination under—Grounds for refusal.

S. 36 confers upon the Court a power which is general in its character. Whenever the circumstances are such as to bring the section into operation, the Court can require the person concerned to be examined. The very object of such an examination is to obtain information as regards the affairs and the dealings of the insolvent, and to see if proceedings should not be taken in the interests of the creditors as a whole for the purpose of challenging the transactions entered into by the insolvent, and to say that litigation might ensue as the result of such an examination, would defeat the very object with which his section has been enacted. The only case in which any such order should not be made is where litigation has actually commenced and is pending between the parties with reference to the very question information about which is sought to be elicited by means of such an examination.

An examination can be ordered when the circumstances bring the case within S. 36, sub-S. (1). The examination may or may not result in some admission of liability on the part of the person examined. If there is an admission, then a summary order can be made under sub-S. (4) or sub-S. (5); if there is no admission, then no summary order can be made. But the mere fact that an admission is not likely to be made is no ground whatever for refusing to direct an examination. *prima facie*, the Court ought not to make an order under S. 36 unless there is ground for thinking that the order is likely to be of some use. But the mere fact that the result of the examination may be of use to the Official Assignee and may be a subject of inconvenience to the person examined in future litigation is no reason for not making the order. A.I.R. 1933 Bom. 309=35 Bom. L.R. 546=57 Bom. 665=145 Ind. Cas. 648.

——S. 36—Examination under—Grounds for refusal.

S. 36 is very wide and there is nothing in the Act limiting the Court's powers thereunder, to the period before the discharge. But these powers should not be

used unduly or unnecessarily long after the discharge. The official assignee when applying under S. 36 for the examination of a person should state shortly the nature of the information likely to be given and the dealings or properties of the insolvent to which such information will relate. A mere allegation that the witness is likely to give useful information is not enough for an order under this section. But an order cannot be refused on the mere ground that litigation might ensue between the party to be examined and the Assignee. 44 Cal. 374=40 Ind. Cas. 94.

——S. 36—Examination under—Nature of—Right of.

The only right which the section gives to the Official Assignee or to any creditor who has proved his debts is a right to apply to the Court to summon a witness. It is in the discretion of the Court whether or not it will do so at all, and, if it does do so, the examination of the witness is, in theory, an examination by the Court ; it is only as a matter of practice that the person applying for the summons is permitted to attend and question the person summoned at all. A.I.R. 1941 Rang. 69= 1940 Rang. L.R 702=194 Ind. Cas. 250.

——S. 36—Examination under—Nature of.

Although persons summoned under S. 36 are not infrequently persons who may be expected to wish to conceal the true nature of their dealings with the insolvent from the Court, that is by no means invariably so and there is nothing to justify treating examinations under S. 36 as penal inquisitions. 164 Ind. Cas. 415= 40 C.W.N. 12=63 C. 88.

——S. 36—Examination or under—Scope of.

It is impossible to lay down any hard and fast rule limiting the scope of a prive examination under S. 36 and though the Court may (not must) think it proper to confine it to questions arising out of the matters stated in the affidavit leading to the summons, there is certainly no rule that only those matters themselves may be put to the witnesses.

Section 36 is not in terms restricted to the examination of persons who are thought to be indebted to or possessed of part of the debtor's estate but extends to " any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property." A.I.R. 1941 Rang. 69=1940 Rang. L.R. 702=194 Ind. Cas. 250.

——S. 36 (1)—Examination under—Pardanashin lady—S. 37—Examination—Procedure.

S. 132 (1), C. P. Code, does not apply to examinations under S. 36 (1), Presidency Towns Insolvency Act, and the Court in a suitable case may summon before it a pardanashin lady who is known or suspected to have in her possession any property belonging to the insolvent. S. 37 gives the Court power, if it thinks fit, instead of summoning such a pardanashin lady to Court, to issue commissions or letters of request. That power is discretionary. 33 C.W.N. 631=56 Cal. 865= A.I.R. 1929 Cal. 528.

——Ss. 36, 46 (2)—Examination under—Nature of proceeding under S. 36—Aggrieved person—Appeal—Receiver, if proper party—Jurisdiction.

A person claiming to be the transferee of property for valuable consideration and in good faith is an aggrieved person within the meaning of sub-S. (2) of S. 46 of the Insolvency Act and is also a party thereto for the purpose of S. 36 of that Act. An aggrieved person is a person against whom a decision has been pronounced which has unjustly deprived him of something or wrongfully refused him something or wrongfully affected his title to something. 14 Ch. D. 458, Foll. In an appeal by the aggrieved person under S. 46 the receiver is a proper party but the appeal is not liable to be dismissed for not making him a party. A proceeding under S. 36 is not in the nature of a suit. It is only an incidental proceeding in the course of a more comprehensive one for adjudging the petitioner an insolvent. To make the provisions of S. 50 of the Insolvency Act applicable the Court in which the proceedings have been initiated as well as the Court which is invited to assist it, must both have jurisdiction in insolvency matters. 12 C.L.J. 452= 7 Ind. Cas. 765=15 C.W.N. 253.

3. Exercise of powers.

——S. 36—Exercise of power.

S. 36 confers on the Court an extraordinary and inquisitorial, though certainly a necessary power, to be exercised in the interests of the due administration of the insolvent's estate without fear,but not without scrupulous regard to considerations of economy and of fairness to the person examined. A.I.R. 1941 Rang. 69= 1940 Rang. L.R. 702=194 Ind. Cas. 250.

——S. 36—Exercise of powers—If permissible after discharge.

The Insolvency Court has power, even after an order of discharge has taken effect to direct the examination of a third party or the insolvent himself under S. 36 of the Presidency Towns Insolvency Act. A.I.R. 1933 Cal. 699=57 C.L.J. 467=37 C.W.N. 718=60 C. 936= 147 Ind. Cas. 191.

——S. 36—Exercise of powers—Limits.

Powers under S. 36 are not to be used as an extra method of discovery in addition to the ample facilities for discovery enjoyed by ordinary litigants under Civil Procedure Code. 115 Ind. Cas. 39=56 Cal. 667=33 C.W.N. 21=A.I.R. 1928 Cal. 786 (F.B.).

——S. 36—Exercise of powers—Limits—Order against ryot for kist.

The Official Assignee cannot apply to the Judge of the Insolvency Court for an order against a *ryot* for payment of *kist* due to the insolvent. The jurisdiction exercised by the High Court in insolvency is the Original Civil Jurisdiction. The provisions of S. 189 of the Madras Estates Land Act which debar Civil Courts, exercising original jurisdiction, from taking cognizance of any dispute or matter in respect of which a suit or application might be made to a Revenue Court cannot be overridden by S. 36 of the Presidency Towns Insolvency Act, which provides for the determination by the Insolvency Court of all questions relating to debts due by third parties to the insolvent. 61 Ind. Cas. 991=45 Mad. 31=13 M.L.W. 374=A.I.R. 1922 Mad. 143.

9. Ex parte Order.

——S. 36—Ex parte order.

An order under S. 36 (1) for examination of persons thereunder can be made *ex parte*. 44 Cal. 286, Foll. 66 Ind. Cas. 715=48 Cal. 1089=26 C.W.N. 750= A.I.R. 1921 Cal. 58.

——S. 36 (1)—Ex parte order.

Applications under S. 36 (1) for examination of persons thereunder should be made *ex parte* under the rules framed by the Calcutta High Court under S. 112 of the Act. R. 30 applies to such applications and not Rr. 17, 18 and 19 and this view is supported by the English Bankruptcy Act. (1914) 4 and 5 Geo. V, Ch. 59 and the rules thereunder. 44 Cal. 286=20 C.W.N. 1155 =36 Ind. Cas. 990.

10. Intention and scope.

——S. 36—Intention and scope.

S. 36 does not contemplate a roving inquiry into the affairs of the insolvent but where the Official Assignee only desires to inquire into a specific matter, *viz.*, whether a certain debt is due from the applicant to the insolvent,

then S. 36 may be invoked. A.I.R. 1934 Sind 158= =29 S.L.R. 49=152 Ind. Cas. 878.

——S. 36—Intention and scope.

S. 36 was not intended for the purpose of enabling the Official Assignee to cross-examine person to whom the insolvent appears to have transferred his property and to get from him the proof of his case. 121 Ind. Cas. 772=7 Rang. 675=A.I.R. 1930 Rang. 32.

——S. 36—Intention and object.

Orders made under S. 36 are purely discretionary. They are intended to be made for the benefit of the general body of creditors and to enable the Official Assignee to establish his rights against the creditors, or the creditors in the insolvency who are brought upon the scene by meansof fraudulent preferences or fraudulent tactics resorted to, who usually are the relatives and friends of the insolvent prior to the insolvency. The law never contemplated that the provisions of S. 36 should be used for the purposes of a fishy cross-examination in order to prepare for future litigation. The scope and utility of S. 36 by the amendment has been considerably restricted. Under the present amended section, under S. 36, one could get a deponent to admit possession of property, or one could find that the deponent was indebted to the insolvent but no summary methods exist now of getting hold of the property by the Official Assignee unless and until the deponent admits that the property belongs to the insolvent. Therefore, in every case if the claim is contested, the Official Assignee is driven to a suit. 118 Ind. Cas. 794=31 Bom. L.R. 420= A.I.R. 1929 Bom. 220.

——S. 36—Intention and object.

S. 36, Cls. (4) and (5) were intended to prove a summary procedure for ordering payments of debts due and delivery of property where there is no dispute But the procedure under that section is inappropriate in the case of disputes arising out of allegations by insolvent that he was compelled to execute mortgages on his property by fraud, undue influence and such other measures. 88 Ind. Cas. 77=27 Bom. L.R. 551= A.I.R. 1926 Bom. 329.

——S. 36—Intention and object of—Property belonging to debtor.

The object of S. 36 is discovery for the purpose of enabling the Official Assignee or a creditor who has proved his debt to obtain information with reference to the property belonging to the insolvent so that he might take proceedings thereon to impeach the transactions which are voidable under the sections of the Act relating to voluntary transfers, fraudulent preferences, etc. Property transferred by the Insolvent 4 months before the order of adjudication is not 'property belonging to the debtor' within S. 36 (5) of the Act, and no order under that section, on the examination of the transferee, can be passed declaring the transaction void under S. 55 and directing the delivery of the property to the Official Assignee. 14 M.L.T. 51=25 M.L.J. 308=(1913) M.W.N. 876=(1914) M.W.N. 247=20 Ind. Cas. 485.

11. Irregularity under.

——S. 36—Irregularity under—No cure.

An irregularity in passing an order on the application of the creditor is not curable under S. 118. 98 Ind. Cas. 723=30 C.W.N. 914=A.I.R. 1926 Cal. 1097.

12. Order under.

——S. 36—Order under—Appeal.

A decision which finally determines the question whether a witness should or should not be further examined under S. 36 is a "judgment" within the meaning of Cl. 13 of Letters Patent (Rangoon) and is, therefore, appealable. A.I.R. 1941 Rang. 69=1940 Rang. L.R. 702=194 Ind. Cas. 250.

——S. 36—Order under—Appeal—Discretion in refusing to summon witness or further examine him—Appeal.

The discretion of the Court under S. 36 in refusing to summon or further to examine a witness is not lightly to be interfered with on appeal. It is not enough for the appellant to show that the discretion was wrongly exercised but he must go further and show either that it was not exercised at all, or, if exercised, was exercised either unjudicially, or on a wrong principle of law, or on a wrong appreciation of the facts. But a right decision, even if reached in the wrong way, will not be interfered with. A.I.R. 1941 Rang. 69=1940 Rang. L.R. 702= 194 Ind. Cas. 250.

13. Order summoning to give evidence.

——S. 36—Orders summoning to give evidence—If governed by O. 16, C. P. Code.

The issue of summons under S. 36 of the Presidency Towns Insolvency Act to persons capable of giving evidence of the insolvent's dealing with his property is governed by O. 16, C. P. Code.

Quaere: Whether R. 19 of O. 16 (the 200 mile rule) operates to limit the jurisdiction of the Court. 61 M.L.W. 323=A.I.R. 1948 Mad. 496=(1948) 1 M.L.J. 241.

——S. 36—Order summoning to give evidence.

The person to be summoned does not at any rate in all cases fall within the category of an ordinary witness to whom the provisions of O. 16, C. P. Code relate. It deals rather with the discovery and recovery of property than with the ordinary testimony which a witness can give and proviso to S. 90 (1) of the Insolvency Act makes it clear that it was not intended to fetter the Court in the exercise of its jurisdiction under S. 36 by a limitation imposed by the C. P. Code.

Therefore the Court has power under S. 36 to summon before it persons who reside at a greater distance than 200 miles. 82 Ind. Cas. 76=27 C.W.N. 370= A.I.R. 1923 Cal. 427.

——S. 36—Order summoning to give evidence.

A person supposed to be a debtor to the insolvent's estate can be summoned by the Court even though he resides over 200 miles from the Court. 110 Ind. Cas. 606 =28 M.L.W. 408=A.I.R. 1928 Mad. 856=64 M.L.J. 715.

14. Sub-sections (4) and (5)—Scope.

——S. 36 (4) and (5)—Discovery of property—Procedure—Notice of motion—Suit—Costs—Form of order.

If the Official Assignee applies under S. 36 (4) and (5) of the Presidency Towns Insolvency Act for discovery of an insolvent's property he must take the examination of such person by itself and ask the Court for an order that is justified by the admissions made or evidence given by such person and without looking to any further evidence at all. There are two courses open to the Official Assignee. The one is to start an action and the other is to proceed against the respondent by notice of motion in insolvency. But it is discretionary with the Court in the latter case to direct at the hearing of the motion that the matter be dealt with by an action. If the Official Assignee brings an unsuccessful motion, however careful he may have been, has to pay the respondent s costs and he will have the right of indemnity given him by the previous order of the Court obtained from the creditor or other person in whose interest the motion is brought. The order for costs should not be directed to be limited to the assets in the hands of the Official Assignee when the respondent is not in any way in default for which he may be partially mulcted in costs. 23 C.W.N. 431=51 Ind. Cas. 654.

——S. 36 (4) and (5)—Scope of.

The questions whether the insolvent is a member of a joint family or whether the business carried on by the insolvent is a business of the joint family are not matters arising under sub-Ss. (4) and (5) of S. 36 and they can be decided under powers under S. 7. A.I.R. 1932 Mad. 167=34 M.L.W. 849=1931 M.W.N. 1253=62 M.L.J. 103=55 M. 385=135 Ind. Cas. 585.

——S. 36 (4) and (5)—Scope of—Contentious proceedings—Summary enquiry.

An Order under S. 36 can only be made if on examination of any person the Court is satisfied that he has in his possession any property belonging to the insolvent. S. 36 (4) and (5) is included to provide a summary procedure for ordering payment of debts due and delivery of property belonging to an insolvent when there is no dispute. It is not intended for contentious matters or for following property the subject of fraudulent preference or dishonest concealment. 42 Cal. 109=28 Ind. Cas. 469.

——S. 36 (4) and (5)—Scope of.

Under S. 36 (4), (5) it is only on the admission of the persons alleged to be in possession of property belonging to the insolvent that the Court can order them to give up the properties. 121 Ind. Cas. 772=7 Rang. 675=A.I.R. 1930 Rang. 32.

15. Sub-section (5)—Application under.

——S. 36 (5)—Application under—Only Assignee can apply.

A creditor cannot apply under S. 36 (5) of the Act. The Court can take an action only on the application of an Official Assignee. 104 Ind. Cas. 89=5 Rang. 375=A.I.R. 1927 Rang. 284.

——S. 36 (5)—Application under—Only Assignee can apply.

An order under S. 36 (5) can be passed only on the application of the Official Assignee and not on the application of the creditor. 98 Ind. Cas. 723=30 C.W.N. 914=A.I.R. 1926 Cal. 1097.

——S. 36 (5)—Application under Only Official Assignee can make.

Order under S. 36 (5) can be made only on a written application by Official Assignee and signed by him. The order can be based on examination under S. 36 (6) conducted by an officer delegated for the purpose. The person examined must get an opportunity to contest the order made. 5 Bur. L.T. 127=6 L.B.R. 142=16 Ind. Cas. 87.

16. Debtor disputing liability.

——S. 36 (5)—Debtor disputing liability—Suit the only remedy.

When once the Official Assignee has summoned a witness under S 36 if that witness disputes his indebtedness the Official Assignee has then no option but to proceed by way of suit. 118 Ind. Cas. 506=52 Mad. 717=30 M.L.W. 159=A.I.R. 1929 Mad. 705=57 M.L.J. 145 (F.B.).

17. Question of conflict as to title.

——S. 36 (5)—Question of conflict as to title.

S. 36 (5) affords a summary means of enabling the Official Assignee to obtain an order of the Courts, when the admitted property of the insolvent has been traced to the possession of a third party for its delivery to him It has no reference to cases in which there is a dispute as to whether certain property belongs to the insolvent or not. Sush a question of title is not within the scope of S. 36 at all. A.I.R. 1941 Rang. 250=1941 Rang. L.R. 268=197 Ind. Cas. 513.

——S. 36 (5)—Question of title involved.

It would be absolutely wrong ever to act under sub-S. (4) or (5) unless there was a case so free from difficulty even on the story of the witness as to make it reasonable to act *brevi manu*. A question as to whether a purchase ten years ago in the name of a lady was a purchase benami, is a long way from being within any thing that S. 36 contemplates. The correct course in such a case where there is any real conflict is either to proceed by way of motion before the Judge in insolvency or to proceed by way of suit. 93 Ind. Cas. 834=54 Cal. 251=30 C.W.N. 346=A.I.R. 1926 Cal. 597.

——S. 36 (5)—Question of title involved.

The Court should not deal with the matter under S. 36, if it really involves difficult questions of title, but should leave the parties to litigate such matter in a regular suit. 68 Ind. Cas. 341=25 C.W.N. 852=A.I.R. 1921 Cal. 95.

——S. 36 (5)—Questions of title as between official assignee and stranger—Jurisdiction.

The Court has no jurisdiction to determine questions of title as between the official assignee and a stranger to the insolvency, where *prima facie* the title is in the stranger. 27 M.L.J. 66=24 Ind. Cas. 239.

18. Scope of S. 36 (5).

——S. 36 (5)—Scope—Petition under S. 7, against insolvent's wife for declaration that property in her name was benami for insolvent—If barred by her examination under S. 36.

Per *Satyanarayana Rao* and *Panchapakesa Sastry, JJ.* (*Raghava Rao, J.*, dissenting).—The object of S. 36 of the Presidency Towns Insolvency Act is to obtain information regarding the insolvent's property and after information is obtained if there is an admission in the course of that proceeding, to make a proper order regarding delivery of possession or payment of the debt where there is an admission. But the matter arising under sub-S. (4) is the dispute relating to the debt, and under sub-S. (5) is the dispute relating to title and possession of property. There is no distinction between the two clauses. Where proceedings under S. 36 (5) are taken against the insolvent's wife who was alleged to be only a benamidar for the insolvent unless she consented to the question of her title being decided by the Insolvency Court, the Official Assignee would have to file a suit against the wife in the ordinary way. I.L.R. (1938) Mad. 72, overruled.

A petition under S. 7 of the Act against the insolvent's wife who was examined under S. 36 for deciding the question of title will be barred. I L.R. (1950) Mad. 895=A.I.R. 1950 Mad. 410=63 M.L.W. 115=(1950) 1 M.L.J. 123 (F.B.).

——S. 36 (5)—Scope—If relates to property with disputed ownership—Person in possession of such property—Examination of such person—Proceedings under S. 7, if barred.

Sub-S. (5) to S. 36 relates only to property admittedly belonging to the insolvent and not property the ownership of which is in dispute. The proceedings under S. 7 of the Act are, therefore, not barred by reason of the examination under S. 36 of the Act of a person in possession of property the ownership of which is disputed. A.I.R. 1937 Mad. 775=46 M.L.W. 327=I.L.R. (1938) Mad. 72=(1938) 2 M.L.J. 377=172 Ind. Cas. 346.

——S. 36 (5)—Scope—There must be clear admission by person examined, before Court can act under S. 36 (5).

The Court cannot act under S. 36 (5), unless there is a clear admission by the person examined.

A debtor executed a deed of composition in favour of a creditor by which the creditor was appointed one of the trustees. That deed provided that the debtor assigned to the trustees certain properties mentioned in the sche-

dule which included certain piece-goods pledged with a Bank Corporation. It further provided that the trustees should be at liberty to raise or advance money from their own or anybody else's pocket in order to clear these goods lying in deposit with the Banking Corporation and to sell them and reimburse themselves. The creditor who was examined under S. 36, Presidency Towns Insolvency Act after the insolvency of the debtor deposed that he cleared the piece-goods belonging to the debtor by paying whatever was due, sold the goods and carried profits. He further stated that he did not make over the amount of profits to the Official Assignee but kept it with himself :

Held, that the deposition contained a clear admission that the creditor had in his possession property belonging to the insolvent, namely, the profit realized upon the sale of the goods less necessary expenses. The case, therefore, fell within the provisions of S. 36 (5). A.I.R. 1939 Cal. 286=I.L.R. (1938) 2 Cal. 633=184 Ind. Cas. 514.

——S. 36 (5) and (6)—Scope.

Sub-Ss. (5) and (6) read together show that the property in respect of which the order is made must be in the " possession " of the person examined. 68 Ind. Cas. 341=25 C.W.N. 852=A.I.R. 1921 Cal. 95.

——S. 38—Order for discharge—Duty of Registrar to complete—Exceptional circumstances—Order of discharge of insolvent—Order not drawn up—Whether insolvent can be treated as undischarged—Official Assignee, if can execute judgment.

Under R. 28 of the Insolvency Rules, it is the duty of the Registrar to draw up and complete an order made on an application under R. 137 for discharge, if the order has not been completed by the insolvent within one week of the order, so that it might be gazetted and the public, the creditors and everybody concerned might know of the order of the Court. The only circumstances under which an order may remain without being drawn up for a long period is where the Judge has made an order that the Registrar need not prepare and complete the order or where the insolvent has no given his consent to the judgment being entered against him.

Where a person was adjudicated insolvent and he was given a discharge on his consenting to a judgment against him, but the order of discharge was not drawn up, signed or filed, and subsequently, when a certain sum of money was credited against him, the Official Assignee claimed this sum for the benefit of the creditors :

Held, that the person could not be treated as an undischarged insolvent and the amount could not be claimed as his after-acquired property for the benefit of his creditors, and that the Official Assignee could not be given leave to execute the judgment. A.I.R. 1932 Cal. 762=59 C. 775=36 C.W.N. 532=140 Ind. Cas. 812.

——S. 38—Reckless and dishonest conduct—Power to refuse discharge—Points to be considered.

The overriding intention of the Legislature in all Bankruptcy Acts is that the debtor, on giving up the whole of his property, shall be a free man again, able to earn his livelihood, and having the ordinary inducements to industry but somteimes it is not right hat the bankrupt should be free immediately ; he must pass through a period of probation ; and theoretically there may be cases in which he ought not to be free at all.

Where the conduct of the insolvent in connection with his impending insolvency during the period preceding it was very bad and he did not show any readiness to mend his ways, the High Court dismissed his petition for discharge with the direction that if at the end of a further period of two years the insolvent elected to apply again for his discharge, he would be at liberty to do so and if, having regard to his conduct during the intervening period, the Court was of opinion that he should be granted his discharge, he could be discharged.

Where an insolvent applies for his discharge, the Court should consider whether having regard to the welfare of the community on the one hand and the right of a British subject normally to live his life as a free man on the other, the Court in the exercise of its discretion, ought to grant the insolvent his discharge. A.I.R. 1931 Rang. 275=9 R. 333=133 Ind. Cas. 231.

——S. 38—Right to be heard—Insolvent.

S. 38 contemplates that an insolvent shall have a right to be heard upon any question of a creditor advancing a proof which is disputed. 51 C.L.J. 283=A.I.R. 1930 Cal. 547.

——S. 39—Nature of order.

In a case falling under S. 39 (2), Cls. (*a*), (*d*) and (*e*). Court's order should be an order suspending the discharge for a specific time. A.I.R. 1941 Rang. 127=193 Ind. Cas. 764.

——S. 39—(Rangoon)—Order under S. 39 (1) (b)—Order under S. 60 (2), if can be added.

Where a Court has, under S. 39 (1) (*b*), suspended the discharge for a specified time, it can add to the order under S. 39 (1) (*e*) an appropriation order under S. 60 (2). A.I.R. 1941 Rang. 26=1940 Rang. L.R. 650=192 Ind. Cas. 293.

——S. 39 (1) (c)—" Creditor " in S. 39 (1) (c).

In S. 39 (1) (*c*), the word " creditor " means, and can only mean the creditors who have proved their debts. A.I.R. 1940 Rang. 22=1939 Rang. L.R. 676=186 Ind. Cas. 536.

——S. 39 (1) (c)—' Creditors '—Duty of Official Assignee to look to amount proved and not amount in schedule.

When in S. 39 (1) (*c*), the Act speaks of payment of a dividend to "the creditors" it can mean nothing else than "the persons who have proved debts". And inasmuch as a dividend can only be calculated upon the amount of an admitted proof, the Official Assignee is bound in the case of each creditor, who has proved, to look to the amount of his proof and to nothing else, notwithstanding that creditor's name may have appeared in the schedule for a large sum. A.I.R. 1936 Rang. 190=14 R. 374=162 Ind. Cas. 871.

——Ss. 39, 40—" Mutual credit "—Money deposited under S. 70 of the Presidency Small Cause Courts Act in virtue of a decree in favour of the insolvent.

For the purposes of S. 39 the line is to be drawn at the date of the vesting order. Money paid under S. 70 of the Presidency Small Cause Courts Act pending reference does not the decree-holder's property at once. Per *Krisnaswami Aiyar, J.*—Unliquidated damages can be set off by the combined operation of S. 38 of the English Acts of 1869 and 1883 with S. 40 of the Indian Insolvency Act. 1910 M.W.N. 558=7 M.L.T. 207=5 Ind. Cas. 3739=3 M. 467.

——S. 39 (1) (c)—Official Assignee having sufficient funds to declare dividends of four annas—Discharge—Further sum received by Official Assignee.

As soon as the Official Assignee has in hand a sum sufficient to declare the required dividend of four annas in the rupee, plus the expenses of the proceedings and his commission, the discharge of the insolvent is complete and if any further sums should come into the Official Assignee's hands, they are the property of the insolvent and must be refunded to him. This is particularly important in the case of salary earners whose discharge has been suspended under S. 39 (1) (*c*), and who are, either voluntarily or under an appropriation order, paying sums periodically to the Official Assignee,

A.I.R. 1940 Rang. 22=1939 Rang. L.R. 676=186 Ind. Cas. 596.

——Ss. 39, 42—Refusal of discharge under S. 39 (1) —Insolvent, if can renew application for discharge under S. 42 (1).

Where an order of discharge is refused under S. 39 (1), it is open to the insolvent, with the Court's permission, to renew his application for discharge under S. 42 (1). S. 39 contemplates the refusal of a discharge in two contingencies : (1) Where the insolvent has been convicted of any of the offences referred to in the section ; and (2) when any of the facts referred to in S. 39 (2) of the Act are found to exist. In the first contingency, the Court has no option but to refuse an order of discharge. In the second contingency, the Court has a discretion to grant or refuse such an order. S. 42 is general in its terms and cannot be restricted in its application to the second contingency referred to above without doing violence to the plain and unambiguous language of the section. A.I.R. 1942 Sind 85=188 Ind. Cas. 778.

——S. 39 (1) (b)—Suspension of order of discharge, if automatically terminates.

Whenever an order suspending a discharge is made either under Cl. (*b*) or Cl. (*c*) of S. 39 (1), under Cl. (*b*) when the specified period has expired, and under Cl. (*c*) when the dividend of four annas in the rupee has been paid or a sum sufficient to pay such a dividend has come into the hands of the Official Assignee, then the suspension automatically terminates and the discharge becomes effective. No further order of the Court is required to complete the discharge. A.I.R. 1940 Rang. 22=1939 Rang. L.R. 676=186 Ind. Cas. 536.

——S. 39—Suspension of order of discharge along with appropriation order—Likelihood of dismissal from service, if ground for exemption from further payments.

Where an order suspending the discharge of an insolvent and an appropriation order are passed, the threat of the insolvent's employer to discharge the insolvent does not constitute any valid reason why the Court should alter the order and grant him exemption from further payments under the appropriation order. The Court, in its administration of the law, cannot yield to the pressure of the insolvent's employers. A.I.R. 1937 Rang. 22=166 Ind. Cas. 935.

——S. 39—Suspension of discharge—Court, in administration of Act, should not yield to employers' demands.

An insolvent who had put in 18 years' Government service applied for discharge and the discharge was suspended for a fixed period of two years and an appropriation order was made. He paid regularly for some time when he received a memo. from the head of his department calling upon him to obtain complete discharge within six months :

Held, that in the absence of any circumstances in the insolvency proceeding warranting dismissal, he should not be ruined merely because he availed himself of his statutory right to appeal to the Insolvency Act, and the Court must administer the Act in accordance with law. It was not in public interest that the administration of the Act should be frustrated. The administration of the Act cannot yield to the departmental head nor to Government Servants' Conduct Rules. Therefore, the order made on the discharge was proper and must stand. A.I.R. 1937 Rang. 14=166 Ind. Cas. 787.

——S. 39—Suspension of order of—Discharge "until twelve annas in the rupee is paid"—Whether in accordance with law.

When the order is passed under S. 39 (1), it is incumbent upon the Court strictly to comply with the provisions of the section. Under S. 39 (1) (*c*), the Court is not empowered to suspend the discharge until a dividend of more than four annas in the rupee has been paid. Consequently, an order suspending the insolvent's discharge "until twelve annas in the rupee is paid" is not in accordance with law. A.I.R. 1935 Rang. 200=13 R. 355=156 Ind. Cas. 982.

——S. 39—Suspension of order of discharge.

An adjudicated insolvent obtained order of discharge in 1912 in the following form, "It is ordered that the insolvent's discharge be with protection suspended for one year and that he be discharged as from the second of October, 1913". No final order of discharge was made. The insolvent acquired the property in 1916-1917 and the Official Assignee claimed the property for division amongst the creditors. *Held*, that the order of discharge became operative by itself on the 3rd October, 1913 ; and the claim of the Official Assignee should be negatived. The Act makes no further proceedings necessary after an order of suspension under S. 39 has been passed. The practice prevailing in the Bombay High Court which requires the insolvent whose discharge has been suspended, to appear and obtain the final and absolute discharge after the expiry of the period of suspension has no warrant in law and cannot be upheld. 21 Bom. L.R. 980=53 Ind. Cas. 627.

——S. 39—Suspension of discharge—Refusal of protection order—Whether sufficient ground to send insolvent to prison on creditor's application.

When the Court orders suspension of discharge for a couple of years and refuses to grant protection order to the insolvent during the first year, it does not follow that, because a protection order is refused, the Court will commit the insolvent to prison if an application is made to it in that behalf. A.I.R. 1937 Bom. 144=38 Bom.L.R. 1204=167 Ind, Cas. 764.

——S. 39 (2) (b)—Failure to keep proper books of account—When punishable—Absence of intention.

Failure to keep proper books of account within S. 39 (2) (*b*) is not proved unless it is shown that the nature of business is such that it is usual and proper to keep certain books showing transactions therein. When a person is carrying on business respecting which no evidence is offered or forthcoming that the keeping of a certain book is usual and proper, the result must be concluded to be that it is unusual and unnecessary for him to keep books. The production of books of account by the insolvent in such a case is a work of supererogation; he need not produce them. And in the absence of the actual fraud, they are not open to criticism since ther are merely in the nature of the private notes in relation to a business in which there is no evidence that it is usual or proper to keep books at all.

Where the insolvent has kept insufficient and incomplete books, and has never set up that these books contained a complete account of all his financial dealing or that they revealed his true financial position, and there is no evidence that they were ever put forward as doing so, it cannot be said that he deliberately kept false books, designed to conceal the true state of his affairs. A.I.R. 1937 Rang. 128=14 R. 758=169 Ind. Cas. 764.

——S. 39 (2) (b)—Failure to keep account.

Where the insolvent carried on a huge building business but did not keep any accounts of the business.

Held, that his not keeping the accounts amounted to a gross neglect, and proper order would be to refuse his discharge. In such a case a decree in favour of the Official Assignee without security for payment of the decretal amount would not be a proper order. 101 Ind. Cas. 419=5 Rang. 50=A.I.R. 1927 Rang. 126.

——S. 39 (1) (d)—Strict compliance necessary.

Any order of the kind mentioned in Cl. (1) (*d*) must

be made exactly within the terms of the clause. Order of Court granting an insolvent his discharge subject to his paying Rs. 140 for six months to the Official Assignee, the first of such payments to be on 10th March and the subsequent payments to be made on the 10th of every subsequent month is not one contemplated by S. 39 (1) (*d*). 95 Ind. Cas. 522=30 C.W.N. 518=A.I.R. 1926 Cal. 794.

——S. 40—Rangoon High Court Insolvency Rules, R. 170—Application for discharge—Attendance of insolvent, necessity of—Failure to appear—Effect of.

The insolvent's attendance at hearing of the application for the discharge on the day fixed in that behalf is requisite for the due hearing and consideration of the application and the failure of the insolvent to appear on the day fixed for the hearing of his application for discharge is a failure to appear in the High Court of Judicature on the day fixed for his attendance for the purpose in hand. A.I.R. 1936 Rang. 62=161 Ind. Cas. 590.

——Ss. 41, 23—Duty of Court to fix time within which insolvent should apply for dicharge—Annulment order to be made only if Court is satisfied that discharge is not applied for.

Under S. 41, the Court has jurisdiction to make an order of annulment only after the happening of certain events, namely, if the insolvent shall not apply to the Court for an order of discharge within such time as may be prescribed. So that, the Court has first to precribe the time within which the insolvent must apply for an order of discharge, and then be satisfied that the application for discharge was not made within that period ; and it is only in that event that the Court has jurisdiction to make an order of annulment. In exercising that jurisdiction, the Court has to consider, at the time when it makes the order of annulment, whether it ought to make any order under S. 23.

Where the Judge made an order of annulment in August but the jurisdiction to make it arose only in November and he did not consider at the time when the jurisdiction arose what order ought to be made :

Held, that the order of annulment was a wholly invalid order. A.I.R. 1935 Bom. 310=37 Bom. L.R. 449=59 B. 600=157 Ind. Cas. 930.

——S. 41—Default to apply for discharge—Annulment of adjudication—Funds whether vest in Official Assignee for benefit of creditors.

Where an adjudication is annulled by reason of the default of the insolvent, the insolvent is to lose the benefit of the insolvency, but he is not to benefit by the annulment. The annulment is not for his advantage consequence on an annulment under S. 41 being made, the fund should be vested in the Official Assignee or proper officer under the Act in force, and is so vested in him for the benefit of the creditors and may be dealt with as if the fund was being dealt with in the insolvency. A.I.R. 1933 Cal. 386=60 C. 259=144 Ind. Cas. 214.

——S. 41—Jurisdiction—Position of mortgagee.

(1) The mortgagee of property is not a person through whom the purchaser of the property at a private sale claims within the meaning of S. 41 ;

(2) the mere fact that there is a covenant in the mortgage deed that the mortgagor would execute the necessary sale-deed in the event of the mortgagee exercising the power of sale will not make any difference ;

(3) the mortgagor cannot be said to be the tenant of or in possession by permission of the purchaser unless the purchaser has done some act to indicate his permission having been granted subsequent to the sale. 1930 M.W.N. 652.

——S. 41—Jurisdiction.

The Registrar in Insolvency has jurisdiction to make the order of annulment under S. 41. 80 Ind. Cas. 840=27 C.W.N. 916=A.I.R. 1924 Cal. 83.

——S. 42—Object of.

In enacting S. 42, it was the intention of the Legislature to afford relief to insolvent who had been refused a discharge, whatever the reason may have been for the refusal, and to invest the Insolvency Courts in India with a discretion in the matter of granting or refusing a discharge similar to that exercised by Judges in England under the English Bankruptcy Law. A.I.R. 1944 Sind 85=188 Ind. Cas. 778.

——S. 42—Scope—Refusal of discharge under S. 39 (1). It is open to the insolvent with the Court's permission to renew his application for discharge under S. 42 (1). A.I.R. 1940 Sind 85=188 Ind. Cas. 778.

——S. 43—Duty of discharged insolvent.

Under S. 43, it is the duty of the discharged insolvent to assist the Official Assignee in the realization of his property, but this does not mean that acts done by him subsequent to his discharge are rendered thereby invalid but only that in some circumstances, the discharge may be revoked. An order of conditional discharge is not a contingent order but an absolute one.

Discharge under S. 30 (1) conditional on decree being passed in favour of Official Assignee for all proved debts granted—One of creditors subsequently waiving claims to debt in insolvency and advancing loan to insolvent—Insolvent and surety executing promissory note for original debt with interest—Agreement held valid and with consideration and not against Act or public policy A.I.R. 193 Rang. 11=1938 Rang. L.R. 19=174 Ind. Cas. 863.

——S. 43—Proceedings under—Nature of.

Proceedings under S. 43 of the Presidency Towns Insolvency Act are in the nature of criminal proceedings and hence there should be a definite charge, a finding and a conviction as a foundation for the sentence. 18 C.W.N. 692, Foll. 30 Ind. Cas. 839 (Mad.).

——S. 45—Adjudication by two Courts — Conditional order postponing discharge by one without stay in the other is bad.

Where a firm was adjudicated insolvent in two Courts, Bombay and Calcutta; and a conditional order postponing the discharge on the insolvents agreeing to a decree in favour of Official Assignee was passed without obtaining a stay of Bombay proceedings and before public examination of partners.

Held, that the order is bad and should not have been made. 32 Mad. 121: Foll. 99 Ind. Cas. 736=53 Cal. 866=44 C.L.J. 454=A.I.R. 1927 Cal. 163.

——S. 45—Bankruptcy — Assets acquired after Bona fide discharge of debts—Third parties dealing with insolvent bona-fide and for value—Official assignee not intervening.

Until the Official Assignee or Trustee intervenes, all transactions by a Bankrupt after his Bankruptcy, with a person dealing with him bona fide and for value in respect of his after-acquired property whether with or without knowledge of the Bankruptcy are valid against the Assignee or Trustee; but apart from such transactions, the Bankrupt acquires property and contracts for the benefit of the Official Assignee. 29 I.C. 168, Foll. 1 C. 556, 24 O. 244 not Foll. Where a

member of a joint Hindu family becomes insolvent and his estate consequently vests in the Official Assignee and there are subsequent joint acquisitions of the family including the insolvent the assignee is entitled only to the share of the insolvent in the said property. 6 L.W. 663=43 Ind. Cas. 532.

——S. 45—Construction of S. 45 (3).

Sub-S. (3) of S. 45 cannot be construed to mean that any property owned by the insolvent which is not mentioned in the insolvency proceedings must be regarded as falling outside their scope. A.I.R. 1939 Cal. 116=I.L.R. (1938) 2 Cal. 250=42 C.W.N. 695=180 Ind. Cas. 683.

——S. 45—Discharge order of — Suit to recover debt from Insolvent's property in foreign territory —Jurisdiction to restrain proceedings in foreign court.

The Insolvency Court in Bombay has no jurisdiction to restrain a decree holder from filing a suit against, an insolvent who has obtained his discharge in the Insolvency Court, in a foreign state, within whose jurisdiction the insolvent has his property, for recovering a debt in respect of which discharge has been obtained. The order of discharge granted by the Insolvency Court in Bombay would be recognised by all Courts in the British Empire but there is no obligation on the Courts outside British India to recognise the order of discharge as a complete release from debts mentioned in the order. 22 Bom.L.R. 1173=59 Ind. Cas. 444.

——S. 45 (S. 357)—Effect of discharge — Insolvency — Debt not included in the schedule—Discharge of insolvent debtor—Right of creditors not in the Schedule, against the discharged insolvent's property.

A creditor whose debt has not been included in the scheduled debts within the meaning of S. 357 of the Code, is entitled to proceed with the execution of his decree against the insolvent's property, notwithstanding his discharge. 30 C. 407.

——S. 45 (S. 357)—Insolvency — Creditors' application — Applicability of section. See C. P. CODE, O. 29, R. 1. 5 C.W.N. 91.

——S. 45 — (Ss. 351, 355 and 357)—Judgment-debtor applying for insolvency — Declaration of insolvency — No discharge judgment-debtor's liability to arrest.

A judgment-debtor who has been declared an insolvent on his application but who has not been discharged under S. 355, C. P. Code is not liable to arrest at the instance of a scheduled creditor. A judgment-debtor who has obtained his discharge under S. 351 or S. 355 cannot again be arrested or imprisoned on account of any of the scheduled debts. (Vide S 357, C. P. Code) (1904) 15 M.L.J. 1=28 Mad. 152 (F.B.).

——S. 45—Joint Hindu family — Discharge of father—Son's liability ceases.

When the father is discharged and his obligation is ended, that of the son also goes with it. But it would be different if a decree had been obtained against the son or even against the father prior to the insolvency in which case it may be possible for the creditor to seize the joint family property in the hands of the son in execution proceedings. A.I.R. 1924 P.C. 50, Rel. on. 97 Ind. Cas. 981=1926 M.W.N. 671=A. I.R. 1926 Mad. 1106.

——S. 46—Contract of indemnity and delivery of goods.

Where a debtor takes delivery of goods by executing a contract of indemnity after which he is adjudicated insolvent, the debt arising out of the indemnity is a debt provable in insolvency within the meaning of S. 46 (3). A.I.R. 1936 Mad. 789=(1936) M.W.N. 690=44 M.L.W. 328= I.L.R. (1937) Mad. 178=166 Ind. Cas. 427.

——S. 46—Debts barred by limitation.

Where the debt is barred by limitation on the date of the order of adjudication of the insolvent but is not barred on the date of the act of insolvency on which the adjudication is based, such a debt can be proved by the creditor. A.I.R. 1936 Bom. 130=60 B. 444=38 Bom.L.R. 71=161 Ind. Cas. 736.

——S. 46—'Debt due to Crown or local authority.'

Debts due to the Crown or a local authority must mean "provable" debts. A.I.R. 1936 Mad. 789=(1936) M.W.N. 690=I.L.R. (1937) Mad. 178=44 M.L.W. 328=166 Ind. Cas. 427.

——S. 46—Debts provable.

Compromise decree passed in Ceylon against agents of Official Assignee in British India whereby creditor was to share pro rata insolvent's assets in Ceylon and was entitled to proceed for balance against assets out of Ceylon.

Held, that the creditor was entitled to prove balance of debt in insolvency proceedings in British India against aforesaid insolvents but could not claim priority over other creditors. A. I.R. 1940 Mad. 837=52 M.L.W. 89=(1940) 2 M.L.J. 621=(1940) M.W.N. 1205.

——S. 46—Debt provable.

Where the period of limitation for a suit to recover a debt expires on a holiday and the judgment-debtor is adjudicated an insolvent on the morning of the re-opening day, the debt can be proved in the insolvency. A.I.R. 1932 Mad. 287=62 M.L.J. 256=35 M.L.W. 260=1932 M. W.N. 216=55 M. 630=136 Ind. Cas. 822 (F.B.).

——S. 46—"Subject" — Meaning of—Insolvent liable to pay debt out of joint family property in his hands or separate property inherited by him from father—Liability is debt provable in insolvency.

The word 'subject' in S. 46 means 'liable', that is, liable personally or in respect of property. Where the debtor is liable to pay a debt or satisfy a liability from and out of the property in his hands, it would be a provable debt in insolvency. Therefore if on the date of the order of adjudication, the insolvents are under a liability to pay a debt from and out of the joint family property, in their hands or from and out of the separate property inherited by them from their father, such a liability is a debt provable in insolvency. Consequently, a Hindu Father's debt is provable in the insolvency of the son under S. 46. Though a personal liability is a necessary foundation for an order of adjudication, it is not a necessary condition for a debt provable in insolvency. It is enough if there is a proprietary liability. A.I.R.

1940 Mad. 837=52 M.L.W. 89=(1940) 2 M. L.J. 621=(1940) M.W.N. 1205.

——S. 46—Debt provable.

Where the order for costs in a suit on mortgage was passed after the date of the adjudication and the obligation to pay the debt was incurred after that date, the debt with regard to the costs is not a provable debt within the meaning of S. 46 (3). A.I.R. 1931 Bom. 554=33 Bom.L.R. 1101=55 B. 649=134 Ind. Cas. 1161.

——S. 46—Duty of Court—As regards debt provable in insolvency as distinguished from dividends to be allowed.

Although no doubt it is the duty of the Insolvency Court to go behind any accounts stated or covenant or judgment and in the interest of other creditors get to the real character of the transaction, it does not mean that if a person has lent one lakh on a promise to repay two, he is a person who can only prove one lakh in insolvency. In such transaction the correct figure at which proof should be admitted as distinct from correct figure upon which dividend should be paid, is the figure which would be due according to the terms of the real bargain between the parties. For the purposes of dividend a different figure has to be computed, viz., the figure of one lakh with interest at 6 per cent. per annum to the date of adjudication. 51 C.L.J. 283=A.I.R. 1930 Cal. 547.

——S. 46—Duty of Official Assignee.

The main object of investing all the insolvent's property in the Official Assignee and requiring him to admit or reject proofs is to avoid any proceedings. The Official Assignee is to make up his own mind, to satisfy himself as to the justness of the claim, just as any other Receiver may have to do. He has to examine the proof. His duty is to put no creditor to unnecessary delay or expense. If he admits a proof any other creditor may apply to have the proof expunged.

If he rejects the proof there is an appeal to the judge. It is at this stage and not before that technical questions of proper evidence may arise and any creditor litigating in this manner about another creditor's proof does so at his own risk as to costs.

Before that stage is reached, every creditor has **prima facie** to bear the cost of proving his own debt (Sch II, para. 26); other creditors are entitled to inspect a proof and of course may and should give all relevant information and assistance to the Official Assignee. The Official Assignee may use S. 36 to obtain information as to any proof. Again, on taking proper steps, the Official Assignee may have the benefit of counsel's opinion on any points of law. 96 Ind. Cas. 459=43 C.L.J. 436=A.I.R. 1926 Cal. 898.

——Ss. 46 and 47—Indian Insolvency Act—Ss. 39 and 40—Set-off — Time of ascertainment of—Debt due to insolvent—Damages.

A person depositing money in Court for payment to his decree-holder can have them set-off in a cross suit against the decree holder, though the decree-holder becomes insolvent and the money deposited is paid to the Official Assignee as the property of the decree-holder. The time for determining the right of set-off, when the decree-holder becomes insolvent and his assets go to the Official Assignee, is the date when the vesting order is made. Unliquidated damages due by the estate of the insolvent can be proved and are capable of being set off, against debt due to the estate. 33 Mad. 467=7 M.L.T. 207 =(1910) M.W.N. 558=5 Ind. Cas. 379.

——S. 46 — Reduction in nominal amount—Accounting.

The time at which the creditor claims to prove is the time at which he brings his application to have his name inserted in the schedule. That being so, while the sum since received must be taken into account when it comes to paying dividend in order that the creditor may not receive more than 20 shillings in the pound it is not a matter which reduces the nominal amount of his proof of debt. 51 C.L.J. 283=A.I.R. 1930 Cal. 547.

——S. 47—Enquiry by Official Assignee—Details as to liability of estate.

It is the duty of the Official Assignee to enquire, when a claim is made, into its substance and to satisfy himself that the estate is liable in respect of the claim made. In order to arrive at this result, he must satisfy himself that there is not a set-off for the whole or a part of the amount claimed and the person claiming is not justified in evading the question as to whether he is liable for any amount by way of damages which will wipe out or reduce the amount of his claim. 109 Ind. Cas. 695=6 Rang. 46=A.I.R. 1928 Rang. 111.

——S. 47—Mutual dealings between creditor and insolvent—Duty of Court.

Where there are mutual dealings between an insolvent and a creditor, an account has to be taken of what is due from the one to the other in respect of such mutual dealings and the balance of the account and no more is to be paid by the one to the other. A.I.R. 1935 Cal. 225=60 C.L.J. 281=41 C.W.N. 106=62 C. 298=155 Ind. Cas. 991.

——S. 47—'Mutual dealings', meaning of.

The words 'mutual dealings' in S. 47 refer to mutual dealings at the time of the insolvency, and cannot refer to a purchase by one of the debtors of a claim against the insolvent after the insolvency. A.I.R. 1931 Rang. 193=9 R. 373=131 Ind. Cas. 726.

——S. 47—"Mutual dealings".

Unliquidated as well as liquidated claims for damages, provided they arise out of contract, come within the words "mutual dealings" in S. 47. 109 Ind. Cas. 695=6 Rang. 46=A.I.R. 1928 Rang. 111.

——S. 47—Set-off to judgment-debtor of insolvent—When not allowed.

No judgment-debtor can be permitted to place himself in a more favourable position **vis a vis** his fellow-debtors by purchasing after adjudication, the liabilities of the insolvent and then setting off his rights thus procured against his original debt to the insolvent's estate. Recognition of such section would cut across all the canons of Insolvency Law. 8 Rang. 419=127 Ind. Cas. 602= A.I.R. 1931 Rang. 25.

——S. 47—Set-off.

Transfer of property by insolvent avoided un-

der S. 55—By S. 17, the property vests in Official Assignee—Creditor can claim set-off under S. 47, against the Official Assignee. A.I.R. 1943 Cal. 140=I.L.R. (1942) 2 Cal. 222=46 C.W.N. 510=206 Ind. Cas. 258.

——S. 48—Assignee's power to scrutinize claims—Claim based on promissory note—Burden of proof as to consideration.

The Official Assignee, like the Trustee in Bankruptcy, represents the general body of creditors and is entitled to go behind the covenant in a mortgage or a stated account and to require satisfactory evidence before admitting proof that a claim represents a genuine debt. He can scrutinise claims and no judgment recovered against the bankrupt, no covenant for payment given by on account stated by him can bind the Trustee in Bankruptcy or deprive him of his right to investigate the claim.

The burden of proof of receipt of consideration by an insolvent regarding a promissory note on which a claim in insolvency is based is on the claimant and not on the Official Assignee despite the provisions of S. 118 (a), Negotiable Instruments Act. A.I.R. 1932 Sind 197=26 S.L.R. 279=141 Ind. Cas. 470.

——S. 48—Insolvency—Creditor's claim challenged by another creditor—Burden of proof.

Where in insolvency proceedings a creditor's claim was challenged by another, it is for the creditor to prove his claim and not for the other to disprove it. 5 C.W.N. 91.

——S. 48—Expunging of debts wrongly proved—Schedule II, Rr. 26 and 27.

A business was carried on by three partners, and the partnership was dissolved. A large sum of money, exceeding two lakhs of rupees was held to be due to one of the partners, **M**, out of the partnership assets. In the partnerships suit, it was found that the partnership had been dissolved. After the partnership suit had been instituted, two of the partners were adjudicated insolvent, and by an arrangement between the solvent partner **M** and the Official Assignee of the estate of the two insolvent partners, the assets of the partnership in Burma and in the Madras Presidency were realized, and one-third thereof was handed over to the representatives of **M** who, meanwhile, had died. **M's** representatives tendered proof of a debt due to the deceased partner. One of the creditors in the insolvency filed an application for the purpose of obtaining an order expunging the proof of the debt by the representatives of **M** upon the ground that inasmuch as the assets distributable in the insolvency were part of the partnership assets and **M** was liable as a partner to liquidate the debts of the partnership, the debt of the representative of **M** was a debt owing by two partners who were insolvent to a third partner, and as such, as postponed until after the debts of the outside creditors of the partnership had been satisfied:

Held, that the proof of the representative of **M** ought to be expunged. A.I.R. 1935 Rang. 59=12 R. 699=156 Ind. Cas. 336.

——S. 48—Proof of debt.

A creditor who lodges a proof should have his proof dealt with upon such lodgment. 70 Ind. Cas. 507=26 C. W. N. 653=A.I.R. 1921 Cal. 771.

——S. 48—Rejection of proof—Insolvency of firm—Suit by creditor against partner—Compromise—Acceptance of smaller sum than due—Release of partner and the whole of the assets—Release operates in favour of insolvent firm and the rejection by the Official Assignee of the proof by the creditor for the balance of the debt is correct. 32 Bom. L. R. 1656=A.I.R. 1931 Bom. 123=129 Ind. Cas. 890.

——S. 49—Adjudication in British India—Decree obtained against Official Assignee in foreign territory — Creditor's right to prove debt in British India.

A compromise decree against the Official Assignee in British India was passed by the Court at Ceylon whereby the creditor was to share **pro rata** with all the other creditors the assets of the insolvents in Ceylon and was to proceed for the recovery of the balance from the assets that existed out of Ceylon. On the date of the aforesaid decree, the assets of the insolvents were in the hands of Official Assignee in British India:

Held, that the creditor was entitled to prove the balance of the debt in insolvency proceedings in British India against the aforesaid insolvents.

Held further, that it was not open to the creditor to claim priority over other creditors in the insolvency proceedings in British India. A.I.R. 1940 Mad. 837=52 M.L.W. 89=(1940) 2 M.L.J. 621=1940 M.W.N. 1205.

——Ss. 49, 17, 60—Preference of one creditor over another—After acquired property of insolvent — Payments by insolvent before adjudication to creditor without notice of insolvency — Insolvent authorising and requesting employer to pay in talments out of his salary—Completed assignment or charge — Amount ordered by Court under S. 60 (2), if vested in Official Assignee and balance, if belonged absolutely to insolvent.

The insolvency law aims at equal and rateable distribution of the property of the insolvent among the creditors who are entitled to prove their debts in insolvency without any preference to one creditor over another. The property of the insolvent comprises also what is known as the after-acquired property, and the payments made by the insolvent to any of his creditors will be protected provided they are made before his adjudication and the creditor has no notice of the insolvency.

Sometimes before his adjudication, the insolvent got a loan from a bank during the pendency of a prior insolvency proceeding. The insolvent undertook to pay back the loan in monthly instalments out of his salary and authorized and requested his employer, the Railway Company to pay the said instalments to the bank and the bank which had no notice of the insolvency as per contract continued to recover the instalments even after the adjudication until the debts were fully recovered:

Held, (i) that on the date of the insolvency, there was only an authority or direction and request by the debtor to the Railway Co. to pay a portion of his salary to the bank or at best a contract to assign the future salary as and when it was earned and that there was no completed assignment or charge. By the adjudication of the

insolvent, the contract was revoked and consequently, the liability of the insolvent or his estate for breach of such contract was only in damages and the creditor was not entitled to enforce the transaction as against his subsequent salary, at any rate not against the assignee in bankruptcy;

(ii) that although any dealing by the insolvent with reference to after-acquired property was protected if the assignee acted **bona fide** and paid value, no matter that he had knowledge of the insolvency, a distinction had been made between the insolvent's after-acquired property in general and his pay, salary or other income, by reason of the provisions contained in S. 60, Presidency Towns Insolvency Act, and that only the amount ordered by the Court under S. 60 (2) vested in the Official Assignee; and the balance being at the absolute disposal of the insolvent, he was free to pay any one of his creditors in full and consequently, the Official Receiver could not recover the amount paid by the insolvent to the bank out of such balance subsequent to his insolvency;

(iii) that the letter of the Official Assignee permitting the bank to collect the amount from the Railway Company according to the contract amounted to a voluntary payment. A.I.R. 1941 Mad. 297=(1940) M.W.N. 1167=53 M.L.W. 662=I.L.R. (1941) Mad. 61=(1941) 1 M.L.J. 703=194 Ind. Cas. 318.

——S. 49—Priority — Hindu son becoming insolvent—Father's separate property must be first applied for paying father's creditors and whatever may remain is to be used for payment to insolvent's creditors. A.I.R. 1943 P.C. 15=56 M.L.W. 160=1943 M.W.N. 197=(1943) 1 M.L.J. 239=47 C.W.N. 298=9 B.R. 361=1943 A.L.J. 265=1943 A.W.R. 44=45 Bom.L.R. 563=69 I.A. 157=I.L.R. (1943) Mad. 603=I.L.R. (1943) Kar. P.C. 5 Sup.=206 Ind. Cas. 482 (P.C.).

——S. 49—Provisions of—If incorporated by S. 229, Companies Act.

The provisions of S. 49 are not incorporated by S. 229, Companies Act, and all questions regarding priority of debts in winding up proceedings are to be governed solely by the provisions contained in S. 230, Companies Act. 169 Ind. Cas. 506=41 C.W.N. 458=I.L.R. (1937) 1 Cal. 684.

——S. 49—Trade creditors—Not entitled to priority.

Although under the English Bankruptcy Law trade creditors are preferred to other unsecured creditors, there is no provision for such preference under the Indian Law. 112 Ind. Cas. 486=51 Mad. 308=28 M.L.W. 290=A.I.R. 1928 Mad. 890=55 M.L.J. 12.

——S. 49 (1)—Scheme for priority—Against the policy of Insolvency law — Should not be sanctioned.

The Official Assignee, in the administration of the insolvent's estate, can on no account prefer one creditor to another; nor can he ask the Court to approve what is prohibited to be done by him directly. The policy of Bankruptcy laws seems to be to treat all creditors alike and this policy is based on grounds of public policy and the Official Assignee cannot contravene this rule much less can the Court aid him to do so.

An Official Assignee intimated to the Court his willingness to continue a suit instituted by the insolvent and was directed to furnish security for costs. Being unable to raise the money in the usual way, he placed before the Court a scheme for its approval whereby certain of the creditors, who had agreed to advance the money on condition that their debts should be paid prior to those of other creditors in case any amount be recovered by the suit, were to be given such priority over other creditors.

Held, that such a scheme cannot be sanctioned by a Court.

Held further, that the scheme could not have been sanctioned even if it would have been approved of by the creditors **(obiter)**.

Held further, that the agreement under the scheme being inconsistent with the policy of the Insolvency Act, would be unlawful under S. 23, Contract Act. 116 Ind. Cas. 125=28 M.L.W. 816=A.I.R. 1929 Mad. 385=55 M.L.J. 657.

——S. 49 (1) (a)—'Debt due to Crown or local authority'.

The expression "a debt due to the Crown or to any local authority" includes not only a debt which had become due to the Crown but also a debt which is provable within the meaning of S. 46 (3). It means a provable demand which the Crown has against the insolvent, whether such demand has become provable or not and whether it is in point of law, strictly a debt or not. A.I.R. 1938 Sind 49=174 Ind. Cas. 157.

——S 49 (1) (a)—Crown debt—What is.

It is not outside the statutory powers of the Government of India to conduct a soap factory by way of education and demonstration and a debt due by an insolvent to such a concern is a debt due to Crown and hence is recoverable in full in preference to the claims of any other creditor. 70 Ind. Cas. 764=45 Mad. 156=16 M.L.W. 46 =30 M.L.T. 246=A.I.R. 1922 Mad. 243.

——S. 49 (1) (a)—Port Trust, if local authority.

A body of Port Commissioners is a local authority as is a Municipal Committee or District Board. The Port Trust is, therefore, a 'local authority' within the meaning of S. 49 (1), and its debt is entitled to priority. The words of S. 49 (1) are wide indeed, and all debts due to the Crown or to any local authority are to be paid in priority to all other debts. A.I.R. 1936 Mad. 789=1936 M.W.N. 690=44 M.L.W. 328=I.L.R. (1937) Mad. 178=166 Ind. Cas. 437.

——S. 49 (3)—Cost of administration — Official Assignee proposing to pay financing creditor 25 per cent. of net realizations from certain litigation as purchase price—Nature of such proposal.

Where the Official Assignee proposes that the indemnifying creditor shall be promised 25 per cent. of the net realisations to the estate from a certain litigation as the purchase price for his assistance that this price shall be treated as "costs of administration" under S. 49 (3), and that all the creditors (including the indemnifying creditor) shall share rateably in the balance of the realisations; the proposal is, in effect, a scheme whereby the Official Assignee, just as he buys the services of an advocate and debits the estate may buy the services of a guarantor and debit the estate. There is no offence against the principle of equality of distribution of assets; all that is proposed

is to treat as a legitimate expense to the estate the cost of procuring for the Official Assignee an insurance against the consequences of failure.

An Official Assignee or Receiver in bankruptcy can buy the financial guarantee of one of the creditors by promising him a portion of the net realizations as the price of his services and to treat the expenditure as a legitimate part of the cost of getting in the assets of the estate. A.I.R. 1938 Mad. 143=46 M.L.W. 690=1937 M.W.N. 1053=(1937) 2 M.L.J. 812=I.L.R. (1938) Mad. 87=175 Ind. Cas. 799 (2).

——S. 49 (4)—Muthalalis — Not partners.

The muthalalis cannot be held to be partners in the type of business known as Labbai or Ejman partnership in Madras Presidency. Therefore, if the firm carrying on the business becomes insolvent, the muthalalis are entitled to rank for dividend out of the assets with the other creditors. 112 Ind. Cas. 486=51 Mad. 308=28 M.L.W. 290=A.I.R. 1928 Mad. 890=55 M.L.J. 12.

——S. 49 (4)—Partnership — Creditors' competition — Adjustment.

The creditors of two insolvents who were trading together in partnership in Madras were not aware of the partnership but were dealing with the second partner as agent of the first partner. The partners were subsequently adjudicated insolvents. The first partner had another business in Cuddapah. In a competition between the creditors of the Madras business and Cuddapah business as regards the availability of the Cuddapah assets for the Madras creditors.

Held, that it was open to the Madras creditors to elect as to which of the assets they will go against whether the general assets of the two partners or the separate assets of the partner against whom they elect. They could elect until the very end of the proceedings and only when they have actually received a dividend there is an election: even after they have received their dividend they could still pay it back and prove against the other assets. 79 Ind. Cas. 966=19 M.L.W. 46=1924 M.W.N. 164=A.I.R. 1924 Mad. 595.

——S. 49 (5)—Hindu joint family property—No priority for creditor of insolvent's father against son's creditor.

The Hindu Law, as administered to-day, has departed from the old Hindu Law, the tendency being to restrict and not to extend the limits of its doctrine. This tendency should not be departed from by holding that a priority of payment out of the joint property exists to-day in favour of the creditors of a father as against the creditors of a son. But even if such a priority had to yield to any statutory provision inconsistent therewith, e.g. S. 49 (5), Presidency Towns Insolvency Act. Nowhere in the Act is any priority conferred on the debts of an insolvent's father. A.I.R. 1943 P.C. 15=47 C.W.N. 298 =56 M.L.W. 160=(1943) 1 M.L.J. 239=1943 M.W.N. 197=9 B.R. 361=1943 A.L.J. 265= 1943 A.W.R. 44=45 Bom.L.R. 563=I.L.R. (1943) Mad. 603=69 I.A. 157=I.L.R. (1943) Kar. (P.C.) 5 Sup.=206 Ind. Cas. 482 (P.C.).

——S. 49 (5)—Hindu joint family property.

Under S. 52 (2) (b), the capacity to exercise the power of insolvent father of a joint Hindu family to sell the joint family property for his untainted antecedent debts vests in the Official Assignee. But such power should be exercised subject to its limitations and the provisions of S. 49 (5) do not apply. A.I.R. 1936 P.C. 277 =1936 O.W.N. 681=2 B.R. 757=44 M.L.W. 417=40 C.W.N. 1382=17 P.L.T. 717=64 C. L.J. 80=38 Bom.L.R. 1129=1936 M.W.N. 1204=17 L. 644=38 P.L.R. 976=71 M.L.J. 812=63 I.A. 384=1937 A.L.J. 414=1937 A.W. R. 505=164 Ind. Cas. 6 (P.C.).

——S. 51—Relation back.

Where a purchaser in execution proceedings has purchased in good faith prior to the order of adjudication, his purchase cannot be assailed on grounds based on S. 51 by virtue of S. 53 (3). A.I.R. 1941 Cal. 112=194 Ind. Cas. 423.

——S. 51—Commencement of insolvency—Proof of debts—Limitation.

Under S. 17 and S. 51, the insolvency commences on the commission of the act of insolvency, and at that date, the property of the insolvent vests in the Official Assignee, whose duty it is to administer it, and distribute it amongst the creditors who prove their debts. As from that date, the Indian Limitation Act has no application and the relationship of debtor and creditor ceases to exist. Where the debt is barred by limitation on the date of the order of adjudication of the insolvent but is not barred on the date of the Act of insolvency on which the adjudication is based, such a debt can be proved by the creditor. A.I.R. 1936 Bom. 130=38 Bom. L.R. 71=60 Bom. 444=161 Ind. Cas. 736.

——S. 51—Creditor, if bound to take action immediately on hearing about act of insolvency.

Under S. 51 of the Act, a period of three months is given within which a petition may be filed. The creditor is not bound immediately an act of insolvency comes to his knowledge to take action. This is clearly a beneficent provision as it gives time for reflection and possibly for the debtor to restore his petition **qua** the creditors. A.I.R. 1936 Mad. 27=43 M.L.W. 280=70 M. L.J. 545=162 Ind. Cas. 722.

——S. 52.

Synopsis.

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1. After acquired property.

——S. 52—After acquired property.

There is no obligation on the part of an insolvent to deliver to the Official Assignee, property acquired by him after his adjudication, unless called upon by the Official Assignee to do so. A.I.R. 1941 Mad. 906=54 M.L.W. 420=I.L.R. (1942) Mad. 199=1941 M.W.N. 899=(1941) 2 M.L.J. 591=200 Ind. Cas. 582.

——S. 52—After acquired property.

The Official Assignee can assert a right to property acquired by the insolvent after his adjudication and before his discharge. Unless the Official Assignee intervenes, so as to assert under S. 52, Presidency Towns Insolvency Act, a right to divide amongst the creditors of the insolvent property which has been acquired by the insolvent after adjudication, such after-acquired property may be dealt with by the insolvent himself and third parties may acquire it from the insolvent. A.I.R. 1935 Bom. 378=37 Bom.L.R. 576=60 Bom. 69=158 Ind. Cas. 542.

——S. 52—After acquired property — Right of Official Assignee — Discretion to abandon unjust claims.

Where an undischarged insolvent acquires property and transfers it to a third person in the course of a transaction by the insolvent with that person in which the dealings of the latter with the insolvent are bona fide and for value, such property does not vest in the Official Assignee until he intervenes in the matter. A.I.R. 1931 Rang. 74=131 Ind. Cas. 504=8 Rang. 665.

——S. 52—After acquired property—Nature of—Possession of insolvent for more than 12 years—Official Assignee's claim, if barred.

Acquisitions by an insolvent who has obtained a merely personal discharge are made as agent of the Official Assignee and as such the possession of the insolvent is not adverse to that of the Official Assignee and the latter's claim to such after-acquisition even after 12 years possession by the insolvent is not barred. 22 Ind. Cas. 271 (Mad.).

2. Bailment.

——S. 52—Bailment.

Pledgee keeping goods in trust for plaintiff—Pledge to defendant — Defendant acting bona fide and without knowledge of trust — Pledgee becoming insolvent:

Held, that the real object of the trust receipts was to defeat the provisions of S. 52 (2) (c) and even if the pledges were invalid, the plaintiff's suit for the recovery of the goods was not maintainable as the property in goods would vest in Official Assignee. A.I.R. 1933 Cal. 366=60 C. 262=149 Ind. Cas. 903.

——S. 52 — Bailment — Insolvency of bailor—Bailee in possession of goods.

Where goods are validly pledged under S. 178, Contract Act, they are not in possession of the pledgors — the insolvents in the case—because the Railway Company held the goods as bailees of the respondents, the possession by the pledgees of the documents of title being equivalent to the possession of the goods: hence these goods were not within the possession, order and disposition of the insolvents at all; it is the 'pledgees' who were entitled to obtain delivery of the goods from the Railway Company. Consequently, the goods do not constitute property divisible among the creditors in virtue of S. 52 (2) (c). A.I.R. 1934 P.C. 246=11 O.W.N. 1511=68 M.L.J. 26=41 M.L.W. 1=39 C.W.N. 209=1935 M.W.N. 27=1 B.R. 145=37 Bom.L.R. 130=60 C.L.J. 528=37 P.L.R. 185=58 M. 181=61 I.A. 416=4 A.W.R. 1306=152 Ind. Cas. 730 (P.C.).

——S. 52—Bailment — Insolvency of Jeweller—Position of person entrusting sovereigns and gold to the Jeweller.

Where a jeweller entrusted by the claimant with gold and sovereigns to make certain jewellery became an insolvent after converting his gold and sovereigns into cash, the transaction amounts to a bailment and the jewellery became a trustee for the gold and sovereigns entrusted to him but inas-much as the gold and sovereigns did not as such form part of the estate taken possession of by the Official Assignee, the claimant is not entitled to the benefit of the doctrines of tracing and quasi-charge and to any preferential payment and ranked only pari passu with the other creditors. 28 M.L.J. 403=(1915) M.W.N. 262=2 L.W. 312=17 M.L.T. 247=29 Ind. Cas. 37.

3. Book debts.

——S. 52—Book debts—Notice to debtors is necessary step to remove them from order or disposition of insolvent—Absence of notice, effect of—Goods, if can be taken from possession, order or disposition of real owner by mere demand on day before insolvency.

In the case of trade debts, the ordinary and appropriate method by which the true owner may terminate his consent to the debt remaining in the possession, order or disposition of the insolvent is by giving notice to the debtor, and the fact of no notice having been given or attempted to be given is where there is an opportunity of giving such notice, conclusive evidence of the consent of the true owner; but the inference of consent arising from the omission to give notice can be rebutted if the true owner, within the time available to him, takes every possible step to terminate the possession, order or disposition of the insolvent, or if the failure to terminate such possession, order or disposition is not attributable to any fault on the part of the true owner. This must, of course, be the case where nothing occurs to alter the circumstances in which the insolvent has the reputation of ownership. The party who is to pay must know at whose order and disposition the debt subsists; the reputation of ownership continues in another person apart from the true owner. The clause, however, comes into operation and the true owner's goods are seized only where he has allowed not merely the debtors of the insolvent to remain without notice but possible fresh creditors of the insolvent to grant him false credit by reason of the reputation of ownership continuing right up to the moment of

insolvency. Goods may be taken from the possession, order or disposition of the reputed owner by a mere demand on the day before the bankruptcy and consent to debts remaining in the order or disposition of the insolvent may be withdrawn by taking some step towards the giving of notice even though such notice does not reach the debtor before the bankruptcy commences. Circumstances giving rise to a reputation of ownership may cease to exist on the day before the insolvency by some act of the true owner which negatives the continuance of any such reputation:

Held, on facts that although the debts were in the order or disposition of the insolvent till January 5, with the consent of the appellant, the person to whom the insolvent had hypothecated all his book debts, present and future, as the appellant had not given notice to any debtor till that date though he had an opportunity to do so, still the reputation of ownership was terminated when the appellant entered the premises on January 5, and was not still subsisting at the Commencement of the insolvency. The claim of the general body of creditors could not, therefore, succeed. A.I.R. 1938 Rang. 426=1938 Rang. L.R. 480=179 Ind. Cas. 541.

4. Decree before adjudication.

——S. 52—Decree before adjudication — Not affected.

Where by an order passed under O. 20, R. 11 (2) the judgment-debtor was to execute a mortgage to the decree-holder.

Held, that the subsequent adjudication of the judgment-debtor as an insolvent could not affect the rights of the decree-holder to have the mortgage executed in his favour. 85 Ind. Cas. 291=4 Bur. L. J. 32=2 Rang. 673=A.I.R. 1925 Ran, . 189.

5. Deposit by appellant.

——S. 52—Deposit by appellant—Is payable to respondent and not to Official Assignee.

Where the defendant appellant obtained an order for stay of execution of decree passed against him on depositing the decretal amount in Court pending the appeal and subsequently the appellant was adjudicated insolvent and the Official Assignee did not choose to proceed with the appeal, which was therefore dismissed, **held** that the money deposited in Court was payable to the decree-holder and not to Official Assignee. 84 Ind. Cas. 922=51 Cal. 1010=A.I.R. 1925 Cal. 416.

6. English Law.

——S. 52—English Law—English Bankruptcy Act (1813), S. 44—Relation.

There is no difference in effect between the two sections. The English arrangement of the section is preferable because more lucid. S. 44 (1), English Act, and S. 52 (1) (a), Indian Act, can never be in conflict with S. 44 (iii) and S. 52 (2) (c) respectively because where one holds property in trust he is the real owner and, therefore, the real and reputed ownership are in the same person and S. 44 (iii) and S. 52 (2) (c) do not apply. 121 Ind. Cas. 745=56 Cal. 1074=A.I.R. 1930 Cal. 171.

7. Hindu joint family.

——S. 52—Hindu joint family.

Father adjudicated insolvent — Undivided interest of son does not vest in Official Assignee under S. 17—But father's power to make son's interest liable for his untainted debts vests in the Official Assignee under S. 52 (2) (b) and the power can be exercised by the Official Assignee subject to all the limitations under which the father himself could exercise it. A.I.R. 1942 Cal. 533=46 C.W.N. 808=76 C.L.J. 333=I.L.R. (1942) 2 Cal. 413=203 Ind. Cas. 154.

——S. 52—Hindu joint family—Capacity of Official Assignee to sell joint family properties for insolvent father—S. 49 (5), if applies.

Under S. 52 (2) (b), the capacity to exercise the power of an insolvent father of a joint Hindu family to sell the joint family properties for his untainted antecedent debts vests in the Official Assignee. But such power should be exercised subject to its limitations and the provisions of S. 49 (5) do not apply. A.I.R. 1936 P.C. 277=1936 O. W. N. 681=2 B.R. 757=44 M.L.W. 417=40 C.W.N. 1382=17 P.L.T. 717=38 Bom. L.R. 1129=17 Lah. 644=64 C.L.J. 80=1936 M. W.N. 1204=38 P.L.R. 976=71 M.L.J. 812=63 I.A. 384=1937 A.L.J. 419=1937 A.W.R. 505=164 Ind. Cas. 6 (P.C.).

——S. 52—Hindu joint family property—Receiver has all the disposing powers of the insolvent with reference to untainted antecedent debt.

When at the commencement of his insolvency a father has the power to enforce by sale of the whole joint family estate the pious obligation of his sons to discharge out of their interest his then existing untainted antecedent debts, the capacity to exercise that power for the benefit of the insolvent vests in the Receiver after adjudication, whatever may be the technical effect of the adjudication upon the co-parcenary in its other aspects. The observation of their Lordships of the Privy Council in A.I.R. 1925 P.C. 18 that the words in S. 2 "disposing power" must be taken to mean an absolute and unconditional power of disposal appears to have no connexion with the interpretation of S. 52 (2) (b). One cannot on the strength of that observation read the word "property" in S. 52 (2) (b) as though it were "property over which or the profits of which the insolvent has an absolute and unconditional disposing power which he can exercise for his own benefit." In the first place, however, S. 2 does not contain an exhaustive definition of the word "property." Secondly, the words in S. 2 are 'any person' and not 'the insolvent.' Thirdly, if so construed, S. 52 (2) (b) would become a mere redundant repetition of S. 52 (2) (a), since all property over which the insolvent has an absolute and unconditional disposing power which he may exercise for his own benefit is, by the definition in S. 2, included in the word "property" and so comes within the scope of S. 52 (2) (a). The insolvency of a father neither takes away the pious obligation of the sons nor destroys the curious right possessed by the father to enforce it, and this being so, the exercise of that right by a receiver in insolvency (who is very far from being

in the position of an ordinary stranger alienee) is in any away repugnant to the principles of Hindu Law. 93 Ind. Cas. 612=7 Lah. 376=28 P.L.R. 245=A.I.R. 1926 Lah. 264.

——S. 52—Hindu joint family—Managing member adjudicated insolvent — Official Assignee's powers.

The Official Assignee of the Insolvency of the managing member of a joint Hindu family succeeds to two things, (1) the undivided interest of the insolvent in the joint property, and (2) his rights as managing member so far as they can be exercised for his own benefit. He is not entitled to have vested in him the shares of the other members. although he can deal with them, if the insolvent could lawfully have done so, if there had been no insolvency. It follows that the Official Assignee, standing for this purpose in the shoes of the insolvent, can alienate the minor sons' interests in the joint property for the purpose of paying the insolvent's debts, unless the debts in question were incurred for an illegal or immoral purpose, the presumption being that they were not. He is joint owner of the property and he must be entitled to joint possession thereof. It is no doubt true that a stranger cannot by reason of having purchased a share in the joint property insist on having joint possession. But the Official Assignee is not an alienee but the representative of the insolvent. There are certain rights of a managing member which the Official Assignee cannot exercise by reason of the personal nature of the rights, such as the right to live in the family house or to share in the family meals. But he is entitled to all the rights of the insolvent, including the right to possession except such rights as are in their nature personal to a member of the family as such. 68 Ind. Cas. 898=1922 M.W.N. 653=16 M.L.W. 559=46 Mad. 54=A.I.R. 1923 Mad. 55=43 M.L.J. 569.

——Ss. 52, 62 and 64—Hindu joint family—Insolvency of Karta—Rights of Official Assignee.

Where the Karta of Hindu Mithakshara Family becomes an insolvent the official assignee's rights are only to such portions of the joint family estate as the insolvent was entitled to in his own right. The Official Assignee requiring the completion of a contract for sale of goods ordered from the defendant by the insolvent before adjudication must elect within a reasonable time to take up the contract and should make a tender of cash before requiring performance. 40 Cal. 523=18 Ind. Cas. 753.

8. Payment by insolvent's donors to creditors.

——S. 52—Payment by insolvent's debtor to creditors—Rights of Official Assignee to recover.

V and T were certified brokers of the Native Share and Stock Brokers Association. V sold to T 75 shares of the Century Mill for June delivery. He then bought from T 12 shares of the same Mill for the same delivery and he also bought five shares of the Fazul Mill for July delivery. Upon these transtctions three sums became due from T to V. As regads the purchase and sale of 12 Century shares the amount was Rs. 1,976-4-0. As to the balance, 63 Century shares, the profit due was Rs. 12,231 4-0 and on the Fazul shares the amount was Rs. 1,458-12-0. V who was in embarrassed circumstances intimated to the Association that he was unable to meet his obligations to his creditors within the Association. The matter was put before the Defaulter Committee, and an attempt at settlement was made. The matter came before the Board on 23rd June and by a resolution of that date he was declared a defaulter. After that date he was adjudicated an insolvent on the petition of an outside creditor. The amounts were actually paid by T to the Defaulter Committee after the date on which V was adjudicated insolvent who distributed to the inside creditors of V. In a suit by Official Assignee for V,

Held, that the sum of Rs. 1,976-4-0 became due quite apart from any action taken by the Board with respect to V's case, and was a case of ordinary differences. The Official Assignee was therefore entitled to recover.

Held further, that although the two sums of Rs. 12,231-4-0 due on the transaction of 63 Century shares, and Rs. 1,458-12-0 due on the transaction for five Fazul shares, were arrived at owing to the resolutions passed by the Board the sums were differences agreed to be due as between T and V and as such recoverable by V and therefore by the Official Assignee. 3 A.C. 213, Foll. 119 Ind. Cas. 788=31 Bom.L.R. 406=53 Bom. 508 =A.I.R. 1929 Bom. 236.

9. Property divisible among creditors.

——S. 52—Property divisible among creditors.

Costs awarded to undischarged insolvent in suit on tort are property of insolvent capable of passing to Official Assignee but not until he has intervened and claimed it. A.I.R. 1934 Rang. 333 =12 Rang. 428=154 Ind. Cas. 79.

10. Property vested in insolvent.

——S. 52—"Property vested in the insolvent"—Member of Bombay Native Share and Stockbrokers' Association — Card of membership—Right of member in.

In the case of a member of the Bombay Native Share and Stockbrokers' Association, the benefit in the card of membership is transferable and heritable only with the sanction of the board. The privilege evidenced by the card of membership is a purely personal privilege. There is no property of the insolvent member in his card which on his insolvency vests in the Official Assignee for the benefit of the general body of creditors. 33 Bom.L.R. 39=55 Bom. 623=133 Ind. Cas. 821= A.I.R. 1931 Bom. 225.

11. Provident Fund.

——S. 52—Provident fund established by Bank for benefit of its employees—Fund is in the nature of trust—Relation between Bank and employee is not that of debtor and creditor — Bank holds funds in fiduciary character—On Bank going into liquidation, fund does not form part of assets of Bank by combined operation of S. 229, Companies Act, and S. 52, Presidency Towns Insolvency Act—Employees are entitled to be paid in full the amounts standing to their credit in fund. A.I.R. 1939 Mad. 352=1938 M.W.N. 1332= 183 Ind. Cas. 889.

——S. 52 — Provident Fund—Official Assignee not intervening before it reaches insolvent—Effect—Acquisition of property after insolvency—Non-intervention by Official Assignee.

The absence of intervention by the Official Assignee before the money deposited in Provident Fund reaches the insolvent's hands might affect the vesting of the money, but when it comes into the possession of the insolvent, it is nevertheless his property, the property of an insolvent divisible among his creditors within the meaning of S. 52 (2) (a).

When the Official Assignee does not intervene all transactions in respect of property acquired after the insolvency with any person dealing with the insolvent bona fide and for value are valid against the Offic il Assignee. A.I.R. 1938 Rang. 245=39 Cr.L.J. 754=176 Ind. Cas. 460.

12. Receiver appointed before insolvency.

——S. 52—Receiver appointed before insolvency—Cl. (c) does not apply.

Where at the commencement of the insolvency the goods of the debtor are in the possession of receiver appointed by the Court, order and disposition clause in S. 52 does not apply, for the appointment of a receiver removes the property from the possession of the debtor and vests it in the receiver. 118 Ind. Cas. 70=52 Mad. 938=29 M.L.W. 664=A.I.R. 1929 Mad. 184=56 M.L.J. 95.

13. Reputed ownership.

——S. 52—Reputed ownership — "Possession, order or disposition."

The phrase 'possession, order or disposition" in S. 52 is used disjunctively, and debts due or growing due to the insolvent in the course of his trade or business are 'goods' by reason of the first proviso to S. 52. A.I.R. 1938 Rang. 426 =1938 Rang.L.R. 480=179 Ind. Cas. 541.

——S. 52 — Reputed ownership — Mortgage of book debts—Appropriate way to end reputed ownership — Taking possession, if enough—Subsequent insolvency of mortgagor—Effect.

The only appropriate way to put an end to the assignor's reputed ownership of book debts that is recognized is for the assignee to give notice to the debtors. If he does not do so, he prima facie leaves them—and voluntarily leaves them—in the order and disposition and reputed ownership of the assignor. In view of the fact that he might at any time since the commencement of the security, by giving notice, have terminated his consent to the insolvent's reputed ownership, it is not open to him if he waits until the very last moment to say that he has had no time to do it.

A person mortgaged in 1931 his book debts. On January 5, 1937, the assignee took possession of the transferor's property under the charge. Notices to that effect were posted at the entrances. But no express notice of the charge was sent to the debtors. On the next day of the assignees taking possession, the transferor applied and got himself adjudicated insolvent:

Held, that the acts of the assignee could not be taken to constitute notice to debtors who may, indeed, be in any part of the world. The reputed ownership of the insolvent did not, therefore, end. Consequently, the book debts outstanding at the date of the commencement of the insolvency were the property of the insolvent divisible among his creditors. A.I.R. 1938 Rang. 1=175 Ind. Cas. 786.

[Reversed in A.I.R. 1938 Rang. 426=179 Ind. Cas. 541.]

——S. 52—Reputed ownership.

The express right of the assignee to sue a debtor in his own name conferred by S. 130 (1) T. P. Act, and the 'possession, order or disposition' giving rise to a condition of 'reputed ownership' under S. 52 (2) (c), Presidency Towns Insolvency Act, are two entirely separate things. It may very well be that so far as the assignee's right to sue is concerned, it is complete and yet there may be left with the assignor such an appearance of continued or reputed ownership as to invoke the order and disposition clause. A.I.R. 1938 Rang. 1=175 Ind. Cas. 786.

——S. 52—Reputed ownership—Scope of.

The doctrine of reputed ownership incorporated in S. 52 has been part of the Bankruptcy Law of England, and its object is to prevent deceit by a trader from the visible possession of property to which he is not entitled. A.I.R. 1937 Sind 37=31 S.L.R. 391=167 Ind. Cas. 505 (2).

——S. 52 — Reputed ownership — 'True owner'—Mortgagee, charge-holder and beneficiary entitle to immediate possession of goods.

The expression 'true owner' under the Bankruptcy Law does not mean the same thing as in the ordinary language is meant by the expression 'owner of goods'. It means the person who has the right to determine the appearance of ownership in the bankrupt and his title so to do may be either legal or equitable. A mortgagee, a charge-holder, and a beneficiary entitled to immediate possession of goods, all come within the purview of the expression 'true owner.' A.I.R. 1937 Sind 37=31 S.L.R. 391=167 Ind. Cas. 505 (2).

——S. 52—Reputed ownership — 'True owner', whether includes person having legal title.

'True owner' for the purpose of S. 52, can have a very special meaning and can include a person having lien, or an equitable charge; as well as a person having the legal title. A.I.R. 1933 Mad. 207=37 M.L.W. 32=56 M. 177=64 M.L.J. 320 =143 Ind. Cas. 641.

——S. 52—Reputed ownership—Delivery of goods sellers—Terms purporting to make them trustees for sellers—Insolvency of buyers—Goods, whether vest in Official Assignee.

Where certain goods were delivered by the sellers to the buyers and the terms of the contract purported to make the buyers trustees for the sellers of the goods and of the proceeds until payment and, after the delivery the buyers became insolvents:

Held, that the goods were in the reputed ownership of the buyers and consequently, they vested in the Official Assignee.

No special words or legal formula can preserve a control where actual control has been abandoned or maintain a connexion with the goods when the connexion has been, in fact, severed or save for the seller property which a seller hands over to a buyer with capacity to deal with it either as against transferees for value or against the Official As-

signee. If the exigencies of trade required that the goods must be handed over for sale, the seller takes the risk, he cannot put that risk upon the public which deals with his buyer ostensibly in possession of those goods as owner. A.I.R. 1932 Cal. 680=59 C. 818=140 Ind. Cas. 594.

——S. 52—Reputed ownership.

Burden of proving circumstances of reputed ownership lies on Official Assignee. Reputation of ownership is always a question of fact depending upon the circumstances of each case. A.I.R. 1931 Sind 70=25 S.L.R. 381=131 Ind. Cas. 705.

——S. 52—Reputed ownership — Withdrawal of consent—Communication of withdrawal — Mere demand — Mortgage of goods in shop, whether covers future goods.

A and **B** carried on business in partnership. The accounts were settled and **B** carried on the business separately after executing a bond to **A** mortgaging the 'goods in the shop' for the amount which was found due to **A**. **B** afterwards became insolvent and the Official Assignee claimed the goods lying in the shop against **A**. The old goods under the mortgage were sold and new goods were brought in for the purpose of the business from time to time and on the day of the insolvency, the goods in the shop were mostly new goods:

Held, (1) that as the mortgage was only in respect of the goods in the shop and not for the future goods, **A** had no right to the goods against the Official Assignee:

(2) that in any case, the goods were with the consent of **A** in the order, possession and disposition of the insolvent, under such circumstances that the insolvent was the apparent owner and consequently, the Official Assignee had a right to claim these goods under the rule of reputed ownership.

Under S. 52 (2) (c), unless a withdrawal of consent is communicated to the person from whom consent is withdrawn, such withdrawal will not be effective.

The question whether in a particular case a demand is made and so the consent is withdrawn, is a question of fact depending on the merits of each case. The demand must be effective, **bona fide** and should be pursued with a view to take possession of the mortgaged goods. It should not be merely a casual demand. A.I.R. 1931 Sind 40=25 S.L.R. 318=131 Ind. Cas. 708.

——S. 52—Reputed ownership.

Where the insolvent executes a pronote in exchange for delivery of goods and the pronote contains a trust receipt stating explicitly that the property in goods or the proceeds thereof is to remain in the sellers until payment the property in the goods does not pass to the insolvent and the goods remain in his reputed ownership within the meaning of S. 52 (2) (c). 121 Ind. Cas. 745=56 Cal. 1074=A.I.R. 1930 Cal. 171.

——S. 52—Reputed ownership — Lorry hired out and used in business—Insolvent is reputed owner.

The very fact that the vehicle hired out by the insolvent who was a trader, was a lorry is sufficient to raise the presumption that the owner parted with its possession knowing that it will be used by the insolvent for his trade and this coupled with the fact that it was so used and was in his possession at the date of presentation of insolvency petition brings it within the rule laid down in S. 52 (2) (c). 117 Ind. Cas. 158=23 S.L.R. 456=A.I.R. 1929 Sind 167.

——S. 52—Reputed ownership—"True owner".

The words "true owner" include the owner of an equitable interest and there can also be a reputed owner of that interest and that reputed owner can be the insolvent himself, that is the legal owner of the property. 39 Mad. 250; 25 Mad. 406 and 11 A.C. 426, Foll. 79 Ind. Cas. 809=47 Mad. 215=19 M.L.W. 54=33 M.L.T. 217=A.I.R. 1924 Mad. 214=45 M.L.J. 817.

——Ss. 52 and 56—Reputed ownership — Sale of stock-in-hand a few days before Insolvency—Possession with insolvent—Validity of sale—If transaction fraudulent and void.

Where goods sold by an insolvent prior to his insolvency are allowed to remain in his own shops until the date of his insolvency, they are in the "possession order and disposition" of the insolvent within S. 52. A sale by the insolvent to a thick friend of his, the consideration for sale consisting of moneys borrowed both by the insolvent and the vendee from a third person, must be looked upon with great suspicion and where the goods sold are not removed from the insolvent's premises till date of his insolvency, the sale must be deemed to be fraudulent and void under S. 56.

Quaere.—Where the sale by an insolvent is for a sum already due to the vendee, whether the vendee could rank as a secured creditor. 29 Ind. Cas. 947 (Mad.).

——S. 52—Reputed ownership—Determination of consent.

It is essential for the section to apply that insolvent should at the commencement of the insolvency be the reputed owner. A letter demanding return of the thing in dispute from this insolvent under threat of criminal proceedings if not complied with is a sufficient determination of the consent.

Per **Schwabe, C.J.**—Consent is determined by the instructions to the Vakil to send the letter and the sending of that letter by him. 79 Ind. Cas. 809=47 Mad. 215=19 M.L.W. 54=33 M.L.T. 217=A.I.R. 1924 Mad. 214=45 M.L.J. 817.

——S. 52—Reputed ownership—Floating charges.

S. 52 does not apply to cases of floating charges created by company registered under the Companies Act of 1913 before its liquidation in favour of its bank.

Where the company under liquidation was an agent to another company for the sale of its goods and its duty was to sell the goods of the principal company and pay the sale proceeds to the latter in due course and return the goods not sold, the principal company was held to have priority in respect of the price of goods received from the agent company. 85 Ind. Cas. 626=20 M.L.W. 861=A.I.R. 1925 Mad. 271.

——S. 52—Reputed ownership.

The pertinent words of the section are 'by the consent and permission of the true owner." So long as the reputed owner is in possession with that consent and permission, and if he is so at the time of insolvency, the goods will pass to the

Official Assignee for the benefit of all the creditors. But, if prior to the insolvency, the true owner withdraws that consent and communicates that withdrawal to the insolvent, the goods can no longer be said to be in the possession, order, or disposition of the reputed owner so as to pass them to the Official Assignee. 74 Ind. Cas. 919=1 Rang. 153=2 Bur.L.J. 248=A.I.R. 1924 Rang. 27.

——S. 52—Reputed ownership.

The words 'in trade or business' cannot be used in their narrow sense. The true construction is that the goods must be in his order or disposition for the purposes of or purposes connected with his trade or business. The language 'in his trade or business' means, not merely visibly employed in his trade or business, but acquired for the purposes of the business, and used for those purposes. 83 Ind. Cas. 546=2 Rang. 154=A. I. R. 1924 Rang. 297.

——S. 52—Reputed ownership—Hypothecation — Stock-in-trade—Possession, order and disposition —Meaning of.

Held, that on the day of the bankruptcy, which related back to the day of absconding, the stock-in-trade was in the possession, order and disposition of the Insolvent so as to make him the reputed owner thereof under S. 52 of the Presidency Towns Insolvency Act. The possession which the petitioner (one of the creditors) had under an agreement of hypothecation accompanied by delivery of keys was not real possession. A deliberate arrangement, such as the above agreement, contemplated to deceive the public, was a fraud upon the Act. Under the agreement the goods were absolutely in the possession, order disposition of the insolvent during the working hours of the day. The petitioner was not entitled to rank as a secured creditor. 22 M.L.J. 441=11 M. L. T. 203=15 Ind. Cas. 371.

——S. 52—Reputed ownership — Possession as agent.

Where possession of certain goods was held by an insolvent firm as agents for sale on a commission basis and on their note-paper they represented themselves as commission agents,

Held, that the insolvents were not reputed owners of the goods within the meaning of S. 52 (2) (c). 100 Ind. Cas. 1017=6 Bur.L.J. 9=A. I.R. 1927 Rang. 133.

14. Rulings on—Applicability to Provincial Insolvency Act.

——S. 52—Rulings on — If apply under Provincial Insolvency Act.

Per King, J.—There is nothing in the Provincial Insolvency Act corresponding to S. 52 (2) (b), Presidency Towns Insolvency Act, but the omission does not furnish any ground for holding that a ruling based on S. 52 (2) (b) does not apply to the Provincial Insolvency Act. A.I.R. 1931 All. 162=1931 A.L.J. 122=53 All. 239=135 Ind. Cas 119 (F.B.).

15. Scope.

——S. 52—Scope.

S. 60 does not interfere with the provision of S. 52. A.I.R. 1941 Mad. 906=I.L.R. (1942) Mad. 199=54 M.L.W. 420=1941 M.W.N. 899 =(1941) 2 M.L.J. 591=200 Ind. Cas. 582.

16. Secured creditor.

——Ss. 52, 17, 57—Secured creditor—Omission to give notice of charge to original debtor—Reputed ownership—Extinguishment of charge—S. 52, construction of.

Where a secured creditor holds a charge or a lien or a mortgage on debts due to a person in the course of his trade or business and the chargeholder omits to perfect his title by giving a notice to the original debtor and leaves them in the possession, order of disposition of that person under such circumstances so as to allow him to deal with them in any way he likes and that person afterwards is adjudged insolvent, the Official Assignee has a right to step in and claim the debt for the general body of the creditors in preference to the right of the secured creditors, under the doctrine of reputed ownership in S. 52, Cl. (c) proviso.

S. 52 is an independent section by itself and is an exception to S. 17. A.I.R. 1931 Sind 44= 25 S.L.R. 310=131 Ind. Cas. 130.

17. Security deposit.

——S. 52—Security deposit by Receiver — Whether vests in Official Assignee on his adjudication.

Money deposited by Receiver in Court by way of security for the due discharge of his office, is not property over which he has a disposing power which he may exercise for his own benefit until it is ascertained whether the same or any portion thereof will be required to be paid out in fulfilment of the condition under which the deposit has been made. The money so deposited does not, therefore, vest in the Official Assignee under S. 52 of the Presidency Towns Insolvency Act on the adjudication of the Receiver. In this view, the Insolvency Court has no jurisdiction to direct payment of the amount to the Official Assignee for distribution amongst the creditors of the insolvent. From another point of view it may be taken that the amount which is deposited in Court by way of security is in the nature of a trust in favour of a particular creditor as the debtor had no control over the money and the Court is bound to apply it only for the purpose specified. 53 C. W. N. 832.

——S. 52—Security deposit—Employee of Bank as part of his engagement depositing money by way of security for honesty — Money placed on fixed deposit in his name—Agreement to pay interest—Such money is held by Bank in trust—Insolvency of Bank—Such money can be followed so as to reach assets of Bank. A.I.R. 1938 Mad. 651=48 M.L.W. 153=1938 M. W. N. 7=178 Ind. Cas 428.

18. Successive adjudications.

——S. 52—Successive adjudications — Rights of distribution—Representation by Official Assignee.

An insolvent obtained an unconditional discharge, no assets being recovered. He was again adjudicated insolvent, and his property acquired after the discharge thereupon became vested in the Official Assignee for distribution among his creditors. Meanwhile, the order of discharge in the first insolvency was rescinded, and it was ordered that the adjudication should be revived, and an order was made that the proceedings in the two insolvencies should be consolidated.

Held, that subject to any bona fide and valid disposition of the property of the insolvent that had been effected between the date of discharge and its rescission, the property acquired after the discharge, and any other assets recovered by the Official Assignee in the second insolvency would become assets distributable in the second insolvency and that the Official Assignee as the representative of the creditors in the first insolvency would be entitled to prove in the second insolvency, and to receive dividends pari passu with the creditors in the second insolvency. 106 Ind. Cas. 326=54 Cal. 858=A.I.R. 1928 Cal. 50.

19. Transfer of equity of redemption.

——S. 52—Transfer of equity of redemption—S. 57—Not goods—Validity.

An equity of redemption is not goods within the meaning of S. 52 (2) (c) of the Act, and under S. 57, any transfer thereof by the insolvent for valuable consideration is valid provided it takes place before the order of adjudication and the person with whom such transaction takes place has not, at the time, notice of the presentation of any Insolvency Petition by or against the debtor. 69 Ind. Cas. 968=45 Mad. 238=14 M.L.W. 715 =A.I.R. 1922 Mad. 144=42 M.L.J. 155.

20. Trust.

——S. 51—Trust — Insolvent Chettyar firm crediting certain amount in name of certain temple and treating itself as debtors of temple—No amount set aside or withdrawn from firm assets—Trustees of temple having no control over such amount—Firm neither holds such amount as trustees of temple nor endowment is effected for deity—Hindu Law—Religious endowment—Trust—Creation of.

It may be as well to guard against the supposition that because the other party to the transaction was a deity the insolvents must have made themselves trustees.

Where the account books of an insolvent Chettyar firm contain an amount credited in the name of a certain temple by way of charity or by way of promise and the entries disclose the intention on the part of the firm to treat itself as debtors to the temple but no such amount is set apart as withdrawn from the firm's assets and the trustees of the temple have no control over such amount but it is to be expended for the deity by the firm at its discretion as occasion may arise, it is unreasonable to hold that the insolvent firm held such amount as trustees of the deity. Nor do the entries in the books effect an endowment of the property for deity. A.I.R. 1938 P.C. 259 =42 C.W.N. 1125=48 M.L.W. 466=1938 M. W.N. 1002=5 B.R. 1=40 Bom.L.R. 1230= (1939) 1 M.L.J. 192=1939 Rang.L.R. 59=32 S.L.R. 898=176 Ind. Cas. 906 (P.C.).

——S. 52—Trust.

Winding up of insolvent company — Company agreeing to hire film to T on deposit of Rs. 1,000 —T sending Rs. 250 as earnest money — Company informing its liability to complete contract—Amount credited to suspense account of T—Demand by T but failure of company — Insolvency of company—T admitted as creditor claiming whole amount—Company having at its credit Rs. 1,100 at winding up order:

Held, that the company was trustee for T for rupees 250; that T was entitled to the whole amount under S. 229, Companies Act, read with S. 52 (1) of the Presidency Towns Insolvency Act. A.I.R. 1937 Mad. 833=47 M.L.W. 260 =(1938) 1 M.L.J. 293=1938 M.W.N. 1178= 177 Ind. Cas. 50.

——S. 52—Trust — Agreement between vendor and vendee—Vendee made trustee for goods or their sale proceeds for unpaid purchase-money—Trust created defeating provisions of S. 52 (2) (c)—Legality of trust—Vendor, if can claim lien —Remedy of vendor.

A vendor parted with goods to the vendee, making the vendee a truste- for 'the goods sold or their sale proceeds' for unpaid purchase-money, thus enabling the vendee to get false credit. On the vendee becoming insolvent, the vendor applied against the Official Assignee for the recovery of the sale proceeds of the goods sold and claimed lien for the unpaid purchase money on the movable assets of the debtor before other creditors were paid:

Held, that the applicant was in no better position than a pledgee of goods who has allowed the pledgor to retain or take possession of the goods with power to sell them in the ordinary course of business. The use of the expression 'trustee for their goods or their sale proceeds" was nothing more than an eye-wash intended to defeat the provisions of S. 52 (2) (c) and could not, therefore, create a valid trust binding upon the Official Assignee. This is abundantly clear from the provisions of S. 4, Trusts Act.

Held, also that it was incumbent upon the applicant to see that the insolvent did not obtain false credit by putting up a board on the premises or by giving notice to the public by any other adequate means that the debtors were not absolutely entitled to all the goods which were under their control. The applicant having failed to take any such precaution, the goods, even if they had not been parted with by the debtors, would have vested in the Official Assignee. All the goods of the applicant having been sold, even if there was a valid trust in the applicant's favour and the doctrine of reputed ownership was not applicable the applicant must fail. The sale proceeds of the applicants could not be identified with the general assets of the insolvents in the hands of the Official Assignee. It could not even be said to whom the applicant's goods which were mixed up with the goods of a like nature were sold and whether

they were sold for cash or on credit and how the money realised therefrom was utilised. The vendor could not, therefore, claim any lien on the movable assets of the vendee in the hands of the Official Assignee before other creditors were paid and the remedy of the applicant was to prove his claim before the Official Assignee as an unsecured creditor and prove the amount of loss sustained by him. A.I.R. 1937 Sind 37=31 S.L.R. 391=167 Ind. Cas. 505 (2).

——S. 52—Trust.

Investment in firm to be handed over to the minor on attaining majority—Insolvency of firm—Assets of firm passing to Official Assignee.

Held, that the investment was sufficient to give the plaintiff a charge upon the sale proceeds in the hands of the Official Assignee. A.I.R. 1933 P. C. 148=37 M.L.W. 780=37 C.W.N. 713=1933 A.L.J. 637=35 Bom.L.R. 756=60 I.A. 203=57 C.L.J. 433=1933 M.W.N. 575=65 M. L.J. 1=56 M. 570=143 Ind. Cas. 162 (P.C.).

——S. 52—Trust — Insolvent holding money in trust—Rights of beneficiary —Obtaining personal decree, effect of.

A company agreed to employ a person as their agent on terms of an agreement which was prepared in draft under which the agent was to pay Rs. 1,000 as deposit to be retained by the company who were to pay interest on it. The agent paid the money but before the agreement was executed, the company became insolvent. The agent sued the company and obtained a decree after the date of the insolvency for recovery of the deposit with interest:

Held, that as the agreement had not been executed, the money was held in trust for a specific purpose by the company, and the plaintiff would have been entitled to recover the whole of the deposit as money held in trust but for the fact that he had obtained a personal judgment for the money. A.I.R. 1933 Bom. 437=35 Bom L. R. 946=58 Bom. 67=146 Ind. Cas. 984.

——S. 52—Trust — Goods entrusted to insolvent as agent, whether pass to Official Assignee—Possession inconsistent with ordinary usage of trade, effect of—Burden of proof.

Goods entrusted to a person as agent for sale and stored by him as the goods of his principal are goods held by him on trust in the fiduciary capacity of an agent within the meaning of S. 52 (1) (a), and consequently, do not pass on the insolvency of the agent to the Official Assignee unless the principal has permitted the agent to have a possession not consistent with the ordinary usage of trade, thus raising a reputation of ownership in the insolvent. The burden of proving circumstances of reputed ownership lies on Official Assignee. A.I.R. 1931 Sind 70=25 S.L.R. 381=131 Ind. Cas. 705.

——S. 52 (c)—Trustee authorised to invest trust moneys in his own business—Adjudication of trustee—Trust funds—Reputed ownership.

Where a trustee is authorised by the terms of the trust to invest the trust funds in his own business and pay interest thereon, and he so uses it; the trust funds cannot be traced by the **cestui que trust** as the relationship between them is, by virtue of such liberty, converted into one of debtor and creditor. The funds will be available for the benefit of the general body of creditors as property subject to the reputed ownership of the trustee. 1930 M.W.N. 1077=134 Ind. Cas. 161=A.I.R. 1931 Mad. 251=60 M.L.J. 355.

——S. 52—Trust — Insurance money — Insured goods with commission agent—Goods destroyed—Agent becoming insolvent—Money if received by Official Assignee can be recovered.

Plaintiff had some corn lying in the godown of defendant on commission sale when the building was burnt down and the corn was destroyed. Agent became insolvent. The corn was covered by a fire insurance policy and the insurance company paid the insurance money to the receiver. The insurance premium was paid by the plaintiff.

Held, that the insurance money paid to the Official Assignee for goods destroyed by fire could be recovered by the plaintiff-creditor who would have a first claim on it. Even if the trust property had been changed into money, still it could be ear-marked and it could be followed and claimed by the **cestui que trust.** 117 Ind. Cas. 51=6 Rang. 689=A.I.R. 1929 Rang. 59.

——S. 52—"Trust"—Not confined to express trusts.

The word "trust" as used in S. 52 is not confined to express trusts but includes all kinds of property held by the insolvent in a fiduciary character. Where goods are entrusted to a commission agent for sale, they do not pass to the Official Assignee, but if the agent has sold them, the money passes to the Official Assignee in insolvency.

When a trader gives goods to the actual commission agent he looks for payment not from the actual sale proceeds of the goods entrusted but to the general credit of the commission agent. 102 Ind. Cas. 389=5 Rang. 73=A.I.R. 1927 Rang. 140.

——S. 52—Trust — Owner's claims.

When goods are insured and the insurance money is received by the agent, that money must be in the same category as money received by him on the sale of the goods.

Where the insurance money has become payable only after the insolvency and death of the agent, the insurance money vests in the Official Assignee and the owner of the goods has no claim to it. 102 Ind. Cas. 389=5 Rang. 73=A. I.R. 1927 Rang. 140.

——S. 53—"Assets realized."

In S. 53, the word "assets" is limited to money or cash which is capable of immediate distribution among the decree-holders. The scope of the section has not been widened by S. 73, C. P. Code. The words "assets held by Court" must mean "money held by a Court", for it is only money and not goods which can be the subject of rateable distribution. The order for rateable distribution no doubt operates so as to create title in the decree-holders to the subject-matter of the order, but money alone can be the subject-matter of the order. Rateable distribution only comes into operation after the sale has been held and the goods converted into money, when the sale proceeds would come into the hands of the Receiver and could be said to be held by the Court. A. I.R. 1929 Cal. 530=I.L.R. (1939) 2 Cal. 143=43 C.W.N. 1197=184 Ind. Cas. 657.

——S. 53—"Assets realised" — Money received by Court for benefit of decree-holder in virtue of execution process.

Although money voluntarily paid by a judgment-debtor into Court for the satisfaction of a decree against him is not 'assets realised in execution', where money is received by a Court in virtue of execution process, it must be held that it is "assets realised in the course of the execution." The requirements of S. 53, are fully satisfied if the money is received by the Court for the benefit of the decree-holder in proceedings initiated according to law for the purpose of executing the decree. A.I.R. 1934 Oudh 11=11 O.W.N. 1282=9 Luck. 278=147 Ind. Cas. 68.

——S. 53—Attachment — Should be raised on adjudication.

If a person is adjudicated insolvent in the High Court there can be no doubt that the High Court, subject to the exceptions mentioned in the section must raise an attachment issued by itself against his property, on the application of the Official Assignee, and whether the property of the insolvent outside British India vests or not, it cannot allow any creditor of the insolvent to take advantage of attachment proceedings as against the Official Assignee. 94 Ind. Cas. 146=50 Bom. 439=28 Bom.L.R. 381=A.I.R. 1926 Bom. 271.

——S. 53—Attachment — Effect.

Mere attachment of property does not constitute a charge and does not constitute the attaching creditor a secured creditor within the meaning of S. 53 (2). 41 Bom.L.R. 506.

——S. 53—Construction.

The section should be so construed as not to apply to notice of presentation of an insolvency petition which has been disposed of and on which no adjudication can follow; but the language ought not to be restricted so as to exclude notice of presentation of an insolvency application on which adjudication may follow. 41 Bom.L.R. 506.

——S. 53—Execution sale—Purchase in good faith prior to adjudication order—Purchase, if can be assailed—Person relying on S. 53 (3)—Onus.

Sub-S. (3) of S. 53 has this effect that if it can be shown that a purchaser in execution proceedings has purchased in good faith prior to the order of adjudication, his purchase cannot be assailed on grounds based on S. 51. If a party seeks to validate an otherwise invalid purchase by relying on sub-S. (3), the burden falls on him of showing that he is covered by it. A.I.R. 1941 Cal. 112=194 Ind. Cas. 423.

——Ss. 53 (1), 108 and 109—Order of Administration—Attachment by creditor prior to order—Sale after order—Rights of attaching creditor.

S. 53 (1) of the Presidency Towns Insolvency Act does not apply to an administration of the insolvent's estate of a deceased person under Ss. 108 and 109 of the Act. An attachment only prevents alienation and does not confer any title or create any charge or lien on the attached property. A creditor who has attached property in execution of a decree has no right therein prior to sale and, upon the making of an administration order before sale the property vests in the Official Assignee and the attaching creditor is relegated to the same position as the other creditors. 44 Cal. 1016=43 Ind. Cas. 348.

——S. 54—Receiver at the instance of a creditor directed to sell judgment-debtor's property—His appointment as an auctioneer—Property put up for sale—Before completion of sale, judgment-debtor adjudicated insolvent—Receiver giving possession to Official Assignee — Application by Receiver for payment from the Official Assignee for the rent of the premises where judgment-debtor's property was stored and for charges of the auctioneer and other clerks:

Held, (i) that Receiver was only entitled to costs incurred up to the date of adjudication;

(ii) remedy for other expenses is against the creditor at whose instance he was appointed. I.L.R. (1941) 2 Cal. 37.

——S. 55.

See also PRESIDENCY TOWNS INSOLVENCY ACT, S. 56.

Synopsis.

1. Applicability.
2. Burden of proof.
3. Enquiry under.
4. Fraudulent preference.
5. Good faith.
6. Limitation.
7. Rights of creditor.
8. Rights of transferee.
9. Scope.
10. Transfer.
11. Valuable consideration.
12. Void—Meaning.

1. Applicability.

——S. 55—Applicability—Property over which insolvent as karta or trustee has disposing power.

S. 55 does not apply to property over which an insolvent in his capacity as karta or trustee has a disposing power, at any rate with regard to the shares of other persons interested in it. A.I.R. 1942 Cal. 342=46 C.W.N. 256=200 Ind. Cas. 560.

——S. 55—Applicability—Single application to set aside several alienations—Multifariousness.

An application by the Official Assignee to set aside a number of alienations made within a short period by the insolvent in pursuance of a general scheme to defraud creditors is not bad for multifariousness. A.I.R. 1937 Mad. 192=71 M.L.J. 788=44 M.L.W. 872=167 Ind. Cas. 520 (2).

——S. 55—Applicability — Mortgage for previous debts—Section applies—Test.

Within two years previous to the adjudication of a person as insolvent, he mortgaged all his available assets to another to whom he owed a huge amount, but there was no contemporaneous payment or any undertaking on the mortgagee's part to make any payment in future to enable the transferor to carry on business and the mortgagee knew at the date of the transfer that the mortgagor was unable to pay his debts.

Held, that the deed was void against the Official Assignee

Held, further, that in considering the effect of

a transaction of this nature the facts must be considered in the light of the law of bankruptcy, the object of which is to ensure rateable distribution of an insolvent's property among his creditors. A transaction therefore which may in other circumstances be free from all taint becomes an offence when it is established that it contravenes the law of bankruptcy. 87 Ind. Cas. 392=29 C.W.N. 374=A.I.R. 1925 Cal. 640.

——S. 55—Applicability—Only Official Assignee can make application.

An application made by virtue of the provisions of Ss. 55 and 56 can only be made by Official Assignee in whom the property of the insolvents is vested and not by a creditor. If the Official Assignee, when asked to take action, refuses it may be that with the leave of the Court a creditor may make such an application. 70 Ind. Cas. 463=26 C.W.N. 803=A.I.R. 1921 Cal. 403.

——S. 55—Applicability— Mortgage by insolvent within two years of insolvency.

Where the mortgage transaction set up was not shown to have been entered into in good faith and for the full consideration the proper course was to set aside the whole mortgage and allow the mortgagee to prove as an unsecured creditor for the amount actually advanced. 43 Mad. 739=39 M.L.J. 345=28 M.L.T. 258=60 Ind. Cas. 205.

2. Burden of proof.

——S. 55—Burden of proof.

Under S. 55, the burden of proof is on the Official Assignee seeking to set aside a transfer. A.I.R. 1941 Rang. 250=1941 Rang.L.R. 268=197 Ind. Cas. 513.

——S. 55—Burden of proof — Transfer made to insolvent's agent—Good faith—Onus.

The burden lies on the Official Assignee to prove that a transfer is without good faith and valuable consideration. It is not proof of the parties to the transaction but proof of the nature of the transaction itself, and that alone which can discharge the onus cast upon the Official Assignee. A transfer to an agent is no more **prima facie** proof of **mala fides** or want of consideration than transfer to a near relative. A transfer to an insolvent's agent does not, therefore, shift the burden to prove want of good faith and valuable consideration, which lies upon the Official Assignee. A.I.R. 1939 Rang. 54=179 Ind. Cas. 966.

——S. 55—Burden of proof—Want of consideration.

Under S. 55, where the Official Assignee seeks to invalidate a transfer of property upon the ground of want of consideration, the burden of proof lies upon him to show that in fact no consideration for the transfer existed. Where the Official Assignee desires to show that a transfer which **has in fact been executed** is void against him for want of consideration, or where he desires to show that what purports to have been a mortgage is not a mortgage at all, the burden of proof lies upon his shoulders and it is not displaced on proof of existence of blood relationship between the insolvent and the transferee. A.I.R. 1937 Rang. **113=169 Ind. Cas. 594.**

——S. 55—Burden of proof—Want of good faith.

The onus of proving that transfers by an insolvent were not made in good faith and for valuable consideration lies on the Official Assignee. A. I. R. 1936 Cal. 212=40 C.W.N. 1012=162 Ind. Cas. 650.

——S. 55—Burden of proof—Transferee claiming that he was excluded from operation of S. 55.

Per **Page, C.J.**—When S. 55 is construed in the sense that the onus of proving that a transfer of property was not made in good faith and for valuable consideration lies upon Official Assignee, it imposes an unreasonable and unfair burden upon the Official Assignee. The law ought to provide that the onus should lie upon the transferee under S. 55 to prove that the transfer was made in good faith and for valuable consideration, the general rule being that such a transfer is void as against the Official Assignee representing the general body of creditors. If a transferee claims that he took the property **bona fide** and for valuable consideration and therefore, was excluded from the operation of the section, the onus ought to be placed upon him of proving that the transfer did not fall within the ambit of S. 55. A.I.R. 1936 Rang. 145=162 Ind. Cas. 202.

——S. 55—Burden of proof—Transfer challenged as not made bona fide and for consideration.

Under S. 55, the onus is on the Official Assignee and not on transferee that a transfer sought to be set aside was not made in good faith and for valuable consideration. In order that such a transfer should be excluded from the operation of the section, there are two essential elements in the transaction that must be proved: (1) that it was made bona fide, and (2) that it was made for valuable consideration. If the Official Assignee proves that the transfer was made within two years of the insolvency and also that it was made either not **bona fide** or without valuable consideration, he is entitled to obtain an order setting aside the transfer upon the ground that it has been proved that the transfer under consideration does not contain both the elements that are requisite for its validity as against him and, therefore, that it falls to be set aside under S. 55. The Official Assignee need not discharge the burden of proving absence of both good faith and valuable consideration but he must, in order to succeed, discharge the burden of proving the absence only of one of these elements. A.I.R. 1936 Rang. 98=14 Rang. 109=161 Ind. Cas. 435.

——S. 55—Burden of proof.

Application under, to set aside a transfer by an insolvent—The onus of proving that the transfer was not made in good faith and for consideration is upon the Official Assignee. 14 Rang. 103.

——S. 55—Burden of proof—Transfer challenged as not in good faith and for valuable consideration.

Where a deed of sale is impeached as not being a transfer in good faith and for valuable consideration within the meaning of S. 55, it is for the Official Assignee who challenges it to establish the contrary in order to succeed in his application. A.I.R. 1934 P.C. 3=1933 M.W.N. 1449=58 C.L.J. 471=66 M.L.J. 1=39 M.L.W. 1=1934 A.L.J. 77=36 Bom.L.R. 137=12 Rang.

105=38 C.W.N. 117=60 I.A. 362=146 Ind. Cas. 743 (P.C.).

——Ss. 55 and 56—Burden of proof—Not only preference but that intention to give preference is necessary.

Under S. 55 the onus lies on the person who seeks to impugn the validity of the transfer, that is to say, in the majority of cases, upon the Official Assignee.

Under the provisions of S. 56, it is not sufficient merely for the person impugning a transaction to show that in fact there was a preference; he has also to show that the transaction was made with a view to giving that preference. In such cases, a very serious and almost insurmountable task lies in the way of the Official Assignee in seeking to challenge the transfer. A.I.R. 1934 Cal. 54=60 Cal. 1278=149 Ind. Cas. 861 (2).

——S. 55—Burden of proof.

The Official Assignee seeking to avoid a transfer under S. 55 has to prove that the transactions were not made in good faith and for valuable consideration. He should also prove both voluntariness and mala fides if relied on. A.I.R. 1932 Cal. 621=36 C.W.N. 337=138 Ind. Cas. 741.

——S. 55—Burden of proof—Trust of property—Bona fides.

In case of a trust created by an insolvent for his creditors prior to his adjudication, the burden of proving the bona fides of the trust, that is, that the trustee is a purchaser in good faith and for valuable consideration is on the trustee. A.I.R. 1931 Mad. 366=33 M.L.W. 468=61 M.L.J. 27=130 Ind. Cas. 753.

——S. 55—Burden of proof.

The burden of proving good faith and consideration in cases arising under S. 55 is on the person claiming to be a secured creditor. 43 Mad. 739, Foll. 115 Ind. Cas. 903=6 Rang. 676=A.I.R. 1929 Rang. 60.

——S. 55—Burden of proof.

The onus of proving that a particular transfer effected by the insolvent is void against the Official Assignee, under S. 56 of the Act is on the Official Assignee, whereas the onus of proving good faith and valuable consideration in a case coming under S. 55 would be on the purchaser. 106 Ind. Cas. 61=50 Mad. 948=39 M.L.T. 378=26 M.L.W. 665=A.I.R. 1927 Mad. 1013=53 M.L.J. 890.

——S. 55—Burden of proof — Mortgage within two years of insolvency.

Where a mortgagee seeks to enforce a mortgage executed within two years of the adjudication, the burden of proving good faith and consideration rests heavily on the mortgagee, although the Official Assignee has moved to expunge proof of the mortgage which he had admitted under S. 36 of the Presidency Towns Insolvency Act. 60 Ind. Cas. 205=43 Mad. 739=28 M.L.T. 258=39 M.L.J. 345.

——S. 55—Burden of proof.

The onus of supporting a purchase from the insolvent just prior to insolvency lies on the person claiming that the purchase can stand. 22 C.W.N. 335=46 Ind. Cas. 196.

——S. 55—Burden of proof.

Where a debtor transfers his properties on the eve of his bankruptcy, the onus is on the transferee to show that there was no fraudulent preference and that the transfer was bona fide in consideration of money really due. 24 Ind. Cas. 513 (Mad.).

——S. 55—Burden of proof.

The onus of proving good faith and valuable consideration is on the transferee, and if there is good faith on his part it is not necessary that the party also should act in good faith. The fact the transferee is the wife with notice of her husband's embarassed circumstances is not sufficient to prove bad faith. 15 M.L.T. 150=20 Ind. Cas. 901.

3. Enquiry under.

——Ss. 55 and 56—Enquiry under — Insolvency Court, if has exclusive jurisdiction in respect of.

Having regard to the language used in the Presidency Towns Insolvency Act, it cannot be said that the Insolvency Court has exclusive jurisdiction in regard to matters coming under Ss. 55 and 56 of the Act. The ordinary Civil Courts have concurrent jurisdiction in such matters, though they can decline to exercise such jurisdiction on grounds of expediency and refer the Assignee to the Insolvency Court. Ss. 55 and 56 do nothing else but declare the rights of the Official Assignee and in what manner these rights are to be enforced is left to the general provisions contained in S. 7. I.L.R. (1949) 1 Cal. 1=52 C.W.N. 343.

——S. 55—Enquiry under — Insolvent's debtors in satisfaction of debts transferring immovable property to wife of insolvent at request of insolvent — Application by Official Assignee to set aside transfer—Issue of benami raised by Official Assignee's application — Jurisdiction of Court to decide—Presumption — Rebuttal.

The debtors of the insolvent transferred their immovable properties at the request of the insolvent to the insolvent's wife. The consideration for the transfer flowed from the insolvent himself viz., the liquidation of their debts to the insolvent. The Official Assignee applied under S. 55, Insolvency Act to set aside the transfer and prayed in the alternative, that the transfers be declared voidable at the instance of the creditors of the insolvent under S. 53, T. P. Act or the transfers be declared collusive and benami and that the real owner of properties which purported to have been transferred to his wife was the insolvent:

Held (i) that by the word "purchaser" in S. 55 is meant the person from whom the alleged consideration for the transfer moved, and not necessarily the transferee. The insolvent occupied the role of "purchaser" and not of transferor and consequently S. 55, Rangoon Insolvency Act had no application thereto;

(ii) that for the same reasons, S. 53, T. P. Act did not apply;

(iii) that since the wife was in possession through her agents of the properties in question, and the dispute between her and the Official Assignee was not a matter of possession but a

matter of title to the properties the matter was not one "arising under S. 364" and the jurisdiction of the Insolvency Court under S. 7 was not in this case ousted by the proviso to the section. Consequently, it was for the Insolvency Judge, in his discretion to decide whether to permit the trial before himself of this issue between the Official Assignee and the wife on the petition of the Official Assignee, or whether to direct the Official Assignee to institute a suit in the ordinary Court having jurisdiction in the matter;

(iv) that the consideration having flowed from the insolvent, there was a presumption that the insolvent was the real owner of the properties transferred and the onus to rebut the presumption was on the wife. A.I.R. 1941 Rang. 250 =1941 Rang.L.R. 268=197 Ind. Cas. 513.

——S. 55—Enquiry under—Jurisdiction.

Any question as to the invalidity of a transaction raised by the Official Assignee under Ss. 55, 56 and 57 can be determined only by the Insolvency Court constituted under the Act and not by the ordinary Civil Court. 170 Ind. Cas. 672 =41 C.W.N. 105=I.L.R. (1937) 1 Cal. 557.

——S. 55—Enquiry under—Drafting of an application under S. 7—Rules to be followed—Oral evidence, if can be permitted as corroborative evidence.

There are no specific rules prescribing the form in which an application should be made when it is sought to impugn a transaction by an insolvent on the grounds mentioned in Ss. 55 and 56. The Court is bound in some measure to observe the ordinary principles as to framing suits laid down by the C. P. Code. It was the intention of the Legislature to permit a comprehensive inquiry to be raised by an application under S. 7.

The Insolvency Act primarily contemplates evidence on affidavit. It is open to the Court to permit oral evidence to be given either because it thinks it right that persons who have sworn affidavits should have their evidence tested by cross-examination, or in order that witnesses who have not sworn affidavits may give evidence in corroboration of witnesses who have sworn them. It is, however, essential that the affidavits should apart from any oral evidence, make out a case by admissible evidence which, if believed, will justify the order asked for. A.I.R. 1934 Cal. 232 =60 Cal. 1367=149 Ind. Cas. 995.

——S. 55—Enquiry under — Proceedings under the section—Notice of motion.

Proceedings under S. 55 can quite conveniently and properly be tried in the insolvency jurisdiction in a form provided by the Insolvency Rules, and the Official Assignee need not be referred to a separate suit.

There is no such thing as petition under the Insolvency Rules in connection with a notice of motion. A notice of motion should be supported by an affidavit. A.I.R. 1932 Cal. 621=36 C. W.N. 33=138 Ind. Cas. 741.

——S. 55—Enquiry under.

The questions under S. 55 are questions where a trustee claims by a higher title than the insolvent-mortgagor. On the other hand if a mortgagee takes proceedings under R. 18 the Court has no option but to make enquiries which the Rule directs: and, if objections under S. 55 are brought to its notice, Court cannot purport to ignore them. But it may be that the most convenient and sensible course in such cases is for proceedings to be stayed to enable a bankruptcy motion (Motion in insolvency) to be brought under S. 55. Ordinarily it would be brought by the Official Assignee. If the Official Assignee being tendered a reasonable indemnity by a creditor unreasonably refuses to bring such proceedings under S. 55, the Court has ample jurisdiction to authorise a creditor in one of the other or several different ways to take proceedings to give effect to the section. 93 Ind. Cas. 898=43 C.L.J. 219=30 C.W.N. 898=A.I.R. 1926 Cal. 618.

——S. 55 — Enquiry under — Voidability—Forum.

Considerations based upon the voidability of a transaction under S. 55 of the Act cannot be gone into by any Court except an Insolvency Court constituted under the Presidency Towns Insolvency Act. 102 Ind. Cas. 702=50 Mad. 776=25 M.L.W. 813=1927 M.W.N. 685=38 M. L. T. 401=A.I.R. 1927 Mad. 684=53 M.L.J. 209.

4. Fraudulent preference.

——S. 55—Fraudulent preference—Act constituting fraudulent preference must be voluntary act.

The act which constitutes a fraudulent preference must, no doubt, be a voluntary act; not an act done under pressure. The word 'pressure' under S. 56 implies an act of free will. An act under pressure is not an act of free will. A.I.R. 1935 Sind 53=29 S.L.R. 265=159 Ind. Cas. 745.

——S. 55—Fraudulent preference—Not allowed.

To permit one creditor being paid fully when there are other creditors is undesirable as that might in fact result in the Court allowing a fraudulent preference in favour of one creditor to the serious detriment of other creditors. 107 Ind. Cas. 860=5 Rang. 685=A.I.R. 1928 Rang. 36.

——Ss. 55 and 56—Fraudulent preference—Test of—Voluntary transfer—Good faith in S. 55, meaning of.

To constitute a fraudulent preference within the scope of S. 56 of the Presidency Towns Insolvency Act it must be shown that the transaction in question was entered into by the debtor with the dominant and substantial view of preferring a particular creditor. The mere fact that as a result of the transaction a particular creditor was preferred to the prejudice of the other creditors is insufficient.

Per **Napier, J.**—A transfer cannot be said to have been made "in good faith" within the meaning of S. 55 of the Presidency Towns Insolvency Act, if it is made in fraud of the bankruptcy laws. 42 Mad. 510=36 M.L.J. 190=25 M.L.T. 265= (1919) M.W.N. 293=49 Ind. Cas. 968.

——Ss. 55 and 36—Fraudulent transfer — Insolvency Court if can enquire into transfer—Transfer immediately before insolvency—Onus.

An insolvency Court can make an enquiry as to whether the transfer of the insolvent is fraudulent and void against the Official Assignee subsequent to the right of the party affected to bring a regular suit. An insolvent's examination is no evidence against the transfer. The onus of sup-

porting a purchase from the insolvent just prior to insolvency lies on the person claiming that the purchase can stand. An assignment of an insolvent on the eve of the insolvency can only stand on proof that it was for the purpose of helping him to carry on the business. 22 C.W.N. 335 =46 Ind. Cas. 196.

5. Good faith.

——S. 55—Good faith—Burden of proof. See PRESIDENCY TOWNS INSOLVENCY ACT, S. 55—BURDEN OF PROOF.

——S. 55—Good faith—Bona fide, meaning of.

If the words **bona fide** were incorporated in S. 55, the only meaning which can be given to them is absence of knowledge of the presentation of an insolvency petition. S. 55 protects all transactions unless, of course, they are in themselves acts of insolvency or fraudulent preferences, entered into with the insolvent by third persons for valuable consideration and **bona fide**, namely, **bona fide** in the sense that the person with whom such transaction takes place had not, at the time, notice of the presentation of any insolvency petition by the debtor. 170 Ind. Cas. 672=41 C.W.N. 105 =I.L.R. (1937) 1 Cal. 557.

——S. 55—Good faith — Transfer of whole property to unsecured creditor.

If an unsecured creditor elects to take a transfer of the whole of his property from a debtor who is insolvent, the transfer has the double effect of preferring his claim against the debtor to the claims of other unsecured creditors, and further of removing from the reach of other creditors the whole of the assets out of which, according to the law of insolvency, the unsecured creditors were entitled to receive a rateable distribution.

Such a transfer cannot be said to have been made in good faith within the meaning of S. 55, and is void against the estate of the insolvent. The want of knowledge of the creditor as to existence of other creditors is immaterial. A.I.R. 1932 Rang. 86=10 Rang. 219=139 Ind. Cas. 273.

——S. 55—Good faith—Test of.

It is only in favour of purchasers and encumbrancers in good faith and for valuable consideration that an exception is made in S. 55. The transferee has to prove both valuable consideration and good faith.

Absence of good faith could be proved by showing that the transaction was a sham one, or that there was a resulting trust in favour of the insolvent, but the same could be proved by other circumstances also. If an insolvent transfers in favour of one of his creditors to whom he owes much more than the debt due to the transferee and the transferee also being fully aware of all the above circumstances, and in concert with the insolvent brings into existence such a transfer deed, and antedates the same, and takes such sale-deed for debt due to him without any contemporaneous advance or other promise to help the insolvent to carry on his business, then the transaction cannot be said to have been entered into in good faith and the same should be held to be void against the Official Assignee under S. 55 of the Act. 106 Ind. Cas. 61=50 Mad. 248=39 M.L.T. 378 =26 M.L.W. 665=A.I.R. 1927 Mad. 1013=53 M.L.J. 890.

6. Limitation.

——Ss. 55 and 56—Limitation—Proceedings under—Institution—Limitation Act, Art. 181, if applies. See LIMITATION ACT (9 OF 1908), ART. 181. 52 C.W.N. 343.

——Ss. 55, 56—Limitation — Act of insolvency, whether ipso facto void—Lapse of three months, effect of.

An act of Insolvency only affords ground for adjudication and is not ipso facto void and unless it be a fraudulent transaction, the lapse of the period within which it can be availed of to support an application for adjudication will place it beyond attack. A.I.R. 1931 Mad. 366=61 M.L.J. 27 =33 M.L.W. 468=130 Ind. Cas. 753.

——S. 55 (2) (b)—Limitation for enforcing debt against sons expiring during father's insolvency—Effect of.

While a father's debt is alive in insolvency, any remedy against the sons in insolvency is not barred. That the debts as against the father are alive is all that is necessary to enable the Official Assignee to make the sons' share liable for them in insolvency by appropriate proceedings. A.I.R. 1931 Mad. 317=33 M.L.W. 323=61 M.L.J. 66=54 Mad. 739=1931 M.W.N. 1085=131 Ind. Cas. 481.

7. Rights of creditor.

——Ss. 55, 47, 17—Rights of creditor —Transfer avoided—Set-off, if can be claimed against Official Assignee.

S. 55, Presidency Towns Insolvency Act, does no more than enable the Official Assignee to avoid a transfer by the insolvent. It does not provide for the subject of the avoided transfer to vest in the Official Assignee. When a transfer of property by an insolvent is void under S. 55, then it is in the same position as before the transfer, namely, it is the insolvent's property and, by S. 17; as such, it vests in the Official Assignee. Hence a set-off in respect of that property can be claimed against the Official Assignee under S. 47. A.I.R. 1943 Cal. 140=46 C.W.N. 510=I.L.R. (1942) 2 Cal. 222=206 Ind. Cas. 258.

——Ss. 55, 56, 7—Rights of creditor—Official Assignee refusing to apply — Whether creditor can apply.

Where the Official Assignee has refused to apply to set aside certain transactions of the insolvent under Ss. 55 and 56, the creditor can himself apply. The questions under Ss. 55 and 56 are not matters arising under S. 36 simply because the respondents have been examined under that section. Hence the proviso to S. 7 is no bar to such an application by a creditor. A.I.R. 1934 Cal. 232=60 Cal. 1367=149 Ind. Cas. 995.

8. Rights of transferee.

——S. 55—Rights of transferee — Transfer by transferee in good faith and acting bona fide.

Where a transfer by an insolvent prior to adjudication is held to be void on an application by the Official Assignee, a transfer by such transferee is also void even if he were a **bona fide**

purchaser for consideration. A. I. R. 1936 Cal. 212=40 C.W.N. 1012=162 Ind. Cas. 650.

——S. 55—Rights of transferee — Transfer or prior to insolvency—Order of adjudication passed on this transfer—Remedy of transferee.

In the case of a transfer by the insolvent prior to his insolvency on which an order of adjudication has been passed, the transfer must be held to be fraudulent and void against the Official Assignee. The remedy, if any, of the transferee is to get the order of adjudication annulled before the Official Assignee can be called upon to prove that the transfer is fraudulent. A.I.R. 1936 Sind 148 =165 Ind. Cas. 273.

——S. 55—Rights of transferee — Transaction set aside—Remedy of party affected as to sums paid —Good faith—Onus.

Where a transaction is set aside under the Act, the party affected by it is not entitled to payment in full out of Insolvent's estate, of the sums paid by him under the transaction, but he can prove them in the Bankruptcy. The onus of proving good faith and valuable consideration is on the transferee, and if there is good faith on his part, it is not necessary that the party also should act in good faith. The fact the transferee was the wife, with notice of her husband's embarassed circumstances, is not sufficient to prove 'bad faith'. The question of 'valuable consideration' is a question of fact. It is not open to a judge to pass an order under S. 55 of the Act under which the validity of the transaction is made to depend upon an uncertain event, e.g., on the vendee being compensated for the loss sustained by him by reason of the transaction. 14 M.L.T. 150=20 Ind. Cas. 901.

9. Scope.

——Ss. 55, 56, 57; 61—Scope—Doctrine of "relation back"—Effect of—Transfer by insolvent constituting act of insolvency—Adjudication order—Transfer, if void—Protection under S. 57, if available—Insolvent, if can say transaction was bona fide.

The principle of 'relation back' does not make the transfer 'void', because, if void, it would have always to have been void. Nor is it strictly 'voidable', which denotes the operation of some form of election in the trustee. What, in fact, happens is that, where the trustee's title relates back under the Act, that post-dated statutory title destroys and overrides any existing title and brings the property back into the estate whence it is deemed never to have departed. While, therefore, an act of bankruptcy has always been held "void" as such, what really is meant is that the title of the transferee under the transfer is "displaced" by the statutory title of trustee and the reason for that is that the 'relation-back' provisions of the statute so operate as to destroy at the instant of the transfer the transferor's own title and (subject to the protective provisions) the title of those claiming through him. The transfer is "voidable" only in the sense that the statute steps in and destroys its effect and not in the sense in which in law the expression 'voidable' is usually employed, namely that of being capable of being avoided at the volition or election of some person. If the trustee does not, in fact, claim the property, that only amounts to the trustee leaving with the transferee property which is not really his and to which he has no title. No real question of 'election' arises, except so far as the trustee may elect whether or not physically to take the property which has become his. Consequently, where the transfer by the insolvent is itself the act of insolvency which forms the basis of the adjudication order, the transfer is void without any reference to S. 55 or S. 56, Presidency Towns Insolvency Act, but subject to the protective provisions contained in S. 57. Subject to these provisions, it is not, therefore, open to the insolvent to be heard to say that the transaction was a bona fide transaction for value or that it did not constitute a fraudulent preference, because, for altogether different reasons, it was 'void'. A.I.R. 1937 Rang. 72=1937 Rang.L.R. 65=171 Ind. Cas. 426.

——S. 55—Scope—Whether overrides S. 63, Contract Act (9 of 1872) in insolvency matters.

S. 55 overrides in an insolvency matter the provisions of S. 63, Contract Act. A. I. R. 1935 Mad. 1009=1935 M.W.N. 297=58 Mad. 702= 69 M.L.J. 360=42 M.L.W. 514=160 Ind. Cas. 425.

10. Transfer.

——Ss. 55 and 56—Transfer — Sale of house to mother in lieu of alleged debt—Sale, held sham.

It is not an uncommon thing for relatives of insolvents to be put down as creditors of the insolvents so as to save something for the debtors out of the wreckage of the concern. Hence, when the mother of the insolvent makes a claim based on a debt of which there is no evidence except her own statement and that of the insolvent, the Court is bound to look upon such a claim with considerable suspicion. [Sale to mother, held a sham transaction.] A.I.R. 1943 Cal. 511=I. L.R. (1943) 1 Cal. 75=209 Ind. Cas. 352.

——S. 55—Transfer — Voluntary transfer — Remission of debt without consideration—Whether amounts to voluntary transfer.

S. 55 does not limit the expression, voluntary transfer to any particular form of alienation of his property by the insolvent. The expression is wide enough to cover all sorts of devices that may be practised or suffered by the insolvent to deprive the creditors of the benefit of his property. Consequently, remission of a debt without consideration is a voluntary transfer. A.I.R. 1935 Mad. 1009=1935 M.W.N. 297=58 Mad. 702=69 M.L.J. 360=42 M.L.W. 514=160 Ind. Cas. 425 (2).

——S. 55—Transfer—B financing A's business by guarantee at bank—Bank calling on B to liquidate overdraft as guarantor—Sale-deed by A in favour of B—B liquidating overdraft—Transfer, validity of.

A who was carrying on a business was financed by means of an overdraft of Rs. 25,000 permitted by her bank on the guarantee of B who deposited the title deeds of his house with the bank and a promissory note for Rs. 25,000 signed by himself and A. When the bank called on B as guarantor to liquidate the overdraft, B obtained a deed of sale from A and liquidated the overdraft by pay-

ment of a sum less than the guaranteed amount. Four days after signing the deed of sale, A left for her home where she told B that she hoped to realise Rs. 35,000 from her father's estate and B thereafter carried on the business to realise the stock. A was adjudicated insolvent and the Official Assignee applied to have the sale-deed declared void:

Held, that there was no evidence that B knew when he took the deed of sale, that A was insolvent and that the transaction was a real one. A. I.R. 1934 P.C. 3=58 C.L.J. 471=1933 M.W.N. 1449=66 M.L.J. 1=39 M.L.W. 1=1934 A.L.J. 77=12 Rang. 105=36 Bom.L.R. 137=38 C.W.N. 117=60 I.A. 362=146 Ind. Cas. 743 (P.C.).

——S. 55—Transfer — Decree-holder becoming insolvent — Transfer of decree—Execution by transferee, if permissible — Official Assignee not objecting to substitution — Court, when can hold that transfer of decree within two years prior to adjudication was good.

Where a judgment-debtor was a party to the execution and he was apprised of the assignment of the decree as well as of the petition of the transferee to be substituted in place of the original decree-holder and to carry on the execution, and raised no objection to the transferee's application, and the Official Assignee (the decree-holder having been adjudicated insolvent) did not take any steps to take possession of the decree and execute it himself:

Held, that the judgment-debtor could not object to the execution and say that the Official Assignee alone was entitled to execute the decree. It is for the Official Assignee or the creditors of the insolvent to object to the money due under the decree being paid to the transferee of the original decree-holder. Therefore, S. 55 does not bar the execution of the decree by the transferee. S. 56, which prevents the transfer of property by the insolvent in favour of a particular creditor with a view to give that creditor a preference over the other creditor is not applicable.

In the absence of any evidence one way or the other, it is not open to the Court to hold that the transfer was not in good faith and for valuable consideration in direct conflict with the recitals in the deed of assignment and the circumstances set forth therein. It is not sufficient for the judgment-debtor to say that the transaction was colourable and collusive and that the decree had vested in the Official Assignee by operation of law. He had to show, not only that the Official Assignee was entitled to intervene, but also he had intervened or that he intended to intervene. A. I.R. 1933 Pat. 130=146 Ind. Cas. 389.

——S. 55—Transfer — Money decree — Void character test—Decree transferred for inadequate consideration—Transfer was held void against Official Assignee.

S. 55 of the Presidency Towns Insolvency Act is quite general and under it a transfer of a money decree will be void altogether as against the Official Assignee unless it is shown by the transferee that he is a purchaser in good faith and for valuable consideration under S. 56.

Where an insolvent transferred for Rs. 700 a decree for Rs. 13,000 and odd when his judgment-debtor owned large property.

Held, that the irresistible conclusion was that there was neither good faith nor valuable consideration. 87 Ind. Cas. 935=2 O.W.N. 221=A.I.R. 1925 Oudh 396.

——Ss. 55 and 56—Transfer by husband to wife—Wife's money utilised by insolvent.

Obiter.—Where an insolvent utilised his wife's money for trade purposes and in consideration of such utilization, transferred some of his property to her, the transaction may be looked upon as an attempt to repair the breach of trust or as a contractual obligation to repair the loss suffered by her. 24 Ind. Cas. 513 (Mad.).

11. Valuable consideration.

——S. 55—Valuable consideration — Transfer by insolvent void under S. 55—Subsequent transfer to bona fide purchaser for value without notice but after order of adjudication—Effect.

Where a transfer by an insolvent is void under S. 55, a subsequent transfer by him to a bona fide purchaser for value without notice but after the date of the order of adjudication is of no effect. The title of the trustee in bankruptcy relates back to the act of bankruptcy and neither original nor the subsequent transferee can establish any title as against the trustee. A.I.R. 1936 Sind 148=165 Ind. Cas. 273.

12. "Void"—Meaning.

——S. 55—'Void', meaning of.

'Void' in S. 55 of the Act means 'voidable' at the instance of the Official Assignee. 14 M.L.T. 51=25 M.L.J. 308=(1913) M.W.N. 876=(1914) M.W.N. 247=20 Ind. Cas. 485.

——S. 56.

Synopsis.

1. Burden of proof.
2. Creditor.
3. Decree against insolvent.
4. Deposition under S. 36—Use of.
5. Fraudulent preference.
6. Good faith.
7. Motive of insolvent.
8. Practice.
9. Threat and pressure.
10. Miscellaneous.

1. Burden of proof.

——S. 56—Burden of proof.

The onus is on those who claim to avoid the transaction to establish that what the debtor really intended and the real intention was to prefer. I.L.R. (1949) 1 Cal. 1=52 C.W.N. 343.

——S. 56—Burden of proof—No defence by insolvent—Court, if can draw inference.

The burden of proving that a payment is a preferential payment is on the Official Assignee and he must satisfy the Court that the dominant motive in the mind of the insolvent when he made the payment was to prefer one creditor to another. The fact that the result of a payment is that one creditor will be preferred to another is not suffi-

cient. It must be proved that the dominant motive of the insolvent was to prefer one creditor, to another and if the evidence is such that another motive can reasonably be inferred, then the payment is not a fraudulent preference.

The fact that the insolvent was heavily in debt, and knew his financial position to be hopeless, is not necessarily of itself sufficient.

Where no explanation is given by the insolvent it is not for the Official Assignee on whom the onus of proof lies, to think out and advance defences on behalf of the insolvent. When the insolvent had not advanced any defence, it is open to the Court to draw from his conduct the ordinary reasonable inference. A.I.R. 1943 Sind 90=I.L.R. (1942) Kar. 577=206 Ind. Cas. 553.

——S. 56—Burden of proof—Importance of.

The onus of proving that there has been a fraudulent preference lies on the Official Assignee or Receiver even if the debtor was insolvent at the time of the payment and knew himself to be so. Onus, however, as a determining factor of the whole case, can arise if the Court finds the evidence pro and con so evenly balanced that it can come to no definite conclusion. Then the onus will determine the matter. If, however, the Court, after hearing and weighing the evidence comes to a definite conclusion, the need for placing the onus does not arise. In other words, the question of onus only becomes important if the circumstances are so ambiguous that a definite conclusion is impossible without resort to it. A. I.R. 1943 Sind 1=I.L.R. (1942) Kar 375=207 Ind. Cas. 365.

——S. 56—Burden of proof—Allegation of fraud.

In determining the question whether a transfer is to be deemed fraudulent and void as against the Official Assignee in bankruptcy, the onus is on the Assignee; he has to show that the case is within the statute. 107 Ind. Cas. 233=30 Bom. L.R. 290=47 C.L.J. 339=27 M.L.W. 744=A. I.R. 1928 P.C. 77=54 M.L.J. 337 (P.C.).

——S. 56—Burden of proof—Allegation of fraud.

The onus of proving fraud is on the party alleging it. 103 Ind. Cas. 174=5 Rang. 229= A.I.R. 1927 Rang. 190.

——S. 56—Burden of proof.

Where it has been established that the assignment by the insolvents to the preferred creditor was fraudulent and void against the Official Assignee the subsequent transferees from him (the preferred creditor) must show that not only did they give valuable consideration for the assignments but also that they acted in good faith. 85 Ind. Cas. 984=27 C.W.N. 611=A.I.R. 1923 Cal. 631.

——S. 56—Burden of proof.

The burden of proving the intention of the debtor to prefer a creditor lies upon the Official Receiver who contests the payment, even if the debtor was insolvent at the time when he made the payment. 19 C.W.N. 157, foll. 12 Bur. L.T. 85=10 L.B.R. 8=51 Ind. Cas. 591.

2. Creditor.

——S. 56—Creditor.

In the normal course, there is nothing in law to prevent a debtor from bona fide paying or securing an individual creditor. Such a transaction is not open to be challenged by any other creditor merely because the firstly mentioned creditor receives his payment before the other creditor begins to enforce his remedy. A.I.R. 1940 Bom. 289=I.L.R. (1940) Bom. 526=42 Bom. L.R. 486=190 Ind. Cas. 606.

——S. 56—Creditor.

Where it is abundantly clear that creditor considered that the money which was paid to him was his own money which belonged to him by virtue of the deed of assignment which the debtor had previously executed in his favour, it cannot be said that he was acting in bad faith in receiving this payment from the insolvent. The case falls under S. 57 and the payment does not amount to act of insolvency under S. 9 (b). A.I.R. 1940 Rang. 168=1940 Rang.L.R. 366=189 Ind. Cas. 653.

——S. 56—Creditor—Surety.

The word "creditor" in S. 56 includes a surety before he is called upon to pay and payment to him may be deemed fraudulent and void as against the Official Assignee. 6 Bur.L.T. 166=7 L.B. R. 44=21 Ind. Cas. 5.

——S. 56—Creditor — Surety or guarantor of principal — Bankrupt — Position of surety.

An acceptor or endorser of a negotiable instrument which has not yet reached maturity is a creditor. Any surety or guarantor, who might should a bankruptcy supervene before the debt of the principal were discharged be entitled to claim among the other creditors in bankruptcy, is regarded constructively as a creditor when the question is one of fraudulent preference. 15 Bom.L. R. 113=19 Ind. Cas. 57.

3. Decree against insolvent.

——S. 56—Decree against insolvent.

Attachment before judgment—Sale pending attachment — Subsequent adjudication of judgment debtor—Official Assignee has no present title to property sold until the sale is set aside under S. 55 or S. 56, Presidency Towns Insolvency Act, or S. 53, T. P. Act. A.I.R. 1943 Mad. 179=56 M.L.W. 213=1942 M.W.N. 740 =(1943) 1 M.L.J. 139=I.L.R. (1943) Mad. 659=207 Ind. Cas. 418.

4. Depositions under S. 36—Use of.

——S. 56—Depositions under S. 36 — Use of — Procedure.

If the Official Assignee has to apply to the Judge for the purpose of setting aside the assignment, on the ground that it was fraudulent and void within the meaning of S. 56 and he intends to rely upon the depositions which have been made by parties before the Registrar in Insolvency at an enquiry held under S. 36, he should give notice to the opposite parties of his intention so to do. It will then be open to the opposite parties, if they so desire, to get copies of the depositions of which notice has been given. The notice should be in a definite form and the applicant should specify in such notice the depositions, taken before the Registrar in Insolvency, on which he intends to rely.

85 Ind. Cas. 984=27 C.W.N. 611=A.I.R. 1923 Cal. 631.

5. Fraudulent preference.

——S. 56—Fraudulent preference—Essentials.

In order to avoid a transfer on the ground of fraudulent preference it is not sufficient that it is shown that the creditor was preferred; it is necessary to show further that the transfer was with a view to give that creditor preference over other creditors. The view to prefer must be shown to be the dominant view though it is not necessary to show that it ought to have been the sole view. I.L.R. (1949) 1 Cal. 1=52 C.W.N. 343.

——S. 56—Fraudulent preference—Essentials.

The essentials of a fraudulent preference as contained in S. 56, are (1) the debtor must at the date of the transfer or payment, be unable to pay himself on demand his debts as they become due, (2) the transfer or payment must be in favour of a creditor, (3) the transfer or payment in fact prefers a creditor over others, (4) the transfer or payment must have been made with a view of giving such creditor a preference over other creditors, and (5) the debtor must have been adjuged insolvent on a petition presented within three months after the date of the transfer or payment. A.I.R. 1943 Sind 1=I.L.R. (1942) Kar. 375=207 Ind. Cas. 365.

——S. 56—Fraudulent preference.

Bill of exchange accepted and trust receipt executed by buyer—Buyer cannot repudiate the contract as an illegal one on the mere ground that the object of the transaction was to prevent equality of distribution among the creditors. Trustees for the general body of creditors cannot claim a higher position. The contract is valid between the buyer and seller except as against the assignee in bankruptcy or against transferees for value. A.I.R. 1944 Mad. 403=(1944) 1 M.L.J. 371.

——S. 56—Fraudulent preference — Transferee creditor related to debtor—No threat or coercive action.

Where a debtor is unable to pay his debts as they become due, from his own money and at such time, makes a transfer to one of his creditors who is related to him and there is no evidence that any threat of criminal proceedings was given or a coercive action taken or threatened to be taken by the creditor to whom the transfer is made, the transfer amounts to fradulent preference within the meaning of S. 56, Presidency Towns Insolvency Act. A.I.R. 1938 Sind 82=32 S.L.R. 672=175 Ind. Cas. 214.

——S. 56—Fraudulent preference—Test as to.

Where garnishee obtained security, by promising to advance money to the insolvent and then did not carry out this promise properly,

Held, the transaction is not fraud on the Bankruptcy Law.

Where the insolvent was undoubtedly unable to pay his debts, as they became due, from his own money and in giving the security in question he preferred the garnishee to the other creditors,

Held, the question remains whether he did so, with a view of giving him preference, this has been explained to mean, looking at the mind of the bankrupt at the time, was there dominant view to give a preference to a particular creditor, if his real object was to continue trading or to save himself from serious consequences, or if he was really induced to make the payment, or give the security, by the pressure of the creditor and those were the dominant factors in his mind and the desire to prefer and the giving of the preference were incidental only, the preference is not a fraudulent preference, within the meaning of the section.

If there is a request for a preference and a promise that if a preference is given, help will be forthcoming, not to enable the insolvent to continue his business but either assist merely to stave off the bankruptcy for a short while or to assist in reinstating him after the bankruptcy, it would be right to say that the dominant view was to prefer; and further, that such a transaction might probably be set aside as a fraud on the Bankruptcy Law. But if the real intention and hope was to avoid bankruptcy altogether then that was the dominant view and the preference merely incidental. 73 Ind. Cas. 532=18 M.L.W. 696=A.I.R. 1924 Mad. 180.

——S. 56—Fraudulent preference—Tests of presumption.

If a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving preference to that creditor over his other creditors. If it is found that the dominant motive was not to give preference, but to save his stock in trade from attachment and sale, the transaction cannot be annulled under S. 56. 12 Bur.L.T. 85=10 L.B.R. 8=51 Ind. Cas. 591.

——S. 56—Fraudulent preference — Intention of the insolvent.

It is the duty of the Court to find out whether the intention to give preference to any one of the creditors was dominant or not. That which has the natural effect of preferring a creditor is presumed to have been so intended to have that effect. 32 Ind. Cas. 795 (Mad.).

——S. 56—Fraudulent preference — Test of—Delay in making application, if ground for dismissal thereof.

Where a payment to a creditor is impeached as a fraudulent preference, the question for the Court under S. 56 of the Act is what was the suostantial effectual or dominant view with which the debtor made the payment. The fact that there was some pressure would not protect the creditor if it is also the fact that, but for the desire to prefer the creditor, the payment would never have been made.

Delay in applying under S. 56 is not by itself sufficient ground for declining to make order. 14 M.L.T. 48=25 M.L.J. 320=20 Ind. Cas. 482.

——S. 56 (1)—Fraudulent preference.

The petitioner, a creditor of the insolvents for Rs. 11,000, was demanding security for her loan and the insolvents of their own motion sold all their stock-in-trade to her on the 25th August without making any valuation. On the 9th of September they were adjudicated insolvents, held, that the transfer gave her a preference over other

creditors and was, therefore void. 9 M.L.T. 211 =(1910) M.W.N. 822=8 Ind. Cas. 1085.

6. Good faith.

——Ss. 56 and 57—Good faith—Distinction between Ss. 56 and 57.

Per Dunkley, J.—The distinction between S. 57, and S. 56 is that the good faith which is in question under S. 57 is the good faith of the creditor who received the payment whereas under S. 56, the good faith in question is the good faith of the debtor who makes the payment. A.I.R. 1940 Rang. 168=1940 Rang.L.R. 366=189 Ind. Cas. 653.

——S. 56—Good faith.

A vendee who purchased property from a person shortly before that person's insolvency for a price appreciably lower than the real value of the property actuated by an intention to get a much larger benefit for himself than he was fairly entitled to as a diligent creditor and conspired with the vendors to defraud or delay his other creditors, is not a vendee in good faith within S. 56 and the sale is void as against the Official Assignee. (1915) M.W.N. 332=29 Ind. Cas. 204.

7. Motive of insolvent.

——S. 56—Motive of insolvent—What was insolvent's dominant view in making payment depends on facts of each case.

The question as to what was the dominant view of an insolvent when he made the payment which is impeached as a fraudulent preference and whether he made the payment with a view of giving preferenc over other creditor depends on the facts of each case. A.I.R. 1943 Sind 1=I. L. R. (1942) Kar. 375=207 Ind. Cas. 365.

——S. 56—Motive of insolvent.

Where the question is whether a transfer made by the debtor is made with a view to give fraudulent preference to the transferee over other creditors, what has to be seen is what the dominant motive of the debtor is in making the transfer or payment in question. If his dominant motive is either to save himself from exposure or criminal prosecution or to secure some particular advantage for himself, such as to enable himself to carry on his business, the transfer or payment cannot be said to amount to a fraudulent preference. A.I.R. 1936 Rang. 129=162 Ind. Cas. 115.

——S. 56—Motive of insolvent.

The animus with which a particular thing is done by the debtor is an essential element in considering whether it is a fraudulent preference. The mere making of a preferential payment is not a fraudulent preference. The substantial motive of the debtor in making it must be looked at. If the substantial motive is to prefer the creditor, the payment is a fraudulent preference. If the substantial motive is reparation for past wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference.

The word 'preference' implies the voluntary act of a person who can do either the one thing or the other as he prefers. Preference involves and imports a free choice.

A firm was unable to pay its debts as they became due. The agent of the firm transferred certain property and outstandings to certain creditors who knew the position of the firm and had done business with the firm through the agent:

Held, that the transaction amounted to a fraudulent preference. A. I. R. 1934 Rang. 17=11 Rang. 489=149 Ind. Cas. 145.

——S. 56—Motive of insolvent.

Although a charge is created on the estate by a person a few days before he becomes insolvent, creation of such charge cannot be held to be fraudulent if it is shown that it was created in the ordinary course of business and with the object of carrying it on and passing safely through the period of danger. 118 Ind. Cas. 615=7 Rang. 201=A.I.R. 1929 Rang. 229.

——S. 56—Motive of insolvent.

Where the dominant motive actuating the debtor was that in making the transfer, he was only doing what he felt himself bound or compelled to do, the transfer is not void as against the Official Assignee. 107 Ind. Cas. 233=30 Bom.L.R. 290 =47 C.L.J. 339=27 M.L.W. 744=A.I.R. 1928 P.C. 77=54 M.L.J. 337 (P.C.).

8. Practice.

——S. 56—Practice—Transaction not arising under S. 36—Notice of motion or suit in Civil Court.

Where the Official Assignee seeks to set aside a transfer made by the insolvent on the ground that it is void under S. 56, it is open to the High Court to exercise a discretion whether the matter should be tried on a notice of motion in the Insolvency Court or to relegate the Official Assignee to a suit in the Civil Court where the matter is not covered by S. 36 of the said Act. A.I.R. 1932 Bom. 566=34 Bom.L.R. 1166= 141 Ind. Cas. 664.

——S. 56—Practice—Procedure.

The onus is originally on the Official Assignee. A motion for declaring that a transaction by the insolvent was void as being fraudulent preference or as a *mala fide* transaction in contravention of Bankruptcy Law, should be tried practically as if it were an action. The case should be opened on behalf of the Official Assignee, and his report read, at any rate as if it were a pleading. The insolvent can be called as a witness by either party; if called, although usually considerable latitude is given, he must be examined by the party calling him and not cross-examined, unless he has shown himself hostile and permission is given to cross-examine the other side can of course cross-examine him. 73 Ind. Cas. 532=18 M.L.W. 696=A.I.R. 1924 Mad. 180.

9. Threat and pressure.

——S. 56—Threat and pressure.

Where the dominant motive of the insolvent in executing a conveyance of certain property in favour of his creditor, even if that creditor happens to be his mother was to get rid of genuine pressure from the creditor who threatened him with a law suit, the conveyance cannot amount to fraudulent preference. [In this case conveyance, held, amounted to fraudulent preference.] A.I.R. 1943 Cal. 511=I. L. R. (1943) 1 Cal. 75=209 Ind. Cas. 352.

——S. 56—Threat and pressure—Threat of legal proceedings.

A threat to take legal proceedings is not of itself

such pressure as will bring a payment out of the provisions of S. 56. A.I.R. 1943 Sind 90=I.L.R. (1942) Kar. 577=206 Ind. Cas. 553.

——S. 56—Threat and pressure.

The Council of the *Shia Imami Ismailias* of Karachi created a fund by raising subscriptions for the birth day celebrations of H. H. the Aga Khan, the Spiritual and Secular Head of community. Out of the fund, Rs. 7,500 were deposited with a certain firm. At a time when the firm was in a hopelessly insolvent condition, the managing partner paid the amount of Rs. 7,500 with interest to the President of the *Shia Imami Ismailias Council*. On the application by the Official Assignee under S. 56, Presidency Towns Insolvency Act, that the payment to the President of the Council amounted to fraudulent preference, the managing partner contended that he made the payment under threats by the President of the Council of ex-communication and report to H. H. the Aga Khan which would have resulted in his social ostracism and incurring displeasure of H. H. the Aga Khan who was his Spiritual and Secular Head:

Held, that if the contention of the managing partner were borne out by the evidence, the payment would not amount to fraudulent preference but it was not.

Held, also that the fund could not be said to be the property of H. H. the Aga Khan. It belonged to the *Shia Imami Ismailias* community of Karachi and was vested in the Council. A.I.R. 1943 Sind 1=I.L.R. (1942) Kar. 375=207 Ind. Cas. 365.

——S. 56—Threat and pressure—Debtor hopelessly insolvent—Threat of legal proceedings.

Threat of legal proceedings in the case of a debtor who was hopelessly insolvent amounts to no threat at all and hence the payment made under such threat in prefernce to other creditors amounts to fraudulent preference. A.I.R. 1943 Sind 1=I.L.R. (1942) Kar. 375=207 Ind. Cas. 365.

——S. 56—Threat and pressure—Payment by debtor to secure his own safety—Whether fraudulent preference.

The creditor was pressing his debtor, not with a view to defrauding anybody, but from the anxiety which often operates in a creditor's mind to get back his dues without delay, and had threatened to disclose debtor's financial position which would result in loss to the debtor and the debtor, to secure his safety, paid the creditor:

Held, that in making the payment, the dominant motive being his own safety, the payment did not amount to fraudulent preference within the meaning of S. 56. A.I.R. 1940 Rang. 168=1940 Rang.L.R. 366=189 Ind. Cas. 653.

——S. 56—Threat and pressure—Free choice of debtor—Consideration of.

When the creditor makes a demand for payment, with or without a threat of launching legal proceedings to recover the debt, the effect of the demand upon the mind of the debtor is such that he is no longer to be regarded as making the payment voluntarily, or exercising free will in the sense of electing to do something which he need not do. If a demand has that effect upon the mind of the debtor, a transfer executed in such circumstances in favour of the creditor is not made by way of a fraudulent preference within the meaning of S. 56. On the other hand, merely because a creditor makes a demand upon the debtor that his debt should be paid, and thereafter a transfer of the debtor's property is made to the creditor, it does not necessarily follow that in so doing, the creditor is exerting upon the debtor such pressure as would exclude the transfer from the ambit of S. 56. It depends in each case on the circumstances. A.I.R. 1934 Rang. 17=11 Rang. 489=149 Ind. Cas. 145.

——S. 56—Threat and pressure—Of attachment—Not fraudulent.

After the committal of an act of bankruptcy and pending the period during which such an act is available for adjudication, a creditor who is aware thereof, is, under ordinary circumstances, justified in declining to receive payment of his debt from the debtor and may proceed to present his petition. But where there was real and tangible pressure on the part of the creditors by means of attachment of the judgment-debtor's movable properties and which pressure was bound to exercise an appreciable influence upon the minds of the judgment-debtors and thus would have rendered their principal motive and not merely the view to prefer, the transaction, namely, the satisfaction of the debt by the judgment-debors, and the receipt of the decretal amount by the creditors could not be considered a fraudulent preference and could not be set aside at the instance of any other creditor. 83 Ind. Cas. 941=39 C.L.J. 512=A.I.R. 1924 Cal. 964.

——S. 56—Threat and pressure.

Where a transaction in favour of one creditor is brought about by pressure from that creditor without any collusion on the part of the insolvent, there is no fraudulent preference. 103 Ind. Cas. 174=5 Rang. 229=A.I.R. 1927 Rang. 190.

——S. 56—Threat and pressure.

Where there was an admission of *R*, the transferee, that he satisfied himself that the assignors were in insolvent circumstances, that their business was about to fail and that he did nothing further than making repeated demands, which were of no avail.

Held, that it would be absurd to call what *R* did *bona fide* pressure. 85 Ind. Cas. 984=27 C.W.N. 611=A.I.R. 1923 Cal. 631.

10. Miscellaneous.

——S. 56—Miscellaneous—Property acquired after adjudication—If bona fide—Not affected.

Until the Official Assignee intervenes, all transactions by an undischarged insolvent after adjudication with any person dealing with him *bona fide* and for value in respect of his after acquired property whether with or without knowledge of the insolvency are valid against the Official Assignee and this rule applies both to movable as well as to immovable property. 103 Ind. Cas. 174=5 Rang. 229=A.I.R. 1927 Rang. 190.

——S. 56—Miscellaneous—Time for purposes of—Computation—Starting point—Annulment of adjudication and readjudication.

For the purpose of determining whether or not a transfer was made within the time prescribed by S. 56 of the Presidency Towns Insolvency Act in a case where there has been an annulment of the adjudication and a subsequent readjudication, it is the date of the presentation of the original petition that has to be taken into account and not the date of the re-adjudication. The re-adjudication is linked up with the original adjudication and is as it were part of the same insolvency proceedings which was started by the original adjudication. I.L.R. (1949) 1 Cal. 1 =52 C.W.N. 343.

——S. 57—Act of insolvency—Test.

Intimation of insolvency to the creditor without leading to an inference that the debtor will suspend payments, is not an act of insolvency. It is such an act if such an inference can be drawn. It is to be determined from each notice.

Creditor's action knowing the act of the debtor is not *bona fide* and will not be protected.

The Court must see if the transaction is contrary to the Bankruptcy Law and not whether it is real and protected by S. 57. 39 Mad. 250=35 Ind. Cas. 942.

——S. 57—After-acquired property of insolvent—Validity of transfer.

Transactions in respect of all property, movable and immovable, acquired by the insolvent after the order of adjudication, with any person dealing with him *bona fide* and for value and completely before the intervention of the Official Assignee are valid. 43 Bom. 890=21 Bom.L.R. 849=53 Ind. Cas. 197.

——S. 57—Analogy of S. 57 with doctrine of lis pendens.

The principles underlying the doctrine of its *pendens* are not dissimilar from the principles which are to be applied in construing S. 57 of the Presi. Towns Insol. Act. A.I.R. 1935 Rang. 61=12 Rang. 577=154 Ind. Cas. 221.

——Ss. 57 and 56—Distinction.

Difference between S. 57, Presidency Towns Insolvency Act and S. 227, Companies Act, indicated. A. I.R. 1939 Sind 196=I.L.R. (1939) Kar. 460=184 Ind. Cas. 428.

——S. 57, Proviso—Firm adjudicated insolvent —Adjudication annulled — Payment by insolvent—Order of annulment set aside in appeal—Payment, if void against Official Assignee.

On April 1, 1933, upon a creditor's petition an order was passed on the Original Side of High Court adjudicating the firm insolvent. On June, 2, 1933, an order was passed by the Judge sitting in insolvency annulling the adjudication. On July 8, 1933, an appeal was filed against the order annulling the adjudication. On August 21, 1933, the appeal was allowed, and the order annulling the adjudication was set aside. Meanwhile, on August 1, 1933, the firm had paid certain sums to the banks:

Held, that the effect of the order passed by the Appellate Court on August 21, 1933 was that the date of the order of adjudication was the date upon which that order was in fact passed, namely April 1, 1933; the title of the Official Assignee in the present case related back to the first available act of insolvency upon which the insolvency petition was based; and it followed, therefore, that *prima facie* the transfers by the insolvent on August 1, 1934, to the Banks were void as against the Official Assignee of the estate of the firm. A.I.R. 1935 Rang. 61=12 R. 577=154 Ind. Cas. 221.

——S. 57—Good faith.

Under S. 57, it is the "good faith" of the creditor that is in question and under S. 56, it is that of the debtor who makes the payment. A.I.R. 1940 Rang. 168=1940 Rang.L.R. 366=189 Ind. Cas. 653.

——S. 57—Protection under S. 57.

S. 57 protects the payment of money by an insolvent to a creditor before adjudication provided the creditor had no notice of any insolvency petition. Consequently, payment does not amount to an act of insolvency as contemplated by S. 9. A.I.R. 1940 Rang. 168=1940 Rang. L. R. 366=189 Ind. Cas. 653.

——S. 57—Official Assignee establishing that transaction within contemplation of S. 57 took place after commencement of insolvency—Onus to prove that it took place before adjudication.

Under the doctrine of "relation back" under S. 51, the property of an insolvent on the making of the order of adjudication vests in the Official Assignee as from the commencement of the insolvency, that is to say, from the date of the act of insolvency upon which the adjudication is made. As from that date, the insolvent ceases to be owner of the property and cannot deal with it. He cannot make payments to creditors or give good and valid discharges. S. 57 of the Presidency Towns Insolvency Act, however, provides an exception to the doctrine by affording protection to *bona fide* transactions taking place between the commencement of the insolvency and the date of the order of adjudication in those cases where the person with whom such transaction takes place had no notice of the presentation of the petition by or against the debtor. When the Official Assignee has established that a transaction within the contemplation of S. 57 took place after the commencement of the insolvency, the onus lies on the person seeking to uphold the transaction to prove that it took p'ace before adjudication and that he had no notice of the presentation of the petition. A denial in the objections filed by him is insufficient to discharge the onus. The objections are mere pleadings. 1939 Sind 361= I.L.R. (1940) Kar. 235=185 Ind. Cas. 778.

——S. 57—Provisions, if restricted.

It is incorrect to say that S. 57, applies only to transactions carried out between the date of the presentation of the petition and that of the adjudication. I.L.R. (1937) 1 Cal. 557=41 C. W. N. 105=170 Ind. Cas. 672.

——Ss. 57, 55—Mortgage suit against insolvents and Official Assignee—Question as to invalidity of transaction can be determined only by Insolvency Court. I.L.R. (1937) 1 Cal. 557=41 C. W. N. 105=170 Ind. Cas. 672.

——S. 57—Purchaser from benamidar.

A purchaser of property from a *benamidar* for the dues subsequent to his adjudication in insolvency does not acquire any title to the property as against the Official Assignee even though the purchase was *bona fide* and for value and without notice. Such a purchaser cannot establish a good title and estoppel against the owner but not against the Official Assignee unless his conduct was such as would create an estoppel against him. 20 C.W.N. 554=23 C.L.J. 463=34 Ind. Cas. 435.

——S. 58—Construction — Penal provision—Strict construction.

The provisions of Cl. (5) of S. 58 are penal in their nature and cannot be construed as applying to any particular case, unless it is quite clear that no other construction of the section is possible.

It is not until the adjudication has been made that the debtor is called in the Act the insolvent and therefore the provisions of S. 58 (5) cannot be held to apply to the powers of the Official Assignee prior to the adjudication when he is acting, not under the powers devolving on him by the operation of the Act itself, but under the powers specially conferred on him by his appointment as receiver under S. 16. 103 Ind. Cas. 184=5 Rang. 244=A.I.R. 1927 Rang. 193.

——S. 58—Person deliberately obstructing lawful order of Court on insolvent's behalf—He can be committed for contempt.

Powers of the High Court of committing for contempt an agent are not limited to S. 58. The Court has the power to commit an insolvent who wilfully obstructs the Court and it has inherent power to commit a person who, with full knowledge, deliberately obstructs the Court on his behalf. When exercising insolvency jurisdiction, the Court is still the High Court. A.I.R. 1938 Mad. 927=1939 M.W.N. 920=48 M.L.W. 462=(1938) 2 M.L.J. 609=I.L.R. (1939) Mad. 19=181 Ind. Cas. 288.

[Reversing A.I.R. 1938 Mad. 175=46 M.L.W. 900 =1937 M.W.N. 1251=175 Ind. Cas. 543.]

——S. 58—Powers to direct payment by third person.

The Insolvency Court has no jurisdiction to order a person to repay a sum of money which the Court had directed should be paid out to him in the regular suit. It has also no jurisdiction to pass any order in connection with the property deposited as security in the regular suit especially when the security has been furnished, not for the benefit of the insolvent's estate, but for the benefit of a third party. A.I.R. 1936 Rang. 151=13 Rang. 703=161 Ind. Cas. 795.

——S. 58—Official Assignee believing property of deceased debtor with certain person—Application for production, legality of—Prima facie case—Question of possession.

Where the Official Assignee, having a well-founded belief that property of an insolvent or a deceased debtor lies in the house of a third person obtains a search warrant from the Court, searches the house and is unable to discover that property because it is cleverly concealed by the occupier of the house, the Official Assignee is not necessarily driven to file a suit against him instead of applying to the Court for directions or for an order for its production in Court.

Before making an order for production of account books from the representatives of a deceased debtor, the Court should decide the question of possession. The Official Assignee has to make out a *prima facie* case that the representatives have the account books in their possession. Mere report of the Official Assignee is not sufficient. A.I.R. 1933 Mad. 74= 1932 M.W.N. 959=36 M.L.W. 703=63 M.L.J. 810=56 Mad. 273=143 Ind. Cas. 265.

——S. 58—Power of Court to give possession to Official Assignee pending decision of dispute.

Under S. 58 (2), the Insolvency Court, in a case where the title of the insolvent to certain property is disputed, can authorise the Official Assignee to take charge of that property pending settlement of the dispute. A.I.R. 1931 Mad. 672=34 M.L.W. 47 =61 M.L.J. 812=54 Mad. 1006=133 Ind. Cas. 777.

——S. 59—Scope—Enabling section.

An Official Assignee on apprehending trouble may approach the Court and obtain a warrant under S. 59 which would be issued to an officer of the Court or to a police officer, but it is only an enabling section and not a prohibiting section and the Official Assignee may obtain possession in other ways. 31 M.L.W. 339=A.I.R. 1930 Mad. 458=124 Ind. Cas. 144= 59 M.L.J. 501.

——S. 60—English law.

The terms of the Presidency Towns Insolvency Act of 1909 are such that they can take no effect upon adjudication under the previous Act, but the modern bankruptcy statutes in England can according to the decisions take effect under that Act by virtue of such sections as S. 40 and S. 60. 51 C.L.J. 283=A.I.R. 1930 Cal. 547.

——S. 60—Insolvent commuting pension—Commutation amount, if vests in Official Assignee.

After-acquired property of an insolvent vests in the Official Assignee though so long as the money was payable as a pension month after month, it was not attachable and was therefore beyond the reach of the Official Assignee. But it would shed this character as soon as it is converted into a lump sum payment as the result of commutation. A.I.R. 1943 Mad. 512=56 M.L.W. 192=(1943) 1 M.L.J. 265 =1943 M.W.N. 323=210 Ind. Cas. 524.

——S. 60—Order of appreciation of salary—S. 60, Civil P. C., if can be invoked.

S. 60 is not at all concerned with attachments. When a Court makes an order under S. 60, appropriating the salary, it does neither in fact nor in form direct the attachment of the property of the insolvent; and S. 60, Civil P. C., cannot be invoked for the purpose of enabling the insolvent to get rid of an order of the appropriation of the salary under S. 60, Presidency Towns Insolvency Act. A.I.R. 1942 Mad. 27=1941 M.W.N. 924=(1941) 2 M.L.J. 845=54 M.L.W. 570=201 Ind. Cas. 112.

——S. 60—Salary below Rs. 100—Court, if can pass order to pay portion of it every month to Official Assignee.

S. 60 has been inserted to enable the Official Assignee to obtain what is known as a 'prospective order', but he cannot obtain such an order when the salary of the insolvent falls below Rs. 100 per mensem. The section is clearly a bar in such a case, unless the insolvent consents to it. A.I.R. 1941 Mad. 906=54 M.L.W. 420=I.L.R. (1942) Mad. 199= 1941 M.W.N. 899=(1941) 2 M.L.J. 591=200 Ind. Cas. 582.

——S. 60—Scope—Whether interferes with S. 52.

Section 60 is a section which enables the Official Assignee to get a prospective order. It is an enabling section and nothing more, and the aid which it gives to the Official Assignee is limited. The section does not, however, interfere with the provisions of S. 52. The salary received by a public servant, though it be below Rs. 100 per mensem, becomes his property when paid to him and, therefore, falls within S. 52. In these circumstances, it would be open in law to the Official Assignee to apply after the salary has been received for an order directing a portion of it to be paid over to him for the benefit of the creditors, but by the time such an application comes on for hearing, probably all the salary would have been spent. The Court might or might not pass such order, but unless the circumstances are exceptional, it might very well refuse to do so in view of the principle embodied in S. 60, Insolvency Act and S. 60, Civil P. C., that small salaries could not be attached. A.I.R. 1941 Mad. 906=I.L.R. (1942) Mad. 199=54 M.L.W. 420=1941 M.W.N. 899= (1941) 2 M.L.J. 591=200 Ind. Cas. 582.

——S. 60 (2)—Appropriation order under.

An appropriation order under S. 60 (2) can be added to an order under S. 39 (1) (*b*) suspending the discharge for a specified time. A.I.R. 1941 Rang. 26=1940 Rang.L.R. 650=192 Ind. Cas. 293.

——S. 60 (2)—Appropriation order—Scope.

Object and scope of appropriation order discussed. A.I.R. 1937 Rang. 22=166 Ind. Cas. 935.

——S. 60 (2)—Earnings of insolvent working on daily wages but paid per month—Whether income or salary and attachable—Master's right to object.

Where a servant becomes insolvent and an order is issued to the employer by the Insolvency Court, though with the consent of the insolvent, to deposit a certain portion of the wages of the servant in the Court, without hearing the employer, it is open to the employer to object to the order on the ground that the wages are not liable to attachment.

An insolvent was employed on a contract of service in a mill as a daily piece work labour, his daily wages were calculated on the quantity of work turned out by him and he was paid once a month for purposes of convenience. His services were liable to be terminated on a month's notice:

Held, that the money paid to the insolvent by his employer, though it was paid under a contract of service, being indefinite in amount and dependent upon the quantity of work done and the number of days worked by the insolvent, it was not income or salary within the meaning of S. 60 (2) and was not attachable. A.I.R. 1936 Mad. 907=1936 M.W.N. 700 =44 M.L.W. 369=71 M.L.J. 432=I.L.R. (1937) Mad. 103=165 Ind. Cas. 466.

——S. 60 (2)—"Income"—Construction—Ejusdem generis.

The term "income" in S. 60 (2), must be construed as *ejusdem generis* with "salary" and the Court has jurisdiction under S. 60 (2) in respect only of the insolvent's salary or income in the nature of a salary.

Where, under the terms of a settlement deed, the insolvent was entitled, *inter alia* to receive a share of the income of certain immovable property amounting to Rs. 250 a month:

Held, that such income was not salary or income in the nature of a salary within S. 60 (2). A.I.R. 1931 Rang. 79=9 R. 138=131 Ind. Cas. 50.

——S. 60 (2)—Pension—Debtor arranging with creditor to pay portion of pension in liquidation of debts—Pension papers deposited with creditor—Insolvency of debtor—Insolvency Court, whether can direct creditor to return papers to insolvent.

A pension payable by Government is not 'property' of the insolvent within the meaning of S. 17, which vests in the Official Assignee.

A pensioner arranged with his creditor to pay a portion of his pension monthly in liquidation of his debts and deposited the pension pay order and other pension papers with the creditor. On being adjudged insolvent, the debtor applied to the Insolvency Court for an order directing the creditor to return pension papers to him:

Held, that the pension was not attachable and the Insolvency Court had, therefore, no power under S. 60 (2) to make an order for the return of the pension papers to the insolvent. A.I.R. 1940 Cal. 192=I.L.R. (1939) 2 Cal. 434=43 C.W.N. 1194 =187 Ind. Cas. 699.

——S. 60 (2)—Rule for fixing amount under S. 60 (2).

The first one hundred rupees of the insolvent's salary and a half of the excess over one hundred are exempt from attachment; and, therefore, there is no reason why the balance at least should not be required to be paid for the benefit of the creditors. That should be the ordinary rule fixing the amount under S. 60 (2). A.I.R. 1941 Mad. 297=1940 M.W.N. 1167=I.L.R. (1941) Mad. 61=(1941) 1 M.L.J. 703=53 M.L.W. 662=194 Ind. Cas. 318.

——S. 60 (2)—Scope.

Amount of the salary ordered by the Court under S. 60 (2) vests in Official Assignee and the balance belongs absolutely to the insolvent who is free to pay it to any one of his creditors and the Official Assignee is not entitled to claim it. A.I.R. 1941 Mad. 297=1940 M.W.N. 1167=I.L.R. (1941) Mad. 61=1941 1 M.L.J. 703=53 M.L.W. 662=194 Ind. Cas. 318.

——S. 61—After acquired property—Vesting of—Right to action.

It is well settled that a cause of action which accrues to a bankrupt subsequent to the adjudication in respect of after-acquired property, remains vested on him and does not vest in his Trustee in Bankruptcy and he is the proper plaintiff to sue in respect thereof and that anything recovered by him remains in the Bankrupt until the Trustee intervene. A plaintiff will not be compelled to give security for costs merely because he is a pauper or a bankrupt. 46 Cal. 156=22 C.W.N. 1018=48 Ind. Cas. 622.

——S. 62—Insolvency of tenant—Disclaimer of lease by Official Assignee determines interest of insolvent from date of disclaimer. 63 C. 1123=40 C.W.N. 846.

——S. 62—Insolvency of tenant—Statutory tenancy of insolvent under Rent Restriction Act, whether insolvent's property.

Statutory tenancy to which the insolvent becomes entitled under the Bombay Rent Restriction Act, 1939 is not his property which could vest in the Official Assignee by the adjudication order. Hence, the Official Assignee cannot disclaim any interest in it. A.I.R. 1945 Bom. 173=I.L.R. (1945) Bom. 702=46 Bom.L.R. 916.

——S. 62—Insolvency of tenant—Statutory tenancy—Disclaimer—Delivery.

The Bombay Rent Act has made the monthly tenant a statutory tenant who cannot be ejected as long as he pays the standard rent. The statutory tenancy is his property and is vested by the adjudication order in the Official Assignee and on the Official Assignee disclaiming any interest in that property the owner of the premises is entitled to an order for delivery against the insolvent. 83 Ind. Cas. 809=48 Bom. 580=26 Bom.L.R. 628=A.I.R. 1924 Bom. 513.

——S. 66. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 62.

——S. 68—Settlement by Official Assignee with creditor of insolvent without leave of Court—Validity.

The omission of the Official Assignee to seek and obtain the leave of the Court does not render the acts done by the Official Assignee under Cls. (*c*) to (*i*) of S. 68 (1), invalid or inoperative; only the Official Assignee will lose the benefit of a protection he would have got for himself had he obtained the leave. Hence a settlement entered into by the Official Assignee and a creditor of the insolvent is valid and binding on the parties, even though the Official Assignee has done so without applying for and obtaining leave of the Court. A.I.R. 1942 Mad. 586=I.L.R. (1942) Mad. 189=(1943) 1 M.L.J. 214=56 M.L.W. 268 =203 Ind. Cas. 266.

——S. 68 (1) (h)—Scope of.

Cl. (*h*) of S. 68 (1), does not make any distinction between compromise of claims in suits already instituted and those in respect of claims not brought

before the Court. A.I.R. 1942 Mad. 586=I.L.R. (1942) Mad. 189=(1942) 1 M.L.J. 214=56 M.L.W. 268=203 Ind. Cas. 266.

——S. 68—Money decree against insolvent—Appeal prior to insolvency—Right of appeal, if falls under S. 68—Appeal, if abates under O. 22, R. 8, C. P. Code.

A suit relating to the property of the insolvent means a suit which, if successful, will increase the assets distributable amongst the creditors, or the defence of which may prevent the assets being diminished. A right to institute an appeal which merely relates to a money-claim against an insolvent is not a legal proceeding relating to the property of the insolvent and does not fall within the powers given by S. 68 to the Official Assignee. Therefore, the Official Assignee cannot maintain the appeal filed by debtor before insolvency for the benefit of the insolvent's creditors, and consequently, the appeal does not abate under O. 22, R. 8. The Official Assignee is not bound by the judgment appealed from, and can, in insolvency, decline to admit the debt. A.I.R. 1941 Bom. 293=43 Bom.L.R. 644=I.L.R. (1941) Bom. 60?=196 Ind. Cas. 339.

——S. 68—Application for satisfaction of insolvent's decree by Official Assignee.

An Insolvency Court cannot entertain an application by the Official Assignee for entering up satisfaction of a decree obtained by the insolvent. 1937 M.W.N. 689.

——S. 68—Partition suit.

No suit for partition can be filed in the Insolvency Court by the Official Assignee representing the father. A.I.R. 1932 Mad. 381=35 M.L.W. 592=63 M.L.J. 37=55 M. 558=138 Ind. Cas. 225.

——S. 68—Contract with insolvent for sale of goods before adjudication—Powers of Official Assignee.

The Official Assignee requiring the completion of a contract to sale of goods, entered into by the defendants, with the insolvent before adjudication must elect within a reasonable time to take up the contract and should make the tender of cash before requiring performance.

Obiter:—The leave of the Court which is referred to in S. 68 of the Act means a particular leave obtained to do a particular thing or things. The Official Assignee is not entitled to carry on the business of the insolvent for the purpose of winding up without the leave of the Court. 17 C.W.N. 578=18 Ind. Cas. 756.

——S. 71—Scope.

S. 71 (1) (*a*) refers only to *interim* dividends and not to the final dividends. A.I.R. 1940 Rang. 22=1939 Rang.L.R. 676=186 Ind. Cas. 536.

——S. 72—Failure to accept proof—Cannot prejudice creditor.

Where a creditor had proved his debt before the declaration of dividend, failure of the Official Assignee to accept the proof in accordance with the provisions of R. 119 (Made by the Bombay High Court) cannot be allowed to prejudice the rights of the creditor and is an adequate ground for disturbing the distribution of the dividend as one not validly made. 117 Ind. Cas. 440=53 Bom. 290=31 Bom.L.R. 35=A.I.R. 1929 Bom. 107.

——S. 75—Official Assignee or creditors permitting insolvent to trade—Person advancing money to insolvent for carrying on business—Rights of.

If the Official Assignee or creditors have permitted the insolvent to trade, they cannot claim upon the person who may be allowed to supply him with stock-in-trade, materials or cash for the purpose of carrying on his business, to have those assets taken and applied for their own benefit in the insolvency. Their object in allowing him to trade must be taken to be with a view to obtain some advantage out of the surplus profits which have been acquired when the trading is over and all necessary outgoings incident to the trading have been paid. The claim of person who has supplied money for business constitutes a prior charge over any claim by the Receiver. A.I.R. 1939 Rang. 186=1940 Rang.L.R. 352=182 Ind. Cas. 298.

——S. 75—Power of Insolvency Court to order payment of sums out of insolvency estate for the defence of the insolvent against a criminal charge.

An Insolvency Court has power to order the payment of sums out of the estate of the insolvent in the hands of the Official Assignee for the defence of the insolvent against a criminal charge especially where the Official Assignee is of opinion that it is desirable from the point of view of the creditors generally that the criminal proceedings should be adequately defended.

The word 'support' in S. 75 is wide enough to justify the making of such an allowance. A.I.R. 1936 Mad. 414=1936 M.W.N. 171=43 M.L.W. 432=70 M.L.J. 563=59 Mad. 862=161 Ind. Cas. 947.

——S. 76—"Creditors", means creditors who have proved their debts.

In S. 76, the word "creditors" means creditors who have proved their debts, because the Official Assignee is not authorized to make any payment to any creditor who has not proved his debt. A.I.R. 1940 Rang. 22=1939 Rang.L.R. 676=186 Ind. Cas. 536.

——S. 76—Creditors paid under composition—Insolvent's right to surplus.

Where, under a composition deed, a trustee was entrusted with the assets of an insolvent firm for payment to creditors and after such payment, a balance was left in his hands, some of the creditors not having made demand, and the insolvent firm sought for payment of that balance:

Held, that the High Court had power to order the Official Assignee as trustee, to pay the balance to the insolvent as prayed for. A.I.R. 1933 Cal. 387=60 Cal. 313=144 Ind. Cas. 216.

——S. 76—Interest.

Where there is a surplus in the estate of the insolvent after paying all the debts in full, Court can give 6 per cent. interest: 13 Cal. 66, Foll. 51 C.L.J. 283=A.I.R. 1930 Cal. 547.

——S. 79—Scope.

The Official Assignee is an officer of the Court and in deciding what is his duty with regard to a contested claim in which he is concerned as trustee, the Court must consider, not merely whether he has a cause of action or right or a defence or answer which would prevail at law or in equity as between ordinary litigants, but also what, in point of honesty, the trustee ought to do in respect of the facts of the case. A.I.R. 1931 Rang. 74=8 Rang. 665=131 Ind. Cas. 504.

——S. 81—Right to Commission—Calcutta High Court Rule, R. 178 (b)—Provisions of Schedule II not availed of—No commission.

R instituted a suit against one *D* for the purpose of enforcing a deed of hypothecation executed by him in favour of the plaintiff. As at the time of the institution of the suit it was not known that *D* had been adjudicated an insolvent, an application was made for the Official Assignee to be brought on the record and the Official Assignee was brought on the record. Thereafter a question of priority was raised between *R* and one *N* and ultimately it was agreed between them that whatever moneys were realized by sale of the stock-in-trade of *D* would be divided between *R* and *N* in the proportion of 1 and 2. Thereafter an arrangement was arrived at by which the Official Assignee was to sell the stock-in-trade through one *M*. The Official Assignee claimed his commission.

Held, that as the parties did not avail themselves of the provisions of the 2nd Schedule of the Insolvency Act for the purpose of realizing their security, they not having availed themselves of the machinery provided by the Insolvency Act, cannot be charged with the commission. 97 Ind. Cas. 294=43 C.L.J. 580=A.I.R. 1926 Cal. 1033.

——S. 82—Liability of Official Assignee—Principles guiding.

Under S. 82 the Court would not hold the Official Assignee personally liable in any matter which he could reasonably take it upon himself to decide, while proceeding regularly under the Statute, and made a decision on a point of law for which there was a reasonable case. At the same time it cannot be held that any mistake, if only it can be put as a mistake in law, is such as to leave the person damnified without a remedy.

An Official Assignee who distributes the whole estate among the scheduled creditors alone ignoring the claims of other creditors of which he has notice before distribution, is personally liable for the sums of which such creditors have been deprived. The fact that the creditors had not moved somebody to put their names into the insolvent's schedule does not furnish an excuse or warrant for what is done by the Official Assignee.

It is not possible for the Court even to pretend to distribute a bankrupt's estate with reasonable certainty unless the rules as to distribution of dividends are regarded by the Official Assignee as absolutely *sacro sanct*. It will be difficult enough even then, but it is not possible to tolerate such a course of conduct as acting by way of analogy giving no notice and taking the risk.

Where the Official Assignee has thrown over all the rules laid down for his guidance in so far as procedure is concerned, and has taken risks which there was no need to take and even in so doing he has acted without reasonable care and has made mistakes in judgment which are not excusable, it is a case in which the Court cannot help itself, but must make the Official Assignee personally liable for the sums of money which are no longer at the credit of the estate and of which the creditors have in fact been deprived. 70 Ind. Cas. 507=26 C.W.N. 653=A.I.R. 1921 Cal. 771.

——S. 85—Inquiry into validity of debts—Official Assignee can question decree debt on sufficient materials.

On an *ex parte* decree being passed, the judgment-debtor instead of trying to get the decree set aside, went to the Insolvency Court and was adjudicated. This debt was the only debt for which he was liable. The Official Assignee investigated into the validity of the decree debt and relying upon the fact that the judgment-debtor was not properly served with a notice and also upon an observation made by a Judge in a previous suit between the insolvent and a third party, held that debt was not proved.

Held: that although the Official Assignee has power to go behind the decree even when the decree-debt is the only debt against the insolvent, still the materials of this case are not sufficient evidence either of collusion or of fraud or of miscarriage of justice as would justify the Insolvency Court in invalidating the decree and holding that the debt is not binding upon or proved against the debtor. 1930 M.W.N. 396=A.I.R. 1930 Mad. 751=129 Ind. Cas. 650 =32 M.L.W. 850=59 M.L.J. 321.

——S. 85—Official Assignee has power to go behind judgment to find validity of debt.

There is no doubt about the powers of the Official Assignee to investigate into the case attempted to be proved before him whatever their nature may be and whether founded on a contract, loan or a judgment or a decree. He has got power to go behind a judgment and enquire into the validity of a debt. 1930 M.W.N. 396=A.I.R. 1930 Mad. 751=129 Ind. Cas. 650=32 M.L.W. 850=59 M.L.J. 321.

——S. 86. *See also* PRESIDENCY TOWNS INSOLVENCY ACT, S. 8.

——Ss. 86, 8, 52, Sch. II, R. 25—Official Assignee—Claim that certain property has not vested in him or to have charge upon property vested in him cannot be dealt with by Official Assignee as tribunal—Action of Official Assignee under R. 25, Sch. II—Appeal — Procedure.

The Official Assignee is the person in whom the insolvent's property vests as owner though only for the benefit of others. A claim that certain property has not vested in him at all or a claim to have a charge upon property which has vested in him cannot, under the Presidency Towns Insolvency Act, be dealt with by him as a tribunal. The Official Assignee in such a matter is a party litigant. Even if the matter could be regarded as a mere question of admitting or rejecting a proof, when the Official Assignee acts under R. 25 of the Second Schedule, it is reasonable and more in accordance with a sound interpretation of S. 86 and with English practice under statutory provisions couched in the same terms that the "appeal" from the "act or decision" of the Official Assignee to the Judge should be by motion and that the oral evidence necessary should be taken before the Insolvency Judge himself. The case where the Official Assignee acts as tribunal cannot be concluded by regarding the Official Assignee as a trial Judge whose estimate of the witnesses' evidence must *prima facie* be accepted. A.I.R. 1938 P.C. 259=42 C.W.N. 1125=48 M.L.W. 466=1938 M.W.N. 1002=5 B.R. 1=40 Bom.L.R. 1236=(1939) 1 M.L.J. 192= 1939 Rang. L.R. 59=32 S.L.R. 898=176 Ind. Cas. 906 (P.C.).

——S. 86—Person aggrieved — Meaning.

S. 86 of the Act includes under person aggrieved by the decision, both a person applying for a decision and person brought before the Court to submit to a decision, when the decision is unfavourable to them. 20 C.W.N. 995=37 Ind. Cas. 71.

——S. 86—Person aggrieved—Appeal.

A person against whom a decision has been pronounced refusing him something he had a right to demand is an aggrieved person. Any person adversely

affected by a judicial order is also an aggrieved person. 33 M. 134=7 M.L.T. 214=(1910) M.W.N. 147=5 Ind. Cas. 974.

——S. 86—Refusal to take action—Appeal.

If the Official Assignee refuses to take action to set aside a transfer, it is open to the creditor to appeal to the Court against that decision under S. 86 of the Act. 104 Ind. Cas. 89=5 Rang. 375=A.I.R. 1927 Rang. 284.

——S. 86—Scope.

S. 86 relates only to the validity of the acts and decisions of the Official Assignee and does not relate to a claim for damages against him for wrongful trespass to goods. The Insolvency Court has no jurisdiction to entertain a claim for damages and if a party making such a claim before it withdraws it he cannot be said to have given it up for all time. 31 M.L.W. 339=A.I.R. 1930 Mad. 458=124 Ind. Cas. 144=59 M.L.J. 501.

——S. 90—Calling case from mofussil Court—No power.

The Judge of the High Court presiding over the Insolvency Court cannot exercise the extraordinary power of calling up any case pending before a mofussil Court under S. 90. 103 Ind. Cas. 754=31 C.W.N. 847=A.I.R. 1927 Cal. 629.

——S. 90—Extension of time.

Where order under S. 36 was made, to attend on 2nd May, 1927, but was served on 4th July, 1927, and the person ordered appealed on 20th July, 1927, time ought to be extended. 115 Ind. Cas. 39=56 Cal. 667=33 C.W.N. 21=A.I.R. 1928 Cal. 786 (F.B.).

——Ss. 90, 17, 30—Property in Foreign State—Whether vests in Official Assignee—Adjudication in British India—Injunction against proceedings in Native State—Power to grant—Annulment of adjudication—Power of Insolvency Court, whether terminates.

An adjudication order does not operate to vest the insolvent's immovable property situated in a Foreign State in the Official Assignee or when there has been a composition scheme approved of by the Court, in the trustees of the composition under the order approving the scheme.

But the language of S. 90 (1) is wide enough to confer on the Court the power of granting an injunction restraining proceedings in a Foreign Court by creditors of an insolvent who is so adjudicated in a British Court and the more so when the parties sought to be restrained carry on business within the Court's jurisdiction even if they do not reside there and have assets within its jurisdiction which can be attached in the case of any breach of the injunction. There is also nothing in principle which prevents the Court from restraining such proceedings.

The jurisdiction of the Insolvency Court is not exhausted owing to the annulment of the adjudication. The Court has jurisdiction to give effect to the scheme it has approved. A.I.R. 1932 Cal. 124=35 C.W.N. 506=136 Ind. Cas. 141.

——S. 90 (1)—Scope.

Under S. 90, Cl. (1) injunction can be granted by a Court restraining a creditor from proceeding against the properties of the insolvent in a foreign country. 62 Cal. 659=39 C.W.N. 1135.

——S. 90—Scope of.

S. 8 (1) gives the Court an unlimited power to review, rescind or vary and S. 90 (1) of Act cannot act to limit that power by importing the provisions of C. P. Code, O. 47, R. 1. 118 Ind. Cas. 615=7 Rang. 201=A.I.R. 1929 Rang. 229.

——S. 90—Scope—Official Assignee—Taking possession of property.

S. 90, provides that the Commissioner in insolvency shall have all the ordinary powers which he would have sitting as a Judge on the Original Side. So when the Official Assignee takes possession of an outsider's property and such outsider sets up paramount title, the Judge can inquire summarily and on motion similar to the procedure laid down in O. 21, Rr. 58, 59 and 60, without compelling the person aggrieved to have recourse to the expensive remedy of a regular suit. 13 Bom.L.R. 13=9 Ind. Cas. 344.

——S. 90—Sufficient cause.

Party applying for review instead of appealing though he had notice of insolvency proceedings—In the absence of sufficient grounds, power of review cannot be exercised under S. 8—Nor can extension of time be granted under S. 90 (5). A.I.R. 1936 Sind 71=163 Ind. Cas. 122.

——S. 90—Transfer of petition from High Court to District Court—Jurisdiction.

When an Insolvency petition pending before the High Court was transferred to District Court, the latter could not try or dispose of the petition. The jurisdiction conferred by the Presidency Towns Insolvency Act and the Prov. Insolvency Act are quite distinct. 38 Mad. 472=14 M.L.T. 184=25 M.L.J. 299=(1913) M.W.N. 1004=(1914) M.W.N. 45=21 Ind. Cas. 77.

——S. 90 (2)—Costs of creditor in proceedings before Official Assignee.

The Insolvency Court cannot award costs incurred by a creditor in an enquiry before the Official Assignee into claims made against the estate as they are not covered by S. 90 (2) of the Act. A.I.R. 1932 Bom. 569=34 Bom.L.R. 1175=139 Ind. Cas. 587.

——S. 90 (4)—Amendments.

A Court has wide powers to grant amendments under S. 90, Cl. (4), and there would appear to be no objection to make an amendment where there is no question as to infraction of the law of limitation. A.I.R. 1935 Sind 53=29 S.L.R. 265=159 Ind. Cas. 745.

——S. 92—Expiry of three months after act of insolvency effect of.

During the pendency of a petition by a creditor for adjudication of the debtor as insolvent, it is open to another creditor whose debt is not time-barred, on the date of the petition, to make an application under S. 92 to be substituted for the original petitioning creditor, to continue the petition. It is immaterial that the application is made more than three months after the date of the act of insolvency on which the petition is based. A.I.R. 1932 Sind 161=26 S.L.R. 162=139 Ind. Cas. 851.

——S. 93—Composition scheme—Effect of death of insolvent.

After the acceptance and approval of the scheme the jurisdiction of the Court continues, and the scheme when accepted and approved operates only as a condional discharge, and subject to S. 31 (2) upon annulment and re-adjudication the *status quo ante* is restored.

When a scheme has been approved and subsequently annulled, and the debtor dies after the scheme has been approved and before it is annulled, S. 93, Insolvency Act, applies; and, notwithstanding the death

of the debtor, any person interested has a *locus standi* to apply that the debtor be re-adjudged an insolvent. 105 Ind. Cas. 90=54 Cal. 650=A.I.R. 1928 Cal. 21.

——S. 94—Scope.

Decree—Appeal to Privy Council by judgment-debtor—Execution of decree and attachment of property—Judgment-debtor adjudicated insolvent pending appeal—Judgment-debtor's application for discharge of orders—Stay of insolvency petition not allowed:

Held, that on adequate security from the alleged insolvent and with liberty to apply, the stay of petition would have been allowed. 34 Bom.L.R. 1436.

——S. 94—Sufficient reason—Pendency of appeal.

Where a petitioning creditor's debt is founded on a judgment, the pendency of an appeal from the judgment would if the appeal is *bona fide* be a sufficient reason for staying proceedings on an insolvency petition under S. 94 of Presidency Towns Insolvency Act. 64 Ind. Cas. 546=13 Bur.L.T. 230.

——S. 99—Firm—Device to avoid insolvency.

A firm should be deemed to carry on business so long as its business debts remain undischarged and it could commit an act of insolvency while so carrying on.

An insolvent firm should not be allowed to evade its responsibility and obligations by the device of one member of the firm bringing a suit against another member and getting a Receiver appointed. A.I.R. 1931 Sind 179=25 S.L.R. 322=134 Ind. Cas. 996.

——S. 99—Hindu Joint family—Notice—Minor.

A joint Hindu family firm can be adjudicated as insolvent under S. 99, Presi. Towns Insol. Act.

It is not necessary in such cases to serve individual notices on all the members of the family.

The minor members of the family cannot, however, be adjudicated as insolvents. A.I.R. 1931 Sind 179 =25 S.L.R. 332=134 Ind. Cas. 996.

——S. 99—Hindu joint family business.

The term "firm" is not applicable to a Hindu joint family business. The Presi. Towns Insol. Act contains no provision entitling a joint family to initiate proceedings and the proceedings initiated under S. 36 are a nullity and liable to be vacated. 164 Ind. Cas. 428 (1)=39 C.W.N. 275.

——S. 99—Hindu joint family business.

Hindu joint family carrying on a family business as such is not a "firm" within the meaning of S. 99, and the members of the family are not "partners" of such a firm. A.I.R. 1936 Rang. 160=14 Rang. 122=162 Ind. Cas. 184.

——S. 99—Insolvency—Partnership — Insolvency of partner of creditor—Evidence—Irregularity of procedure.

R. 47 of the Madras Insolvency Rules does not apply to a petition to declare that a given person is a partner in a firm against which a petition has been presented. In such a case the power is given by S. 99 of the Act. But such an order passed under R. 47 is not bad by the irregularity of procedure. 22 Ind. Cas. 14 (Mad.).

——S. 99—Minor partner.

In British India and Burma, an infant cannot be a partner at all. Therefore, in S. 99 (2), Rang. Insol. Act, "an infant partner" means an infant who is admitted to the benefit of partnership and not a partner by contract. A.I.R. 1939 Rang. 52=179 Ind. Cas. 469.

——S. 99—Minor partner—Procedure.

A person under the age of majority cannot be adjudicated as insolvent for failure to pay the debts of a trading firm though he has a right to participate in its property after its obligations are discharged. It does not, however, follow that a trading concern carried on for the benefit of one or more adult persons and a minor may not be adjudicated as insolvent in the firm name in which its business was carried on, and the property of such concern dealt with in the insolvency proceedings for the benefit of the general body of creditors. (1894) A.C. 607, Foll. 97 Ind. Cas. 446=21 S.L.R. 280=A.I.R. 1927 Sind 18.

——S. 99—Scope—Enabling one.

S. 99 is only an enabling section akin to O. 30, C. P. Code, and does not purport to prescribe anything that is to be done or left undone in order to obtain an adjudication order where a debtor who is a member of a partnership firm or where the members of a partnership firm apply for an order of adjudication. It would be open to a partner and more certainly to a co-parcener to apply to be adjudicated an insolvent and in such a case he would be right in setting out the debts due by his firm, for the reason that under the ordinary law they would be debts for the full amount of which he would be personally liable and this fact will not turn his application into one by the firm. 94 Ind. Cas. 793=30 C.W.N. 173 =A.I.R. 1926 Cal. 640.

——S. 97—Scope—Exercise of powers under.

S. 97, provides that, where insolvency proceedings are pending against the partner in a firm any other insolvency petition shall be presented in or transferred to the Court in which the first mentioned petition is in course of prosecution. The section is sufficiently wide to cover insolvency petitions presented under the Provincial Insolvency Act to a Court which is subject to the superintendence of the High Court.

Where there were three partners and while against two of them, insolvency proceedings were pending before the Official Assignee in a Presidency Town, an Insolvency petition was presented by or against the third partner, to a moffussal Dt. Court.

Held, that the High Court of Madras in its Insolvency jurisdiction had no discretion to refuse to transfer the insolvency petition from the moffussal Court to the High Court. 86 Ind. Cas. 1031=48 Mad. 514=21 M.L.W. 394=1925 M.W.N. 110= A.I.R. 1925 Mad. 569=48 M.L.J. 228.

——S. 98—Scope—Insolvency of a partner—Effect of.

Though the insolvency of a partner does not in India *ipso facto* terminate the partnership the Official Assignee of the insolvent cannot take possession of the goods of the partnership without the consent of the other partner or partners in whose possession they may happen to be. 31 M.L.W. 339=A.I.R. 1930 Mad. 458=124 Ind. Cas. 144=59 M.L.J. 501.

——S. 99—Scope—Not firm but its partners can be adjudicated in name of firm.

A firm is not a legal entity, and a firm cannot be adjudicated insolvent but the partners of a firm can be adjudicated in the firm name and when the petitioning creditor commits himself to a statement that the firm to be adjudged insolvent is merely a business name of a single person, then there is no significance in an adjudication in the firm name. A.I.R. 1938 Rang. 475=179 Ind. Cas. 526.

——S. 101—'Official Assignee, if include trustees under composition deed.

The words "Official Assignee' in S. 101, do not include trustees under a deed of composition. Moreover, an application calling upon them to admit a claim cannot rightly and properly be called an appeal from their decision within the meaning of S. 101. A.I.R. 1937 Cal. 336=173 Ind. Cas. 906.

——S. 101—When time begins to run—Order under S. 18 of Sch. II.

Where an order is got by certain parties under S. 18 of the 2nd Schedule to prove their mortgage before the Registrar in Insolvency, and an appeal is filed from the Registrar's report, the 20 days provided by S. 101 run not as from the findings being filed or signed, but as from the matter being completed and the report being signed. 60 Ind. Cas. 889=47 Cal. 721=26 C.W.N. 631=A.I.R. 1921 Cal. 776.

——S. 102—Applicability.

S. 102 of the Presidency Towns Insolvency Act applies only to an insolvent adjudicated under that Act. 98 Ind. Cas. 116=53 Cal. 929=44 C.L.J. 350=27 Cr.L.J. 1268=A.I.R. 1927 Cal. 149.

——S. 102—Credit by false personation—Section applies.

Where credit was obtained by an undischarged insolvent by falsely impersonating another, *Held*:—

Obtaining credit by a trick would equally be within the purview of the section, the fact of the person obtaining it being an undischarged insolvent being undisclosed. 85 Ind. Cas. 229=26 Cr.L.J. 485=3 Bur.L.J. 329=A.I.R. 1925 Rang. 176.

——S. 102—Obtaining goods on jangad by undischarged insolvent without letting himself known as such.

In the case of a *jangad* transaction, the owner of the goods gives credit to the deliveree though it is subject to certain conditions, and to that extent, the deliveree obtains credit. The section is satisfied if, credit, in fact is given, and in the case of a 'sale or return', or *jangad* transaction, it is given. The object of the section is to protect the unwary public from undischarged insolvents. Consequently obtaining goods on *jangad* by an undischarged insolvent without informing the giver that he is an undischarged insolvent amounts to 'obtaining credit' within the meaning of S. 102. A.I.R. 1934 Bom. 360=36 Bom.L.R. 731=36 Cr.L.J. 134=58 Bom. 646=152 Ind. Cas. 706.

——S. 102—Property acquired after adjudication—Undischarged insolvent, when entitled to mortgage or deal with it.

As regards property acquired afterwards subject to the right and claim of the Official Assignee, so long as the Official Assignee does not interfere, the uncertificated bankrupt has the power to buy and sell and give discharged and do all other acts as he could have done and had done before the intervention of the Official Assignee. And, therefore, an undischarged insolvent who is in possession of property acquired afterwards, can mortgage and deal with it. A.I.R. 1934 Cal. 529=38 C.W.N. 283=61 Cal. 281=35 Cr.L.J. 1238=151 Ind. Cas. 137.

——S. 102—Property acquired after adjudication—Mortgage of, by undischarged insolvent.

The transfer of the property by way of mortgage in raising the loan on hypothecation of immovable property acquired by the insolvent after the adjudication order does not stand on the same footing as obtaining credit merely, as mentioned in S. 102, Presidency Towns Insolvency Act. A.I.R. 1934 Cal. 529=38 C.W.N. 283=61 Cal. 281=35 Cr.L.J. 1238=151 Ind. Cas. 137.

——S. 103—Commitment—For offence under S. 103 is illegal.

Due to S. 104, Presidency Towns Insolvency Act amended read with S. 254, Cr. P. Code commitment of an accused for trial to the High Court Sessions for an offence under S. 103, Presidency Towns Insolvency Act is illegal because the case under that section is a warrant case and the maximum punishment for the offence is only two years' imprisonment. 120 Ind. Cas. 813=1929 Cr. C. 521=56 Cal. 785=31 Cr.L.J. 184=A.I.R. 1929 Cal. 777.

——S. 103—Concealment — Ingredients of — After-acquired property of insolvent—Failure to notify Official Assignee—Whether concealment.

To constitute concealment within the meaning of S. 103 (*b*) (*ii*) there must be some act on the part of the petitioner whereby he can be shown to have wilfully kept some property away from the notice or the view of the Official Assignee. If there was a duty on his part to disclose, or if there was a call on him to disclose, and he did not conform to it, or gave incorrect particulars, that would be a case of concealment within the meaning of the rule. When an allocation has been made it cannot be disputed that the excess over that allocation in the personal earnings of the insolvent belongs to him, he having an unfettered right over it. No duty is cast on him by statute to disclose such earning to the Official Assignee. Hence, if he does not disclose such, no offence is committed under S. 103 (*b*) (*ii*). 231 Ind. Cas. 147=A.I.R. 1947 Mad. 187=48 Cr.L.J. 705=49 M.L.W. 620=1946 M.W.N. 694=(1946) 2 M.L.J. 333.

——Ss. 103, 104—Condition to be fulfilled before insolvent can be put on trial before a Magistrate—Delay of prosecution — Whether to be considered.

Before an insolvent can be put on trial for an offence under S. 103, the Insolvency Court should be satisfied, firstly that there are grounds to believe that the debtor has been guilty of an offence under the Act and secondly, that the circumstances are such as to render a prosecution desirable.

Delay in launching a prosecution is a matter to be considered in a criminal trial. It is not fair to ask the accused to meet a charge in respect of an offence committed many years back. A.I.R. 1933 Sind 381 =27 S.L.R. 468=147 Ind. Cas. 136.

——Ss. 103 and 49—Conviction—Essentials of.

To constitute an offence under S. 103, the intent to give undue preference or diminish the divisible assets is essential and unless this is shown to be the material result of the accused's action, such an intent cannot be inferred. A transfer, by a person declared an insolvent under S. 49 (4) of property to his wife in consideration of the private debts owned by him to her without the fraudulent intent being valid, no conviction for an offence under S. 103 can stand. 16 Cr.L.J. 193=27 Ind. Cas. 753 (Mad.).

——S. 103—Fraudulent preference — Separate arrangement with each creditor.

There is no fraudulent preference where an insolvent arranges with each of his creditors for payment of a definite fraction of their dues where he alleges that others also have received the same but the

creditors never acted upon it. 4 Bur.L.T. 200=11 Ind. Cas. 809.

——S. 103—Non-disclosure of books.

For his not disclosing his books the debtor can be dealt with under Insolvency Act. 113 Ind. Cas. 854=48 C.L.J. 531=A.I.R. 1929 Cal. 144.

——S. 103—Offence under general law—Subsists.

Where the insolvent was entrusted with furniture by the Official Assignee for the purpose of continuing his business and, in breach of the trust, he disposed of it to various persons:

Held: that his conviction under general law was proper, even assuming that the facts proved do amount to an offence under S. 103 (*b*) (2), Presidency Towns Insolvency Act. 105 Ind. Cas. 448=39 M. L.T. 268=28 Cr.L.J. 928=A.I.R. 1927 Mad. 1018.

——S. 103—Offence under — Cognizability—Complaint of creditor.

Proceedings against an insolvent are set in motion only if the Insolvency Court is satisfied of the offence under S. 103 of the Presi. Towns Insolvency Act and a creditor cannot initiate proceedings before another Court. 25 M.L.J. 577=(1913) M.W.N. 1000=14 Cr.L.J. 637=21 Ind. Cas. 685.

——Ss. 103 and 104—Offence under the Insolvency Act—Trial of—Notice of charge and the charges framed, if must agree—Undue preference when creditor not admitted.

A charge under S. 103 must be in pursuance of notice required to be issued under S. 104. 21 Cr. L.J. 481=24 C.W.N. 418=56 Ind. Cas. 577.

——Ss. 103, 104 and 36—Offences under the Insolvency Act—Notice of charges—Framing of charges—Discrepancy.

S. 103 applies to offences committed both before and after the adjudication and also to cases of wilfully withholding the production of books even after they have come to possession of the Official Assignee. Though a charge under S. 103 cannot be maintained if not framed in pursuance of the notice under S. 104 this must be taken as subject to the principle which is embodied in S. 537, Cr. P. Code and in determining whether this is so the Court shall have regard to the fact whether the objection could and should have been raised in an earlier stage. 47 Cal. 254=24 C.W.N. 425=21 Cr.L.J. 522=31 C.L.J. 209=56 Ind. Cas. 778.

——S. 103—Proof of charge.

A charge against the insolvent for an offence under the Insolvency Act must be made against him and must be proved against him beyond a reasonable doubt. 101 Ind. Cas. 419=5 Rang. 50=A.I.R. 1927 Rang. 126.

——S. 103—Scope.

S. 103 falls into two parts, the intention under each being different, and under each part there are several cases of specific offences. Where three distinct charges, each charge comprising offences under cl. (*a*) (*iii*) and cl. (*b*) (*ii*) of S. 103 are joined together in the same charge, the joinder is illegal under S. 233, Criminal P. C. A.I.R. 1934 Bom. 303=36 Bom.L.R. 639=35 Cr.L.J. 1477=151 Ind. Cas. 934.

——S. 103-A—Certificate under—Form and nature of.

In the case of a certificate under sub-S. (2) of S. 103-A, Presidency Towns Insolvency Act (Rangoon) it is not necessary that there should be a separate document headed "certificate" and commencing with the words "I hereby certify" or "It is hereby certified" but there must be somewhere in the record a statement by the Court granting the discharge that the insolvent's insolvency was caused by misfortune without any misconduct on his part.

A finding to the effect that the fact that the insolvent's assets are not of a value equal to four annas in the rupee on the amount of his unsecured liabilities had arisen from circumstances for which he could not justly be held responsible does not imply that the insolvency was caused by misfortune. There is a contrast between the words "misconduct" and "misfortune". The absence of misconduct does not mean that insolvency was caused by misfortune. A.I.R. 1942 Rang. 30=1941 Rang. L. R. 638=199 Ind. Cas. 274.

——S. 104—Application for sanction to prosecute insolvent for offence under—Duty of Judge—Duty to satisfy himself that money transferred is money belonging to insolvent.

Where an application is made to the Judge in insolvency to prosecute an insolvent for an offence under S. 103 (*b*) (*ii*), unless the Judge is satisfied that the money transferred is money belonging to the insolvent, he should not sanction the prosecution. Unless the Judge has clearly in his mind that some definite offence has been committed in the course of "the subsequent dealings of the insolvent" he is not justified in sanctioning the prosecution merely because, in the event, it might turn out that the Magistrate could elicit from the evidence adduced in the course of the prosecution that an offence under the Insolvency Act had been committed. A.I.R. 1933 Rang. 253=149 Ind. Cas. 1106 (2).

——S. 104—Discretion under—When can be exercised — Complaint, if should be made at time of hearing discharge application—Questions to be considered in deciding if complaint should be made—Preliminary enquiry, if necessary—Notice to insolvent, necessity of.

It is open to the Court at any stage of the proceedings after the adjudication order has been passed, and even after discharge, to exercise the discretion with which it is vested under S. 104. It is not necessary, and in many cases, it would be undesirable, that the Court should order that a complaint be made under S. 104 at the hearing of an application for discharge. Different considerations arise when the Court is called upon to decide whether, and if so, upon what terms, an insolvent should be granted his discharge, and whether the Court should exercise the powers which it possesses, under S. 104. (Duty of Court in considering whether a complaint should be made under S. 104 indicated). An application under S. 104 is not one in which the insolvent against whom proceedings are proposed is entitled to take part unless invited to do so by the Court. But it cannot be said that where an insolvent is not heard on an application under S. 104, the insolvent is not thereby prejudiced in any way, because, in the event of proceedings by way of prosecution being instituted, he has, of course, ample opportunity of appearing and defending himself in those proceedings when launched. It depends on the circumstances and, it may often be of great importance to the insolvent that he should have an opportunity of explaining to the Court the reasons why he contends that the Court should not proceed to the extreme limit of making a complaint under S. 104 against him in a Criminal Court. A. I. R. 1935 Rang. 324=13 R. 528=158 Ind. Cas. 644.

——S. 106—Applicability.

The proviso to S. 106 (1) is concerned solely with the provisions of the Act relating to the discharge of the insolvent and has no bearing on the appealability of the orders passed. A.I.R. 1940 Mad. 572=51 M.L.W. 433=(1940) 1 M.L.J. 533=1940 M.W.N. 527.

——S. 106—Examination of debtor—Excusing delay in application.

In fit cases the Court should not be disinclined to condone a short delay in making the application for the examination of a debtor where the creditorss had no express notice that the estate of the debtor was ordered to be administered in a summary way. 120 Ind. Cas. 94=A.I.R. 1930 Sind 76.

——S. 106—Leave to appeal—Refusal—Procedure.

Where leave to appeal, under S. 106 (*a*) is refused by the Insolvency Court, the unsuccessful party can apply to the Court of Appeal for special leave to appeal. If a question of principle is involved, the Appeal Court can hear the appeal under its inherent powers. 72 Ind. Cas. 261=25 Bom.L.R. 161=A.I.R. 1923 Bom. 245.

——S. 108—Construction—Proceedings under S. 108—Attaching creditor, position of—Attachment followed by sale—Attaching creditor, if entitled to proceeds.

The administration in insolvency of a deceased debtor's estate under S. 108, must necessarily mean that the uncharged assets of the estate are to be utilised for the benefit of the general body of creditors, and as a mere attachment creates no charge, an attaching creditor is in no better position than any other ordinary creditor. If the attachment has resulted in a sale and the sale proceeds are in Court, the attaching creditor is entitled, irrespective of S. 53 to the money or so much of it as is necessary to meet his claim. A.I.R. 1941 Mad. 183=52 M.L.W. 894=(1940) 1 M.L.J. 979=1940 M.W.N. 1251=I.L.R. (1941) Mad. 398=193 Ind. Cas. 460.

——S. 108—Court's discretion to disallow petition.

A creditor is not entitled to an administration order *ex debito justitiae* upon proof of the statutory conditions precedent but the Court has a discretion to disallow the petition when it finds that sufficient cause is shown. A.I.R. 1936 Sind 175=29 S.L.R. 410=164 Ind. Cas. 1113.

——S. 108—Mere fact of being partner, if comes within the term "carrying on business."

The mere fact that a person is a partner in a business carried on in a particular place does not constitute his carrying on business at that place within the meaning of S. 108. The expression 'carrying on business' is not intended to be used in an unrestricted sense. It is limited to business carried on personally. A.I.R. 1936 Sind 175=29 S.L.R. 416=164 Ind. Cas. 1113.

——S. 108—Suit—Proper parties.

The next-of-kin and the intermeddler with an estate are proper parties to an administration suit. A.I.R. 1933 Mad. 74=1932 M.W.N. 959=36 M.L.W. 703=63 M.L.J. 810=56 M. 273=143 Ind. Cas. 265.

——S. 109—Administration order—Direction postponing drawing up of order—Property, whether vests in Official Assignee from pronouncement of order or drawing up of order.

Where an administration order is made under S. 108, the property vests in the Official Assignee the moment the order is pronounced. Delay in the drawing up of the order does not affect the vesting of the property.

A direction that the order is not to be drawn up until after a certain period does not, therefore, delay the vesting of the property.

The ordinary *prima facie* rule of all the Courts of law and equity is that the drawing up of the order is not the bringing into existence of the order. A.I.R. 1933 Cal. 208=36 C.W.N. 861=59 C. 1475=141 Ind. Cas. 358.

——S. 109—Scope and effect.

The inclusion of the provisions of Part 3, in S. 109 does not involve the exclusion of the provisions of the other section of the Act in respect of the administration of estates in insolvency. The reference to Part 3, in S. 109 (2) of the Act is made merely to avoid any doubt or difficulty which might arise as to the application of the provisions of that part which referred to orders of adjudication, to cases of administration in insolvency. This reference does not involve the exclusion of the operation of S. 7 and the powers given by S. 7 can be exercised by the Court if the terms of that section do not preclude its application to cases of administration in insolvency. 27 Mad.L.J. 66, Diss. 97 Ind. Cas. 224=4 Rang. 157=A.I.R. 1926 Rang. 157 (F.B.).

——S. 109—Subsequent vacating of order.

At the date of the institution of a suit by the manager of an estate for recovery of amounts due for minimum royalties, the estate had vested in the Official Assignee under an order of Court. The order vesting the estate in the Official Assignee was subsequently vacated.

Held, that the effect of the subsequent vacating of the order was that there was no decision vesting that estate in the Official Assignee at the date of the institution of the suit so as to prevent the plaintiff from maintaining the suit and that he was competent to maintain the suit. A.I.R. 1943 Cal. 547=37 C.W.N. 298=60 C. 533=146 Ind. Cas. 256.

——S. 112—Adjudication on proof by claimant—Bombay rules.

Per *Kemp, J.*—The Official Assignee is bound to adjudicate upon the proof submitted by claimant within seven days of the latest date mentioned in the notice of dividend as to the latest date for lodging proofs. 117 Ind. Cas. 440=53 Bom. 290=31 Bom. L.R. 35=A.I.R. 1929 Bom. 107.

——S. 112—Notice to creditors—Bombay rules.

Per *Kemp, J.*—The notice must state the latest date within which creditors can prove. The necessity of giving such a date is important because it limits the time for proof and dates the rejection of the proof within that time as the starting point for an appeal against the Official Assignee's decision. 117 Ind. Cas. 440=53 Bom. 290=31 Bom.L.R. 35=A.I.R. 1929 Bom. 107.

——S. 112—Insolvency Rules (Bombay), Rr. 112, 115—Trustee under composition scheme—Order rejecting claim — Revision — Jurisdiction of Insolvency Court—Notice of motion under R. 112—Jurisdiction of trustee to call for proof of claim under R. 115.

It is open to the Insolvency Court to revise an order passed by a trustee under a composition scheme, on a notice of motion either under R. 112 of the Bombay Insolvency Rules, 1910, or under the inherent jurisdiction of the Court.

Under R. 115, the trustee has no jurisdiction to call for proof of a creditor's claim or to reject it.

A.I.R. 1932 Bom. 557=34 Bom.L.R. 1172=141 Ind. Cas. 672.

——S. 112—Insolvency Rules (Calcutta), Rr. 67, 71, 72, 74, 81—Petition of insolvency by creditor—Procedure.

Insolvency Rr. 66, 71, 72, 74, 81 framed by the Calcutta High Court are the particular rules dealing with an application by a petitioning creditor, and the rules contemplate only a formal petition with an affidavit in support and a notice by the debtor specifying the statements which he intends to deny or dispute. No other affidavit, notice or pleading is suggested, but R. 81 contemplates an adjudication on the materials before the Court including any oral evidence that may be tendered at the hearing and an adjournment if either party desires to produce further oral evidence. So long as the rules indicate a particular form of procedure, that procedure should be observed. A.I.R. 1936 Cal. 269=166 Ind. Cas. 657.

——S. 112—Insolvency Rules (Karachi), R. 151-A.

Both under Act and R. 151-A, a suit to recover from the debtor or the trustee, under a scheme or composition is barred. The creditor's only remedy is by an application under S. 32 (2). A.I.R. 1943 Sind 228=I.L.R. (1943) Kar. 305=210 Ind. Cas. 202.

——S. 112—Insolvency Rules (Karachi), R. 154—Creditor, when can take benefit of composition—Creditor not having proved his debt—Whether can proceed against surety under the composition.

Under R. 154 of the Karachi Town Insolvency Rules, no creditor can take the benefit of a composition unless he has proved his debt before the approval of such composition. Consequently, a creditor who has not lodged his proof with the Official Assignee and has not proved his debt under the Insol. Act cannot proceed against a surety under the composition.

R. 154 of the Karachi Town Insolvency Rules is imperative. A.I.R. 1935 Sind. 137=29 S.L.R. 258 =156 Ind. Cas. 722.

——S. 112—Madras Rules, R. 47—Scope of.

R. 47, which says that an order of adjudication shall be made against partners individually, does not mean that an order of adjudication shall not be made against the firm. If it has that meaning, it is at variance with S. 99 and may be *ultra vires*. 91 Ind. Cas. 127=22 M.L.W. 411=1925 M.W.N. 749= 48 Mad. 795=A.I.R. 1925 Mad. 1249=49 M.L.J. 457.

——S. 112—Madras Rules, R. 98—Permission—Failure to apply for—Court allowing plaintiff to proceed with suit—Revision.

Where plaintiff had to apply to Court under R. 98 for permission to proceed with the suit and he failed to do so, but was nevertheless permitted by Court to proceed with the suit and obtained a decree.

Held, that the High Court would not interfere in revision on the mere failure of the plaintiff to apply under R. 98. 8 M.L.T. 362=(1910) M.W.N. 562 =8 Ind. Cas. 160.

——S. 112—Madras Rules, R. 102—Ex parte decree—Setting aside—Sufficient cause—Illness of defendant.

Under R. 102 of the Rules, to set aside *ex parte* decree it must be proved that the deft. was prevented by sufficient cause from attending at the trial. An application to set aside an *ex parte* decree was based on the ground of the deft.'s illeness on the day of hearing and the Judge passed the following order. "No grounds, Dismissed with costs".

Held, that the order did not mean that the deft.'s illness and his inability to appear on account of such illness were not grounds for setting aside the *ex parte* decree but that the Judge was not satisfied that the deft. was prevented by illness from appearing and therefore the High Court could not interfere in the revision. 11 Ind. Cas. 992 (Mad.).

——S. 112—Madras Rules, R. 104—Report by Official Assignee. when evidence.

The Official Assignee's report is evidence of the matter reported only when the matter is one with regard to which the Official Assignee is directed or empowered by the Act to make a report. It is not evidence in a criminal proceeding though the Assignee is authorised under R. 104 to make a report for the purposes of prosecution. R. 116 will be *ultra vires* if it is to be construed as making the report of the Official Assignee for any purpose, evidence of the facts stated therein. 14 M.L.T. 48=25 M.L.J. 320=20 Ind. Cas. 482.

——S. 112—Madras Rules, O. 17, R. 19—Commission on payments made by Official Assignee under composition.

It is the practice of the Madras High Court to allow the Official Assignee to charge commission on payments made under a scheme of composition. O. 17, R. 19 is wide enough to permit of this. A.I.R. 1943 Mad. 12=55 M.L.W. 615=(1942) 2 M.L.J. 448 =1942 M.W.N. 630=I.L.R. (1943) Mad. 338= 205 Ind. Cas. 94.

——S. 112—Rangoon Rules, R. 202.

In a case where an adjudication order obtained by a creditor is annulled, the Official Assignee is entitled to a commission, though he is entitled to demand from the adjudicating creditor all the out of pocket expenses he may have incurred. A.I.R. 1933 Rang. 280=149 Ind. Cas. 1036.

——S. 112—Rangoon Rules, R. 202 (2)—Sale of property free from mortgage with consent of mortgagee—Official Assignee's right to commission—Rule 202 (2), validity of.

Under R. 202 (2) of the Rules framed by the Rangoon High Court under the Presidency Towns Insolvency Act, the Official Assignee, when he sells property subject to a mortgage by deposit of title deeds free from that mortgage with the consent of his mortgagee, is entitled to draw a commission of 5 per cent. on the gross sale proceeds and not merely on the balance, if any, after satisfying the mortgage-debt.

R. 202 (2) is not *ultra vires*. A.I.R. 1931 Rang. 61=8 R. 514=129 Ind. Cas. 497.

——S. 115—Appeal—By Attorney for Assignee—Exception from stamp duty.

Where an Attorney acting for the Official Assignee files an apeal against an order in insolvency proceedings, S 115 of the Presidency Towns Insolvency Act exempts from stamp duty the copy of the order appealed against. 59 Ind. Cas. 475=43 Mad. 747=12 M.L.W. 89=1920 M.W.N. 424=39 M.L.J. 135.

——Ss. 115, 125—Matter covered by S. 115—Fees, if can be prescribed under S. 125—S. 115, purpose of.

S. 125 does not give the Court power to prescribe a fee in respect of a matter covered by S. 115 of the Act. The purpose of S. 115 is clearly to save as much as possible of the insolvent's estate for distri-

bution amongst the creditors. A.I.R. 1938 Cal. 755 =42 C.W.N. 1146=I.L.R. (1939) 1 Cal. 56=178 Ind. Cas. 797.

——S. 116—'Duly made'—Interpretation and effect of.

The expression "duly made" merely contemplates that the acts of bankruptcy on which the order of adjudications is founded should be regarded as acts of bankruptcy. It does not give such findings the legal consequences of a decision against the parties who have not had any opportunity of being heard in the matter.

It is only in their character as acts of bankruptcy that the adjudication is said to be founded on them and if the Official Assignee should, in such cases also, desire to obtain a decision against third parties, he should adopt the ordinary procedure indicated in the Act. 101 Ind. Cas. 12=50 Mad. 541=25 M.L.W. 434=1927 M.W.N. 152=38 M.L.T. 119=A.I.R. 1927 Mad. 526=52 M.L.J. 352.

(*Overruled in* (1943) 2 M.L.J. 160=A.I.R. 1943 P.C. 130.)

——S. 116—Transfer found act of insolvency in order of adjudication—Transferee, though not party, cannot challenge.

The order of adjudication is conclusive and cannot be disputed. Hence a transfer which has been found to be an act of insolvency in the order of adjudication can no longer be alleged by the transferee not to be void on that ground, although the order affects his rights and is passed in his absence.

But the third party who is placed in this anomalous position is, of course, not without redress. His remedy is to appeal as a person aggrieved against the adjudication order which has so far determined his rights. This being the sole remedy, is one which justice demands that the Courts should carefully protect; and if an extension of time for appealing is reasonably required, such extension should be granted *ex debito justitiae, e.g.*, where the party and his pleader have on account of doubt about the applicability of certain English decision, chosen a wrong remedy but promptly, extension under S. 5. Lim. Act, should be granted. A.I.R. 1943 P.C. 130=56 M.L.W. 423=(1943) 2 M.L.J. 160=1943 A.L.J. 357 =1943 M.W.N. 494=10 B.R. 57=47 C.W.N. 914 =70 I.A. 93=1943 A.W.R. 67=I.L.R. (1943) 2 Cal. 517=I.L.R. (1943) Kar.P.C. 135 Sup.=208 Ind. Cas. 351 (P.C.).

Overrules A.I.R. 1927 Mad. 526=101 Ind. Cas. 12.

——S. 116 (2), if restricted to petitioning creditors and debtors only.

S. 116 (2) is in general terms and does not restrict its effect to the petitioning creditors and debtors only and there is no reason why it should not extend to third parties. A.I.R. 1936 Sind 246=30 S.L.R. 281=166 Ind. Cas. 133.

——S. 118—Order for delivery of property—Order passed on application made by creditor—Irregularity is not curable under S. 118.

An order under S. 36 (5), Presy. Towns Ins. Act can be passed only on the application of the Official Assignee and not on the application of the creditor, and an irregularity in passing an order on the application of the creditor is not curable under S. 118. 98 Ind. Cas. 723=30 C.W.N. 914=A.I.R. 1926 Cal. 1097.

——S. 118—Petitioning creditor inadvertently omitting to include security—Proceedings, if to be set aside.

If the petitioning creditor inadvertently, and not deliberately, omits to include or mention a security, it is not right that the proceedings should be wholly set aside. A.I.R. 1935 Cal. 84=61 C. 924=154 Ind. Cas. 524.

——S. 121—Advocates of Madras—Right of audience.

Advocates enrolled in the Madras High Court under the provisions of the Bar Councils Act are entitled to act and plead in the insolvency jurisdiction of the High Court. 113 Ind. Cas. 876=28 M.L.W. 545= 52 Mad. 92=1928 M.W.N. 856=A.I.R. 1928 Mad. 1182=55 M.L.J. 551 (F.B.).

——S. 121—Attorneys—Right of audience before officer under S. 6.

The Attorneys of the High Court have right of audience before the officer appointed by the Chief Justice under S. 6 of the Act. S. 121 of the act preserves this right of audience possessed by Attorneys. 37 Bom. 464=15 Bom.L.R. 217=19 Ind. Cas. 421.

——S. 121—Effect—Section leaves the right of audience unaffected.

The effect of S. 121 of the Act is that, if Vakils had the right of audience in the Insolvency Courts before 1909, it was not taken away from them; but, if they had not such a right previously, it was not conferred on them. 85 Ind. Cas. 1025=48 Mad. 331=A.I.R. 1925 Mad. 385=48 M.L.J. 36 (F.B.).

——S. 121—Vakils of Madras.

Vakils have no right of audience in the Insolvency Court at the Presidency Town of Madras. 85 Ind. Cas. 1025=48 Mad. 331=A.I.R. 1925 Mad. 385= 48 M.L.J. 36 (F.B.).

——Ss. 122, 71—Practice to reserve for creditors who have not proved their claims on amounts shown in insolvent's schedule with Official Assignee's commission of five per cent. is contrary to spirit of Act—S. 71 (1) (a) refers to interim dividends.

Practice to reserve for those creditors who do not prove their claims on the amounts shown in the insolvent's schedule with the Official Assignee's commission of five per cent. is contrary to the spirit and intention of the Insolvency Law and cannot be defended under any provision of the Act. Such reservation of amounts for the benefit of creditors who have not proved their debts is not a reservation of "unclaimed dividends" which are dealt with in S. 122 of the Act. This latter section refers to dividends due to creditors who have proved their debts but who did not come forward to claim their dues when the dividend was declared. The provisions of the section do not authorize a retention of funds in favour of a creditor who has not proved his debt up to the time of declaration of the final dividend. S. 71 (1) (*a*) which provides for the only case in which funds have to be or can be reserved refers only to *interim* dividends and not to the final dividend. A.I.R. 1940 Rang. 22=1939 Rang.L.R. 676=186 Ind. Cas. 536.

——S. 123—Annulment of adjudication order by Insolvency Court—Application for refund—Maintainability.

S. 123, no doubt, provides that even where moneys have been transferred to the Govt. a person entitled thereto may apply to the Court for an order that they be refunded to him. The section must be construed reasonably in the light of the Act; and so construed,

such an application can only be made when the Court, which, as defined by the Act, is the insolvency Court, is seized of any particular matter as such Court. Every Judge of the High Court exercises various kinds of jurisdiction. The Commissioner in insolvency has more than one jurisdiction. In one jurisdiction, he acts as the Commissioner in insolvency; in the other, he exercises the ordinary jurisdiction in civil cases. A Judge of the High Court can never act as Commissioner in insolvency unless there is a matter which arises in insolvency. A.I.R. 1935 Bom. 310=37 Bom.L.R. 449=59 B. 600=157 Ind. Cas. 930.

——S. 125—Scope.

S. 125 does not give the Court power to prescribe a fee in respect of a matter covered by S. 115. A. I.R. 1938 Cal. 755=I.L.R. (1939) 1 Cal. 56=42 C.W.N. 1146=178 Ind. Cas. 797.

——S. 126—Scope—Bankruptcy Act, 1914, (4 and 5, Geo. V, Ch. 59), S. 122—Adjudication by Rangoon High Court—Jurisdiction of Rangoon High Court to apply to Madras High Court to act in aid—Jurisdiction of Courts in British India to act in aid of each other.

Under S. 126, Presidency Towns Insolvency Act, the Rangoon High Court can call upon the Madras High Court and its officers to act in aid of it and of the Official Assignee of Rangoon in the matter of an insolvency.

S. 122, Bankruptcy Act, 1914, not only authorises one Court in the United Kingdom to aid and get aid from British Courts outside the United Kingdom but also enables the British Courts outside the United Kingdom to aid each other. Therefore, it authorises one High Court in British India to aid another High Court in British India to help a Provincial Insolvency Court in British India.

Under S. 122, Bankruptcy Act, in order to give the Court whose aid is sought by another Court, jurisdiction to aid, there must be an order of the Court seeking such aid together with a request. A. I.R. 1932 Mad. 264=34 M.L.W. 765=62 M.L.J. 96=1932 M.W.N. 249=135 Ind. Cas. 616.

——Sch. 2—Proof of claim by secured creditors. *See also* PRESIDENCY TOWNS INSOLVENCY ACT, S. 48.

Where certain shares are standing in the name of the insolvent's wife, the bank need not value these shares inasmuch as they are *prima facie* her property, and a lien over the property of a stranger is in no sense a lien over the property of a debtor so as to attract the applicability of the rules pertaining to proof of claims by secured creditors. A.I.R. 1933 Sind 355=27 S.L.R. 224=150 Ind. Cas. 274.

——Sch. 2, R. 11—Admission of debt—Calcutta Rules, R. 128.

The mere fact that the sum is payable under the composition and is stated therein to be payable does not of itself forego the need for proof of debt required by R. 128. 90 Ind. Cas. 449=53 Cal. 448 =29 C.W.N. 1019=A.I.R. 1926 Cal. 176.

——Sch. II, R. 12, proviso—Failure of Official Assignee to redeem — Effect.

The failure of the Official Assignee to signify his election to exercise the power to redeem the property within the time allowed puts an end to his equity of redemption which, without more, vests in the mortgagee and on the failure of the Official Assignee to elect, his rights in the equity of redemption are gone and neither he nor the debtor is competent to execute a conveyance or an assignment in favour of the mortgagee. A.I.R. 1932 Sind 73=26 S.L.R. 29=139 Ind. Cas. 95.

——Sch. 2, R. 18—Scope—Sale of insolvents' property—Subsequent incumbrancers' right of redemption.

Proceedings contemplated by R. 18 are to be adopted where there are no subsequent incumbrancers or persons having the right to redeem under S. 91, T. P. Act, because if the Court ordered a sale under R. 18 under those circumstances, it would be tantamount to depriving the subsequent incumbrancers or persons having the right to redeem under S. 91, T. P. Act, of their right to redeem even though that right to redeem was not extinguished either by act of the parties or by a decree of the Court. A.I.R. 1945 Bom. 161=46 Bom.L.R. 921.

——Sch. 2, R. 18—Inquiry into mortgage—Procedure.

Per *Rankin, J.*—The first order, which under R. 18 may be made, is an order appointing a certain time in the future as the date upon which the Court will enquire into the existence and validity of the mortgage. Nothing further should be ordered at that stage. When the time comes to hold an enquiry, if the mortgage has been substantiated, then the officer has it open to him to make another order, namely, declaring the existence of the mortgage and directing that certain accounts shall be taken; if necessary, also by that order having declared the existence of the mortgage, he may direct a sale. Where the Judge is administering an insolvent's estate, the rules of the Insolvency Court are to be given a meaning consistent with reasonable administration. The mortgagee may stand upon his security and ignore the bankruptcy altogether except to the extent that he must recognize that the Official Assignee now stands in the place of the original mortgagor. He may, therefore, bring a suit like anybody else upon the mortgage making the Official Assignee a defendant mortgagor and if he does that then all enquiries proper in a mortgage suit will be made by the Court, all the necessary parties will be present in Court and a good deal of time and expense will be incurred. But to facilitate the administration of an insolvent's estate R. 18 of Sch. II of the Act gives the mortgagee the great advantage which one of the English Bankruptcy Rules—R. 75—has for many years past given to a mortgagee where the mortgagor is an insolvent. Instead of bringing a suit a summary application may be made under the terms of this Rule; and when a summary application is made at a time when the Official Assignee had had no opportunity to make an enquiry into the circumstances of the insolvency, the first thing to be done is that some endeavour should be made to postpone the consideration of this application until the Official Assignee is fully satisfied that he knew enough about the dealings of the mortgagor to enable him safely to admit the mortgage. The mortgagee is not obliged under R. 18 any more than if he brings a suit to implead any creditor or any other person than the Official Assignee. But this summary procedure to enforce his rights is not intended to exclude people who may have rights contrary to his own. A duty is cast upon the Court by R. 18 of Sch. II to hold an independent enquiry not merely to determine issues between the mortgagee and the Official Assignee and to make orders by consent. What the Court is to do is this: The Court shall proceed to enquire whether such person has mortgage and for what consideration and under what circumstances: and, by the Rule which follows immediately afterwards, the Court is entitled to summon

people and examine them for the purpose of satisfying itself as to the circumstances under which the mortgage has been executed. It is perfectly absurd to say that in such circumstances it would not be open to the Court to send for any creditor or his witnesses and hear them. In addition to that, if the Official Assignee had known that any creditor was taking exception to this mortgage or if the Court had known that anyone was taking that course it would be improper for the Official Assignee to allow that case to go by default or to take any steps to prevent the creditor and his information from being brought to the notice of the Court. 93 Ind. Cas. 898=43 C. L.J. 219=30 C.W.N. 898=A.I.R. 1926 Cal. 618.

——Sch. 2, R. 18—Mortgage—Registrar cannot go into validity.

Where an order for proof of a mortgage before the Registrar in insolvency is made under R. 18, Sch. 2, the Registrar has no jurisdiction to deal with the question of the validity of the mortgage even though the parties consent and agree to his doing so, and by his decision adversely affect parties interested who are not *sui juris*. 47 Cal. 721=60 Ind. Cas. 889= 26 C.W.N. 631=A.I.R. 1921 Cal. 776.

——Sch. II, R. 18—Proceedings, parties to —Purchaser of part of Insolvent's property—Cross-examination by such person—Effect.

A purchaser from a person subsequently adjudicated an insolvent is not a necessary or proper party to the proceedings under Cl. (18) cannot intervene therein unless his purchase is challenged. He not being adverse party, cannot cross-examine the applicant to establish the claim against the estate of the insolvent. The cross-examination in contravention should be eliminated from the record. 24 C. L. J. 149=36 Ind. Cas. 689.

——Sch. II, R. 18—Setting aside sale—Powers.

The power under Art. 18 of Sch. II of the Presidency Towns Insolvency Act involves also the power to consider the validity of the sale. If a proper case is made out for setting aside the sale, the Insolvency Court can set it aside. If there is no reason to set it aside, it will merely confirm the sale.

The Insolvency Court has also jurisdiction to order delivery of possession to the auction-purchaser at such sale where the parties concerned submitted to the Court's jurisdiction and co-operated in procuring the order for sale. 123 Ind. Cas. 367=53 Mad. 233 =31 M.L.W. 170=A.I.R. 1930 Mad. 785=58 M. L.J. 98.

——Sch. II, R. 20—Secured creditor—Claim—Limits.

A secured creditor, though he can claim interest up to the date of payment when he seeks to recover what is due to him from the proceeds of the sale of the secured property must confine his claim when he seeks to prove against the order property as an unsecured creditor to the principal and interest which have accrued up to the date of adjudication, or liquidation as the case may be, deducting therefrom the amount realized by the sale of the property. 120 Ind. Cas. 702=7 Rang. 514=A.I.R. 1930 Rang. 20.

——Sch. II, R. 23—Applicability.

Schedule II, R. 23 does not apply to a case in which the date of adjudication is intecedent to the judgment debt, and in which, by the decree, express provision is made for the debt to carry interest. A.I.R. 1943 P.C. 15=47 C.W.N. 298=56 M.L.W. 60=(1943) 1 M.L.J. 239=1943 M.W.N. 197=9 B.R. 361= 1943 A.L.J. 265=45 Bom.L.R. 563=I.L.R. (1943) Mad. 603=I.L.R. (1943) Kar. P. C. 5 Sup.= 69 I.A. 157=1943 A.W.N. 44=206 Ind. Cas. 482 (P.C.).

——Sch. II, R. 23—Cessation of interest—Relevant date.

Interest on the creditor's debt ceases from the date of the adjudication of the debtor. The Official Assignee is governed by the insolvency law and it is not open to him to disregard the provisions of the Act and consent to payment of interest after the debtor's adjudication contrary to the Act. A.I.R. 1940 Mad. 837=52 M.L.W. 89=(1940) 2 M.L.J. 621=1940 M.W.N. 1205.

——Sch. II, R. 23—Scheme of composition—Interest—When R. 23 (2), applies.

When the question of allowing interest to creditors under a scheme of composition entered by an insolvent with his creditor arises, the terms of the composition itself must be taken into consideration, and if the scheme of composition itself contains something inconsistent with R. 23 (2), the terms of the scheme should prevail and the rule is not applicable. A.I.R. 1930 Rang. 296=129 Ind. Cas. 509.

——Sch. II, R. 23—Secured creditor—Not affected.

Paragraph 23 of the Second Schedule applies to unsecured debts. Therefore a secured creditor can claim interest at contract rate up to the time of realization. 83=Ind. Cas. 576=2 Rang. 197=A.I.R. 1924 Rang. 352.

——Sch. II, R. 23 (2)—Insolvents carrying on family business—Deposits made by persons—Amounts carried forward from year to year with interest at twelve per cent. per annum—Proof of claim—Amounts on which interest is to be calculated for purposes of dividend—Interest on amount whether can be calculated at six per cent. per annum for purposes of dividend—New debt if created by carrying forward old debt.

The insolvents who were carrying on a family business were adjudged insolvents in 1946. In the books of their business it was shown that certain close relatives of the insolvents had made deposits during the years, 1917 to 1929, and that the amounts were carried forward from year to year with interest calculated at twelve per cent. per annum. The Official Assignee admitted the claims in respect of the deposits but in doing so he held that, for purposes of dividend interest should be calculated only at six per cent. per annum on the amounts originally deposited from the date of deposit to the date of adjudication.

Held, that the debts provable were not the original debts but the capital sums consisting of a number of debts inclusive of interest which was calculated at the end of each year at twelve per cent. per annum and carried forward in the books of account, and that the depositors were entitled to take into consideration for purposes of dividend the capitalised amount shown to their credit in the last account, namely of the year 1929, together with subsequent interest at six per cent. per annum from that date till the date of adjudication. 1948 M.W.N. 375=A.I.R. 1949 Mad. 29=(1948) 1 M.L.J. 463.

PRESIDENCY TOWNS INSOLVENCY AND PROVINCIAL INSOLVENCY (SIND AMENDMENT) ACT (XXV OF 1939), S. 4—Retrospective operation.

The Legislature did not intend to introduce into pending proceedings a new and shifting basis. The Legislature intended S. 4 to apply to proceedings commenced after the coming into operation of the Amending Act and to declare awards, the subject of

any such proceedings made before the coming into operation of the Amending Act, to be decree. Such awards, which would not otherwise be decrees thus now become decrees, for the purpose of such proceedings. A.I.R. 1944 Sind 217.

PRESS ACT (I OF 1910)—Scope of—All presses before and after the Act are included—Jurisdiction—High Court.

All printing presses, whether before or after the Act, are within the purview of the Act. The question whether the contents of a newspaper specified in a Government Order of forfeiture under S. 4 of the Act is or is not of the description given in Cl. (1) of the section is the only matter left to the consideration of the High Court sitting as a Special Tribunal under the Act. 39 Mad. 1085=5 L.W. 1=(1916) 2 M.W.N. 385=18 Cr.L.J. 157=21 M.L.T. 124=37 Ind. Cas. 525.

——Ss. 3 and 23—Deposit of security—Time for—Not specified.

S. 3 of the Act does not provide for the specification of any time within which the deposit required is to be made and must be construed to mean that it must be made in a reasonable time. Where a person relieves himself of his obligation to deposit security in pursuance of a notice under S. 3 by disposing of the press and withdrawing his declaration he is not guilty under S. 23 (1). 37 Bom. 555=15 Bom.L.R. 580=14 Cr.L.J. 448=20 Ind. Cas. 608.

——S. 3, sub-S. (1), Provisos 17 and 22—Magistrate—Power to cancel order dispensing with security—Notice to printer if necessary—Revision—C. P. Code, S. 115—Cr. P. Code, S. 439—Certiorari.

S. 3, sub-S. (1) of the Press Act contemplates that in ordinary cases security shall be deposited by the owner of a printing press and the only duty of the Magistrate is to fix the amount and receive it. The Magistrate may dispose with the security for special reasons but the proviso gives him the power to cancel such dispensation and direct a deposit to be made. The action of the Magistrate in requiring or dispensing with a deposit or cancelling the dispensation is administrative not judicial; and the Magistrate is not bound, strictly speaking, to *hear* the person affected by his order, though it may be more discreet to do so. The High Court is therefore not competent to revise the order of the Magistrate either under Ss. 435 and 439 of the Cr. P. Code or under S. 115, C. P. Code assuming the order of the Magistrate to be a judicial or *quasi*-judicial order, the power to issue a writ of *certiorari* against any such order is taken away by S. 22 of the Press Act. *Semble.* S. 115, C. P. Code and S. 435, Cr. P. Code have not taken away the jurisdiction of the High Court to issue a writ of *certiorari* in cases, not coming within the said provisions. 43 Mad. 146=37 M.L.J. 139=17 A.L.J. 925=23 C.W.N. 986=21 Bom.L.R. 867=(1919) M.W.N. 555=10 L.W. 451=20 Cr.L.J. 593=26 M.L.T. 408=1 U.P.L.R. (P.C.) 74=46 I.A. 176=52 Ind. Cas. 209 (P.C.).

——Ss. 3 (1) and 22—Order by Magistrate on keeper of press to deposit security—Revision by High Court.

An order under S. 3 (1) is not a judicial but a ministerial act and cannot be questioned by the High Court. 20 P.R. 1918 Cr=32 P.W.R. 1918 Cr.=136 P.L.R. 1918=19 Cr.L.J. 740=46 Ind. Cas. 516.

——S. 3 (1)—Proviso and Ss. 17 and 22—"Any order" Revision—High Court—Jurisdiction.

The above expression does not include an order dispensing with the deposit of security. The High Court under Ss. 17 and 22 of the Act has no revisional power over proceedings under S. 3 of the Act. 39 M. 1085=5 L.W. 1=(1916) 2 M.W.N. 885=18 Cr.L.J. 157=21 M.L.T. 124=37 Ind. Cas. 525.

——Ss. 3 (1) and 22—Security order for, after once dispensing with same—Legality of.

Per *Abdur Rahim (Offg.), C. J.* and *Seshagiri Aiyar, J.*:—The Chief Presidency Magistrate cannot demand security after having dispensed with it at the time of declaration Per *Ayling, J.*:—Under S. 3 (1) the Magistrate has the fullest discretion both as regards requiring security and determining the amount and this discretion is to be exercised not once for all but from time to time. The proviso to S. 3 (1) gives additional power to the Magistrate over and above those conferred by the first para. "Any order" in S. 3 (1) includes also an order dispensing with security. Proceedings under S. 22 includes proceedings under S. 3 (1). 30 Mad. 1164=4 L.W. 625=(1916) 2 M.W.N. 497=32 M.L.J. 151=21 M.L.T. 190=18 Cr.L.J. 239=37 Ind. Cas. 607.

——Ss. 3 (1) and 23—Order cancelling exemption from security—Order relating to security for newspaper—Newspaper stopped, but press used—Whether liable.

Where a Magistrate, cancelling the exemption security ordered on the passing of the Act (I of 1910) required security for newspaper from the accused, who owned a press and printed a newspaper and the accused stopped publishing the newspaper, but used the press a conviction under S. 23 of the Act cannot be upheld. 16 Bom.L.R. 87=15 Cr.L.J. 297=23 Ind. Cas. 505.

——Ss. 3 (1) and 2 and 23—Order under S. 3 (2) by District Magistrate if ultra vires—Requisites—Revision—Government of India Act, S. 107.

An order under S. 3 (2) of Act (I of 1910) could be passed only by a Local Government. As it did not appear on what ground the exemption from depositing security had been originally granted and on what ground the District Magistrate required security to be deposited at a later stage, the order of the District Magistrate was bad and liable to be set aside by the High Court under S. 17 of the Government of India Act, 1915. 4 Pat.L.W. 155=19 Cr.L.J. 355=44 Ind. Cas. 579.

——Ss. 4, 17 and 22—Deposit—Forfeiture—Bringing into hatred or contempt—Attack on system—Bureaucracy—Criminal appeal—Practice of the Judicial Committee.

S. 4 of the Press Act and the analogous provisions of Ss. 124-A and 153-A of the Penal Code attempt to balance two important public considerations: the undesirability of anything tending to excite sedition or to excite strike between classes and the undesirability of preventing *bona fide* argument for reform. In applying these balancing principles different minds may come to different results. In substance the question under S. 4 (1) (c) is this; are the passages such as in fact to excite or do they disclose an attempt (which implies intention) to excite hatred, contempt or disaffection towards the Government or any class or section of His Majesty's subjects in India and in judging the question of intent the publisher must be deemed to intend that which is the natural result of the words used having regard, among other things the character and description of the public likely to read the words. An attack on a school of

opinion does not necessarily involve excitement to hatred or contempt of those who hold that opinion. But one is apt to lead to the other and regard must be had to the fact that those words in Cl. (*c*) which refer to the hatred or contempt of a class or section are not limited by Expln. II. In this respect the Penal Code differs from the Press Act.

Held, that the attacks on the bureaucracy or Anglo-Indians, in the case under appeal, were calculated, whatever might have been the primary object of the writer, to bring into hatred or contempt His Majesty's Civil Servants in India. The Board observed that as the statute applicable to the case had been properly construed by the High Court, they would not having regard to the constitutional limitations on their functions in criminal cases, interfere on appeal. 43 Mad. 146=37 M.L.J. 139=17 A.L.J. 925=23 C.W.N. 986=21 Bom.L.R. 867=(1919) M.W.N. 555=10 L.W. 451=20 Cr.L.J. 593=26 M.L.T. 408=1 U. P.L.R. (P.C.) 74=46 I.A. 176=52 Ind. Cas. 209 **(P.C.)**.

——Ss. 4 and 20—Scope of—"Government, established by law"—Meaning of.

An article may well be beyond the bounds of the Penal Code and yet be drawn into the net of the Indian Press Act. Per *Curiam*.—The truth of the facts alleged in the article is no ground for taking the case out of the operation of S. 4 of the Press Act, and evidence is not admissible to prove their truth. Both the Crown and the accused may, under S. 20 of the Press Act, give in evidence other copies of the newspaper published after the commencement of the Act in aid of the roof of the nature and tendency of the matter contained in the offending article. Per *Woodroffe, J.* (*Fletcher, J., agreeing*).—When the words of a document are plain and unambiguous extrinsic evidence to explain it is not admissible even where the intention of the writer is rightly in issue. In judging of the question of intent, the publisher must be deemed to intend that which is the natural result of the words used. The words "Government established by law in India" in S. 4 are not to be construed as indicating only the supremacy of the British Crown in India and the British connection with it, as opposed to independence. 23 C.W.N. 1057 =30 C.L.J. 289=54 Ind. Cas. 578 (S.B.).

——S. 4 (1) 3 (1)—Notice, essentials of.

S. 4 does not require that the words complained of shall be stated *verbatim* in the notice but only that they shall be started or described. S. 4 of the Press Act in very comprehensive. It is not necessary that the words complained of should be in themselves seditious nor is it necessary that they would bring into hatred or contempt His Majesty or the Government established by law in British India. It is sufficient if they have this effect with regard to any class or section of His Majesty's subjects in British India. It is not necessary that they should directly bring about this result. If they are likely or may have a tendency either directly or indirectly and whether by inference, suggestion, etc.; then they come within the *mischief* of the section.

It is legitimate to advocate in writing it change in the system of the Government or in existing social conditions and to urge the community or any section thereof to combine for this purpose. It is also legitimate to compare unfavourably existing conditions with those of a by-gone age, but this can be done only if the method employed does not infringe S. 4 of the Press Act. Whatever the intention of the writer may be, he must take care to guard his language that it should avoid a tendency to bring into hatred of contempt the Government of any class of his Majesty's subjects in British India. 4 Pat.L.J. 174=(1919) Pat. 65=20 Cr.L.J. 177=49 Ind. Cas. 593 (F.B.).

——S. 4—Whether ultra vires of the Indian Legislature—Preaching Home Rule, if obnoxious—'Disaffection' 'hatred' 'contempt'—Meaning—Reference to non-Indian element in Government of India—'Government established by law in British India'—Object of S. 4, Cl. (e)—S. 4 (1) Expl. 2—Intention of writer, how far relevant—Penal Code, Ss. 124-A, 153-A—Difference between these sections and S. 4, Press Act—'Tendency' explained—S. 4 of the Press Act is not ultra vires of the Indian Legislature.

A publicist cannot be allowed to attribute improper motives to the Government, but otherwise the preaching of Home Rule for India consistent with the loyalty to the Crown is not by itself bad under S. 4 of the Act.

The words "Government established by law in British India" mean an established authority entitled and able to administer the public affairs of the country, and are not identical with any particular individuals administering the Government. They must be interpreted in the light of S. 3 of the General Clauses Act and so interpreted to include the Government of India and all local Governments.

The Government in India, as well as the supremacy of the Crown and the British connection, is included in the expression "Government established by law in British India."

All forms of ill-will towards the Government including hatred, contempt, enmity, dislike, hostility are included in the words 'Disaffection'. The words 'Hatred and contempt' mean something more than disapproval or dislike.

Suggestions of replacing non-Indian elements in the Government by Indian elements with a view to securing greater efficiency and advantage are legitimate, but it is objectionable to speak of the foreign character and origin of the Government and thus arouse hatred and contempt against it.

The intention of the writer or editor is not relevant except under Explanation II which protects comments on the Government's measures and actions which do not excite hatred or contempt against the Government. But the protection is afforded only to comments on the Government's measures and actions and not to attack on the Government itself.

Articles other than those in question can be considered in aid of the proof of the general nature, tendency and policy of the newspaper concerned; and the burden of disproof of any such bad tendency as is mentioned in the sub-clauses to S. 4 rests on the person forfeiting the security. The word 'tendency' simply signifies the natural effect on a normal understanding per *Ayling, J.*—There is nothing in the Act which throws the onus on the applicant. The words themselves form the main evidence in the case.

No warning or explanation is necessary before the Government takes action under S. 4 of the Act; and the section covers also writings put in through mere carelessness.

(Per *Seshagiri Iyer, J.*)—S. 4, Clause (*e*) is aimed at language which is likely to render the cooperation between different races living in India impossible. The language must be such as to lead to the breaking of the peace.

The language of S. 4 (1) of the Press Act is wider than the corresponding provisions in Ss. 124-A,

153 of the Penal Code. 39 Mad. 1085=(1916) 2 M.W.N. 385=5 L.W. 1=18 Cr.L.J. 157=21 M. L.T. 124=37 Ind. Cas. 525.

——Ss. 4 and 19—Questions to be decided—Relevancy of expression.

The question to be decided by the Chief Court would be whether the Government is entitled to take exception to writings in the vernacular newspaper in India of which the result is not to allay excitement, but to stair up fresh trouble.

Where it is impossible for the Chief Court to say that the Local Government with which the responsibility rests for determining how far real danger arises has acted wrongly, it will not set aside the order of forfeiture passed by the Government. 211 P.L.R. 1914=37 P.W.R. 1914 Cr.=15 Cr.L.J. 493=28 P.R. 1914 Cr.=24 Ind. Cas. 581.

——Ss. 4, 12, 17, 19 and 22—Onus under S. 4—Jurisdiction of High Court—Extent of scope.

In an application under S. 17 of the Act, to revise the order of forfeiture under S. 12 of the Act, the onus is on the petitioner to show that it was impossible for the pamphlet to come under S. 4 of the Act. The functions of the High Court are limited to considering whether the petitioner has discharged that onus. The High Court has no jurisdiction to pronounce on the wisdom or unwisdom of the order of forfeiture.

The direction in S. 12 of the Act ('stating the grounds of its opinion') is mandatory and mere citing of the words of the section without setting out the facts forming the basis of the opinion is not a sufficient compliance with that direction, but the High Court is barred by S. 22 from questioning the legality of the forfeiture on that ground.

In an enquiry under the Act the question of the intention of the publisher or writer is not directly material. 41 Cal. 466=14 Cr.L.J. 497=18 C.W.N. 1=20 Ind. Cas. 977.

——S. 4—Presumption that the declarant had a hand in the printing of a book—Object of declaration—Attempt necessarily involves intention.

A declaration under S. 1 is intended by the legislature to fasten responsibility for the conduct of the press on the person declaring. When a book is complained of as seditious or libellous the Court may presume that the owner of the press had a hand in the printing and was aware of the contents and character of the book. Courts should be careful to draw no inference of guilt against the declarant from the mere fact of declaration and must consider the surrounding circumstances and probabilities to enable them to arrive at a conclusion whether the declarant had a hand in the printing and publishing so as to bring him with the particular section of the Penal Code. Per *Heaton, J.*—An attempt to do a thing must necessarily involve some intention. 35 Bom. 55=12 Bom.L.R. 675=11 Cr.L.J. 546=7 Ind. Cas. 937.

——S. 4 (1)—'Article'.

The expression "article" ordinarily means a literary composition of which the editor is actually or presumptively the author and the same thing cannot be said with respect to a paragraph containing news communicated by a correspondent. But if the paragraph in question falls within the ambit of sub-S. (1) of S. 4, the keeper of the Press cannot derive any help from the fact that it was wrongly described as an "article" in the Government communique or that there was an erroneous impression that it was also accompanied by an article. 71 Ind. Cas. 519=3 Lah. 405=24 Cr.L.J. 167=5 P.W.R. Cr. 1923=A.I.R. 1923 Lah. 61 (S.B.).

——S. 4 (1)—Order made by Governor-General-in-Council at Delhi are orders of Local Government at Delhi.

High Court has no jurisdiction to interfere with the orders of a foreign Local Government the orders having been issued under S. 4 (1) of the Act. 42 Cal. 730=16 Cr.L.J. 698=30 Ind. Cas. 746 (S.B.).

——S. 4 (1) (c)—Motive and construction of article—Evidence as to motive is irrelevant—Attack upon certain policemen is not attack upon Government—A few policemen do not constitute a class or section of His Majesty's subjects.

If the words in their plain grammatical meaning are of the nature mentioned in S. 4 (1) (*c*), it is immaterial whether the editor acted in good faith or otherwise. It is only in connection with comments expressing disapproval of the measures of the Government that the protection afforded by Explanation II to the sub-section can be invoked, and then it can be shown that the comments were made with a view to obtain alteration of the measures of the Government by lawful means. The phrase "The Government established by law in British India" includes the collective body of men authorised by law to administer executive Government in British India, as distinguished from any particular set of administrators or individuals administering the country for the time being. An attack upon certain policemen at a particular place does not convey any reflection upon the governing authority. It is necessary, to draw a clear distinction between the Government and individual officers employed under the Government; words bringing the former into hatred or contempt constitute sedition but similar words directed against the latter can only infringe the law of libel. A class or section as contemplated by cl. (*c*) connotes a well defined group of His Majesty's subjects and a fortuitous concourse of one or two Inspectors or Sub-Inspectors and a few policemen, who happen to be employed at a particular place, cannot be designated a section of His Majesty's subjects much less a class thereof. 71 Ind. Cas. 519=3 Lah. 405=24 Cr. L.J. 167=5 P.W.R. Cr. 1923=A.I.R. 1923 Lah. 61 (S.B.).

——S. 4 (1) (c)—Act if ultra vires—"Government established by law"—Meaning of.

The Press Act is not *ultra vires* the legislature "Government established by law in British India" means the established authority which governs the country and administers its public affairs and includes the representatives to whom the task of Government is entrusted. The word 'Government' in Ss. 2 and 4 of the Act is equivalent to Government established by law in British India. 43 M. 146 P. C., Foll. When a newspaper published articles which conveyed to an ordinary person the idea that the rulers of this country "in addition to incompetence, cowardice and heartlessness" where guilty of slaughter of innocent people in order to terrorise them into subjection, and to crush out all kinds of political movements and national aspirations, held that the Government was justified in forfeiting the security. 42 All. 233=18 A.L.J. 11=21 Cr.L.J. 238=2 U.P.L.R. (All.) 1 =55 Ind. Cas. 110 (S.B.).

——Ss. 4 (1) (c), 17, 19 and 20—Disaffection—Intention of writer—Government established by law.

The word 'disaffection' includes disloyalty and all feelings of enmity and the duty of the High Court under S. 19 is limited to a consideration of the question whether the order of forfeiture is justified by the words and tendencies of the article.

The intentions or motives of the writer are irrelevant, the possible results of the article are to be considered.

Under S. 17, the petitioner should show that the article did not, as a matter of fact, contain any words-signs or visible representations likely or having a possible tendency to excite disaffection towards His Majesty or the Government in India or the Cabinet in England.

Per *Johnstone, J.*—The truth of a statement is not a sufficient justification. The time when the statement is made and the circumstances should also be considered in coming to the conclusion. 21 P.W.R. 1915 Cr.=16 Cr.L.J. 274=19 P.R. 1915 Cr.=28 Ind. Cas. 322.

——S. 4 (1) (c)—'Government established by law in British India'—Meaning.

The words 'Government established by law in British India' include local Governments.

Where the whole tone of an article was beyond fair comment, the Chief Court will not interfere with the order of forfeiture of security made by the Government in respect of the press publishing the newspaper. 210 P.L.R. 1914=36 P.W.R. 1914 Cr.=15 Cr.L.J. 490=27 P.R. 1914 Cr.=24 Ind. Cas. 578.

——Ss. 4 (1), Expl. II and 20—Notice what should contain—Evidence.

In a notice issued under S. 4 (1), the particular passage objected to, in an article need not be specified. Expl. II to S. 4 does not apply to the case were the gravity of the charge made by Government against the article is not so much that it contains "comments" on the acts of the authorities as that it consists of an account of certain events so inaccurate, so misleading and so unfair to those authorities as to be likely apart from all "comments" to excite the feelings mentioned in the notice. Other articles from other issues of the paper containing the article in question are admissible for the purpose specified in S. 20 of the Act alone (*i.e.*) 'in aid of the proof of the nature or tendency of the said article'.

The hatred and disaffection likely to be excited must be shown to be against the Indian Government, but an inaccurate and unfair statement of account of ill-treatment of Indians elsewhere in British dominions becomes relevant. 16 Cr.L.J. 555=33 P.W.R. 1915 Cr.=15 P.R. 1915 Cr.=29 Ind. Cas. 827.

——S. 8—Order under, Revision.

An order passed under S. 8 is not subject to revision by the High Court, though the section under which the order was issued was not mentioned. 17 C.W.N. 1245=15 Cr.L.J. 145=22 Ind. Cas. 721.

——Ss. 9 and 19—Application for interference—Setting aside order of forfeiture.

It is not open to the Court to do anything more than either reject the application, or set aside the order of forfeiture as a whole: the Court cannot discriminate between the forfeiture of security and the additional forfeiture of the Press permitted by S. 9. 211 P.L.R. 1914=37 P.W.R. 1914 Cr.=15 Cr.L.J. 493=28 P.R. 1914 Cr.=24 Ind. Cas. 581.

——Ss. 9 and 17—Paper—Notice—Specification of words—'Government', meaning of scope of action.

A notice under S. 9 of the Act specifying the name of the correspondent and headings of the letters, is a sufficient compliance with the law as to specification. The ojectionable passages need not be quoted.

The Act does not provide for an opportunity being given to the publisher of showing cause against the notice. 'Government' in the Press Act has the same extended meaning as S. 3 (21) and S. 3 (29) of the General Clauses Act X of 1897.

Charges made against the Government of the Frontier Provinces involve forfeiture of security under the Act. The truth or the falsehood of the statement in the paper does not concern the Court in proceedings of the Press Act. 14 P.R. 1913 Cr.=14 Cr.L.J. 50=6 P.W.R. 1913 Cr=37 P.L.R. 1913=18 Ind. Cas. 347.

——Ss. 17 and 4—Forfeiture of security—Setting aside—Defect in notice—Seditious intent—"Intention" and "Tendency"—Evidence admissible—Justification by truth—Extrinsic evidence, if admissible—Evidence Act, Ss. 92, 98 and 14—Onus of proving order of forfeiture wrong.

Per *Curiam.*—Upon an application under S. 17 of the Press Act (I of 1910) to set aside an order of forfeiture of security, the Court has to see whether the article in question is obnoxious to the provisions of S. 4 of the Act. Defect in the form of notice under S. 4, sub-S. (1) is no ground for setting aside the order of forfeiture. It is Expln. II to S. 4 which imports consideration of the writer's intention. The explanation does not cover all the cases comprehended in cl. (c). The explanation does not apply where the words used have a tendency to bring into hatred or contempt, etc. The question of intention is only material if the Court has to deal with comments on the measures (meaning thereby the legislative measures or action of the Government or the administration of justice). These comments again are not protected if they, in fact, excite or attempt to excite hatred, contempt or disaffection. Per *Mookerjee.*—Comments of the character mentioned in Expln. II to S. 4 of the Act may be permissible even though they are likely or may have a tendency to produce the corresponding result mentioned in cl. (c), but they must not excite or constitute an attempt to excite hatred, contempt or disaffection. The term "Measures" in the explanation was intended to apply to legislative measures. Upon an application under S. 17, the Court does not approach the case with the presumption that the order is erroneous. The burden lies upon the Petitioner to establish that the publication is not of the nature described in S. 4, sub-S. (1) of the Act. 23 C.W.N. 1057=30 C.L.J. 289=54 Ind. Cas. 578 (S.B.).

——Ss. 17 and 22—High Court, power of—Order forfeiture—Revision—Grounds for.

The powers of the Court set in S. 19 are confined to setting aside of the order upon one ground and no other, *viz.*, that the writing in question is not of the nature described in S. 4 (1). The result is that although the notification does not, under S. 4, comply with the provisions of the Act, the High Court is barred from questioning the legality of the forfeiture which the notification purports to declare. 4 Pat.L.J. 174=1919 P.H.C.C. 65=20 Cr.L.J. 177=49 Ind. Cas. 593 (F.B.).

——Ss. 17, 18 and 19—Government of India Act, S. 65 (2)—Jurisdiction of special tribunal under the former Act to consider if it contravenes the latter Act.

The High Court sitting as a special tribunal under Ss. 18 and 19 of the Press Act is not entitled to consider the question of the contravention or otherwise of S. 65 (2) of the Government of India Act by the Indian Legislature in passing the Press Act.

Obiter.—Nor does S. 17 of the Press authorise the High Court to question a Magistrate's proceedings under S. 3 of the Act though without jurisdiction. 39 Mad. 1085=5 L. W. 1=(1916) 2 M.W.N. 385 =18 Cr.L.J. 157=21 M.L.T. 124=37 Ind. Cas. 525.

——S. 17—Limitation Act, S. 5, Applicability of—"Within two months from the date of such order."

The words "within two months from the date of such order" should be construed strictly and literally and cannot be understood to mean "within two months from the date of receipt of such order." S. 5 of the Limitation Act has no application under S. 17 of the Press Act. 15 Cr.L.J. 222=126 P.L.R. 1914=16 P.R. 1914 Cr.=32 P.W.R. 1914 Cr.=22 Ind. Cas. 1006 (S.B.).

——S. 22—Declaration under—Notice to all persons.

A declaration under S. 22 is notice to all persons of the fact of the Government having declared the forfeiture and not of the forfeiture having been legally made. 39 Mad. 1085=5 L.W. 1=(1916) 2 M.W.N. 385=18 Cr.L.J. 157=21 M.L.T. 124=37 Ind. Cas. 525.

PRESS AND REGISTRATION OF BOOKS ACT (25 OF 1867). *See also* COPYRIGHT ACT.

——Scope—Publisher and printer undergoing imprisonment—Article published during such imprisonment—Liability for it.

Though a declaration under the Press and Registration of Books Act makes a printer and publisher *prima facie* liable as such printer and publisher for anything written in journal of which he became the printer and publisher, still he may rebut such a presumption. Where in respect of an article falling under S. 124-A, Indian Penal Code, the printer and publisher (accused) is able to prove that at the time of the appearance of the said objectionable article in his Journal he was actually undergoing imprisonment, he could not be deemed to have had any control of the press or held liable for the publication of the said article. (1950) 2 M.L.J. 776.

——Scope—Change in person of keeper of press—Fresh declaration if necessary.

There is nothing in the Act to suggest that any fresh declaration should be filed in the case of any press which has once been declared and which continues at the same address. The Act does not appear to provide for a change in the person of the keeper of the press. 8 O.W.N. 25=130 Ind. Cas. 380=32 Cr.L.J. 545= 6 Luck. 514=A.I.R. 1931 Oudh 81.

——S. 1—Definition of "book" is exhaustive.

The definition of "book" as given in S. 1 of XXV of 1867 is exhaustive. It is wrong to say that the "book" may include documents other than those specifically mentioned in the definition. A.I.R. 1940 Pat. 618= 21 P.L.T. 675=42 Cr.L.J. 78=191 Ind. Cas. 106.

——S. 1—Document consisting of only one sheet cannot be regarded as book.

The Press and Registration of Books Act does not contemplate that a single sheet of paper in which a writer publishes an article relating to some current topic should be regarded as a book of which a copy is required to be delivered to the officer concerned under the Act. A.I.R. 1940 Pat. 613=21 P.L.T. 675=42 Cr.L.J. 78=191 Ind. Cas. 106=7 B.R. 145.

——S. 3—Word "paper" in S. 3, means newspaper.

The word "paper" in S. 3, Press and Registration of Books Act is synonymous with newspaper as defined in the Act. A.I.R. 1943 Lah. 1=43 Cr.L.J. 897=44 P.L.R. 524=I.L.R. (1943) Lah. 95=202 Ind. Cas. 735.

——Ss. 3 and 1—Poster containing appeal to public for peace after communal riots—Appeal printed on single sheet of foolscap paper—Whether book or pamphlet.

A poster styled as *aman ki appeal* (an appeal for peace) was issued shortly after a communal disturbance at Sargodha in July 1940. In it, the writer made a fervent appeal to the people of Shahpur District to live in peace and harmony, not to play in the hands of mischief-mongers, and not to do anything which would embitter feelings between the various communities or accentuate differences between the rural and urban population. The "appeal" consisted of a few lines and was printed on a single foolscap sheet :

Held, that the poster could not, by any stretch of reasoning, be considered to be anything analogous to a book or newpaper or a pamphlet.

Lacuna in the Press and Registration of Books Act, in so far as it omits to define the phrase "paper printed." pointed out. A.I.R. 1943 Lah. 1=44 P.L.R. 524=43 Cr.L.J. 897=I.L.R. (1943) Lah. 95=202 Ind. Cas. 735.

——Ss. 3, 4, 12—Circulation of leaflets without printer's name—Onus of proving that leaflet was printed in British India.

Where a young school boy was found to be in possession of and distributing certain leaflets without printer's name etc. :

Held, that the burden was on the prosecution to prove that the paper was printed within British India for convicting the boy under S. 12 of the Press and Registration of Books Act, 1867. A.I.R. 1931 Cal. 641=35 C.W.N. 778=33 Cr.L.J. 91=134 Ind. Cas. 1197.

——Ss. 3, 4, 5—'Press,' 'printing,' 'newspaper', meanings of—Cyclostyling with Roneo duplicator, whether printing.

A Roneo duplicator is not a printing press and cyclostyling by means of such a duplicator does not amount to printing within the meaning of Ss. 3, 4 and 5, Press and Registration of Books Act.

The word 'printing' in the said Act must be construed in its strict narrow sense of typography. A.I.R. 1931 Nag. 177=27 N.L.R. 270=32 Cr.L.J. 1266= 134 Ind. Cas. 854.

——S. 4—Object of.

S. 4 appears to have been enacted with a adouble motive. The first is that the executive authorities shall note where the press is situated and the second that they shall know who is the person in charge. A.I.R. 1931 Oudh 31=6 Luck. 514=32 Cr.L.J. 545=8 O.W.N. 25=130 Ind. Cas. 380.

——S. 4—Letter of proprietor intimating change of manager, whether amounts to fresh declaration—Prosecution for keeping press without declaration.

On 6th June, 1929, the accused made an application to the District Magistrate is which he stated that he was starting a printing press at a certain place and that he has appointed one *L* as manager and requested the District Magistrate to accept a declaration under S. 4 of the Press Act signed by *L*. The declaration was signed and sealed by the District Magistrate on 17th June, 1929. On 12th July, 1930, the accused submitted a letter stating that *L* had resigned from the press referring to it as 'our press' and that he was, therefore, no more the manager of that press. The letter was expressly signed by the accused as 'proprietor.' It was accepted

and filed by the District Magistrate. On 25th August, 1930, the accused made a second declaration under S. 4 in his own name. The accused was charged with having kept a press from 12th July, to 24th August, 1930, without making a declaration.

Held, that the letter of 12th July, 1930, amounted to a declaration by the accused under S. 4 and must be regarded as having been accepted as such and the accused was not guilty of any offence. A I.R. 1931 Oudh 81=8 O.W.N. 25=32 Cr.L.J. 545=6 Luck. 514=130 Ind. Cas. 380.

——S. 4—'For the printing of books or papers,' interpretation.

The words "for the printing of books or papers" are an adverbial phrase modifying the verb "keep" in the sentence "keep in his possession." They are not an adjectival phrase modifying the noun "press." They refer to the object of the possessor of the machine. A.I.R. 1931 Pat. 351=10 Pat. 492=12 P.L.T. 767=32 Cr.L.J. 1063=133 Ind. Cas. 682.

——Ss. 4, 3—The word 'papers,' interpretation.

The word 'papers' in Ss. 3 and 4 is, practically if not exactly, synonymous with newspaper as defined in S. 1 of the Act. A.I.R. 1931 Pat. 351=10 Pat. 492=12 P.L.T. 767=32 Cr.L.J. 1963=183 Ind. Cas. 682.

——S. 4—Declaration made under the Act—Effect of the declaration—The declarant taking no part in the management of the press—Publication of seditious book at the press—The declarant having no knowledge of the sedition and having no intention to publish it—Penal Code (45 of 1860), Sec. 124—Sedition—Intention.

The accused had made a declaration under S. 4 of the Press Act (25 of 1867), that he was the owner of a certain press called the Atmaram Press. The management of the press was carried on by another person who looked after the whole concern. At this press was printed a bulky book which purported to be one devoted to metaphysics and philosophy and was styled "Ekashloki site." It also contained a seditious matter at long and varied intervals and interpersed with discussion of religious matters. The accused took no part in the management of the press nor did it appear that he had read the book or acquainted himself with the nature of it. He was charged with the offence made punishable under S. 124-A of the Indian Penal Code and convicted of the same. On appeal,

Held, by *Chandavarkar, J.* that the cumulative effect of the surrounding circumstances was such as to make it as probable that the accused had not read the book as that he had known its seditious object and that evidence having thus been eventually balanced and equivocal a reasonable doubt arose as to the guilt of the accused the benefit of which must be given to him.

Held, by *Heaton, J.*, that it was impossible to convict the accused under S. 124-A of the Indian Penal Code unless it was found that he had an intention of existing disaffection and that the evidence fell very far short of proving the intention.

Per *Chandavarkar, J.*—A declaration made under S. of the Press Act, 1867, is intended by the legislature to have a certain effect, namely, that of fastening responsibility for the conduct of the press on the person declaring in respect of matters where public interests are involved. Therefore when a book complained of seditious or libellous matter is printed in a press the court performing the functions of a jury may presume that the owner had a hand in the printing and was aware of the contents and character of the book. But whether such a presumption is warranted in any individual case must depend upon its own facts and circumstances. The presumption however is not conclusive; it is not one of law but of fact and it is open to the accused to rebut it. The object of making a declaration under S. 4 is to create a sense of responsibility so that if any public mischief occurs owing to any action or conduct of the press, the law can at once know who must *prima facie*, be held responsible for it. At the same time the court should be careful to draw no inference of guilt against the declarant from the mere fact of the declaration but must consider the surrounding circumstances and probabilities to enable them to arrive at a conclusion whether the declarant had a hand in the printing and publishing so as to bring him within the operation of S. 124A of the Indian Penal Code, where the charge is under that section.

Per *Heaton, J.* An attempt to do a thing must necessarily involve some intention; for a man cannot be said to attempt to do that which he has absolutely no knowledge of doing and no intention to do. 35 Bom. 55=11 Cr.L.J. 546=12 Bom.L.R. 675=7 Ind. Cas. 937.

——S. 4—Object.

S.4 appears to have been enacted with a double motive. The first is that the executive authorities shall note where the press is situated and the second is that they shall know who is the person in charge. A removal of the premises clearly deprives the executive authorities of their knowledge as to the location of the press. But the same cannot be said where there is a change in the personnel of the keeper of the press. 8 O.W.N. 25=6 Luck. 514=130 Ind. Cas. 380=32 Cr.L.J. 545=A.I.R. 1931 Oudh 81.

——Ss. 5, 12—Person selling pamphlet or paper in streets—Offence—Publisher, who is.

The publisher of the paper referred to in S. 3 and S. 5 of the Press and Registration of Books Act is the man who publishes it in the ordinary sense of the term, that is to say, arranges with the proprietor for its distribution, and a mere seller or distributor of the paper is not a publisher under either of those sections. The only person who can be guilty of publishing under S. 12 is the person who is performing the act of a publisher within Ss. 3 and 5.

Consequently, a person distributing in streets certain pamphlets or papers giving notice of a certain meeting cannot be made liable under S. 89. A.I.R. 1937 Bom. 28=38 Bom.L.R. 1115=38 Cr.L.J. 145=166 Ind. Cas. 263.

——S. 7—Presumption under—Identity with publisher of offending matter on production of copy of declaration—Whether can be deduced—Penal Code, S. 500.

At the trial of a person for publishing a libel contained in a newspaper, the presumption permitted to be raised by S. 7 of Act (25 of 1867) as to his identity with the publisher of the offending matter, on production of the copy of his declaration given under S. 5 (2), *ibid*, is restricted to the *prima facie* proof that he was the publisher only at the place specified in the declaration and does not extend to the proof of the fact that he was also the publisher of the libel at places not specified in the declaration. A.I.R. 1935 Nag. 90=36 Cr.L.J. 744=155 Ind. Cas. 450.

——S. 7—In the case of periodicals, an initial presumption as regards such knowledge might be raised under S. 7 of the Press and Registration of Books Act, 1867. But in the case of mere pamphlets, no such presumption arises and the fact that the accused is the declared keeper can, therefore, be only taken into consideration along with circumstances in coming to a decision as to whether the appellant has any knowledge of the contents of the pamphlet. A.I.R. 1931 Lah. 182=32 Cr.L.J. 681=12 Lah. 483=32 P.L.R. 740=131 Ind. Cas. 273.

——Ss. 7 and 4—Authorship and knowledge of contents of books—Presumption—Person named as author in a book is not necessarily to be presumed as author—Declaration under S. 4 is not evidence

to presume knowledge of contents on the part of maker.

Per *Shah, Ag. C.J.*—There is no presumption as regards a book that the person whose name appears as the author is the author thereof. The statement from the Manager of the Press cannot be treated as evidence of the facts stated therein.

The declaration under S. 4 of the Act is not evidence of his knowledge of the contents, though it is a fact which along with other evidence in the case must be considered in deciding the question of fact. The fact of a person's being the keeper of the Press and the printer of the pamphlet by itself does not imply any knowledge of the contents. Some evidence which would indicate a knowledge of the contents on his part is necessary. There is no provision in the Act as to the presmuption to be drawn from a declaration made under S. 4 and the names of the printer and publisher printed under S. 3 as there is under S. 7 as regards declaration made under S. 5 of the Act. The knowledge of the contents so far as necessary has to be proved like any other fact.

Per *Crump, J.*—A printed book of itself proves nothing relevant to the present enquiry. There is no presumption that it is written by the man who is described as the author, unless it is one of that limited class of books covered by S. 87 of the Indian Evidence Act. The written information given by the Manager of the Press is not given in the discharge of any duty, for neither the Act nor the Rules under the Act as those now stand impose any such obligation.

A keeper of a considerable Press may not know the contents of each and every book printed at his Press. Without details as to the connection of the keeper with the actual business it is impossible to make any such presumption. The declaration under S. 3 or the written information supplied by the Manager carries the matter no further. Without knowledge a man cannot be guilty of abetment. 76 Ind. Cas. 294=25 Bom.L.R. 97=47 Bom. 438=25 Cr.L.J. 150=A.I.R. 1923 Bom. 255.

——S. 12. *See also* PRESS AND REGISTRATION OF BOOKS ACT, SS. 3, 4, 5.

——Ss. 12, 3—Person carrying on business through manager—Liability of, under S. 12.

Where a person carries on the business of a press through a manager and has nothing to do with the management of the press, still if he employs a Manager to print the books and the business of printing is his, he must be considered to have printed the books through his manager under the Press and Registration of Books Act.

The mere fact of printing the book or paper otherwise than in accordance with S. 3 of the Act is an offence and this offence can be committed by a man when the act itself is done not by him personally but by his servants.

Intention is not necessary for an offence under S. 12 of the Act. A.I.R. 1933 Rang. 4=34 Cr.L.J. 262=141 Ind. Cas. 685.

——Ss. 12, 3, 4, 13, 15—Printing news in cyclostyle machine—Conviction under Ss. 12, 13, 15, legality of.

Where the accused had, in his possession, a cyclostyle machine which he used for the purposes of multiplying copies of a periodical newspaper without making declaration or publishing the name of the printer or place of printing and he was convicted under Ss. 12, 13 and 15 of the Press and Registration of Books Act, 1867 :

Held, (*i*) that the operation of multiplying copies by means of a cyclostyle machine was 'printing';

(*ii*) that as the accused kept a machine for the purpose of printing of paper and printed newspapers without conforming to the rules, he was rightly convicted under Ss. 12, 13 and 15 of the Act.

The question as to whether the printing press is or is not within S. 4 is a question of the use to which the printing press is, in fact, put or intended to be put by the possessor. A.I.R. 1931 Pat. 351=10 Pat. 492=12 P.L.T. 767=32 Cr.L.J. 1063=133 Ind. Cas. 682.

——S. 13—Burden of proof.

It is for the prosecution to establish that the press was one which required a declaration and in order to do so the prosecution must prove that it was in workable order. 57 Cal. 460=34 C.W.N. 142=1929 Cr.C. 401=A.I.R. 1929 Cal. 635.

——S. 13—Declaration in name of manager—Authorities not being misled—Subsequent declaration in proper form—Offence if constituted.

Where it appeared that the executive authorities knew that a certain person was the owner of the press but the District Magistrate himself allowed him to submit a declaration signed by his manager and when the latter resigned the owner himself submitted a declaration describing the press as his,

Held, that the owner of the press had not submitted any offence. 8 O.W.N. 25=6 Luck 514=130 Ind. Cas. 380=32 Cr.L.J. 545=A.I.R. 1931 Oudh 81.

——S. 13—'Press'.

The press that is referred to in S. 13 is a press for the printing of books and papers. and so in order to sustain a conviction under S. 13 it is necessary to find that the press was in sufficiently fit condition to enable the printing of books or papers thereby. 57 Cal. 460=34 C.W.N. 142=1929 Cr.C. 401=A.I.R. 1929 Cal. 635.

——S. 14—False statement in declaration.

Any false or untrue statement made in the course of making a declaration is made punishable under the section. A false statement in a declaration which is not made and subscribed before a Magistrate as provided by section 4, cannot be said to have been made in making a declaration. 73 Ind. Cas. 689=24 Cr.L.J. 657=A.I.R. 1923 Lah. 440.

——S. 16—Does not provide for conviction.

S. 16 does not provide for conviction and sentence. A.I.R. 1940 Pat. 613=7 B.R. 145=21 P.L.T. 675=42 Cr.L.J. 78=191 Ind. Cas. 106.

——S. 16—Interpretation.

The words "delivered out of the press" are not equivalent to "printed". The work of printing might be completed before any copy were actually delivered out of the press. 99 Ind. Cas. 1032=49 All. 315=25 A.L.J. 105=8 L.R.A. Cr. 31=28 Cr.L.J. 232=7 A.I. Cr.R. 208=A.I.R. 1927 All. 237.

PRESS (EMERGENCY POWERS) ACT (23 OF 1931)—Powers under—When may be invoked.

The public and the press must be allowed considerable latitude in expressing themselves and in criticising the acts of the Government in order to redress the grievances of the public, and this is all the more important since the attainment of independence. It is only in exceptional circumstances that the powers conferred by the Press (Emergency Powers) Act should be invoked. Ordinary the safety of the State and the individual can very well be preserved by taking action against the offender under the ordinary law of the land. 51 P.L.R. 82=A.I.R. 1949 E.P. 289=50 Cr.L.J. 756 (S.B.).

——Should be construed strictly and in favour of subject.

The provisions of the Indian Press (Emergency Powers) Act No. (23 of 1931) are of a penal character, and, according to the ordinary rules of interpretation, they should be construed strictly and in such a manner as to

protect the liberties of the subject. A.I.R. 1934 Lah. 264=35 Cr.L.J. 1447 (2)=151 Ind. Cas. 943.

——Ss. 2 (1) (6), 4 (1) (d)—Pamphlets coming within S. 2 (1) will also come within S. 2 (6) if they contain matter described in S. 4 (1).

Sub-sections (1) and (6) in S. 2 are not mutually exclusive and although the pamphlets in question come within sub-S. (1), they will also come within sub-S. (6), if they contain any matter described in S. 4 (1) as amended. A.I.R. 1936 Mad. 835=1936 M.W.N. 614=71 M.L.J. 357=44 L.W. 381=I.L.R. (1937) Mad. 14=38 Cr.L.J. 5=165 Ind. Cas. 860.

——Ss. 2 (5), (6) and 18 (1)—News—Handbills containing words "nearly 1,000 Political Prisoners Detained in India without Trial"—Words, held not news—Document, held handbill or poster and not newspaper or news sheet and its unauthorised issue was no offence under Act—Arrest under Act should not be made without necessity—Arrest of accused, held not justified.

The accused distributed handbills or posters to the public the material portion of which read as follows: "Whither democracy? Nearly 1,000 Political Prisoners Detained in India without Trial."

Held, that the words "Nearly 1,000 Political Prisoners Detained in India without Trial" could hardly be called "news," within the dictionary meaning of that word, this information having been in possession of the public for some considerable time. Nor could the document be described as a simple form of a newspaper. One item of "news" in any event would hardly constitute a newspaper. The documents distributed by the accused were handbills or posters and the unauthorised issue thereof was no offence under the Act:

Held, further that though an offence under the Act was cognizable, there was little discretion and less consideration in ordering an arrest in this case. A summons would have been amply sufficient for what at the most was obviously only a technical offence. A.I.R. 1942 Lah. 203=44 P.L.R. 26=43 Cr.L.J. 756=I.L.R. (1942) Lah. 553=201 Ind. Cas. 631.

——S. 2 (5)—"Public news"—Paper publishing account of activities of persons of sufficient importance to interest public—Paper published for public and sold to them or given away—Paper, if a newspaper.

Per *Special Bench.*—The expression "public news" in S. 2 (5) means something such as "current happenings or alleged current happenings of interest or likely to be of interest to the public or to a portion of the public". Anything new or unknown when communicated to another is news, and news which is intended for, or is communicated to the general public, no matter what its nature, is public news. An item of news, irrespective of its nature when reported in a paper published for the general public would be a public news, but if published only in, for instance, a periodical intended for a small circle of medical branch of pathology, would not be public news. The Indian Press Act would apply in the case of the former kind of periodical, but not of the latter. All news appearing in a periodical published for the general public is public news, and the paper is a "newspaper" within the meaning of the Act. If the proprietors of a paper choose to make week by week "news" of the activities or alleged activities of persons of sufficient importance to interest members of the public for whom the paper is published, and to whom it is sold or given away, they cannot fairly complain that it is not a newspaper, and that it does not contain public news. They have themselves made what would otherwise be a matter of private interest, if of interest at all, "public news." A.I.R. 1942 Sind 65=I.L.R. (1942) Kar. 127=43 Cr.L.J. 838=202 Ind. Cas. 405 (S.B.).

——Ss. 2 (6) and 18—Applicability—"News"—News-sheet—Meaning of—Publication of news-sheet—What amounts to.

"News" in the expression "news-sheet" as defined in S. 2 (6) of the Press (Emergency Powers) Act, means the presentation of a novel item of information which is reasonably intended to be accepted by the readers as such. "News" must have reference to the mode of presentation and not to an existing novelty of the circumstance or event which it is sought to convey or describe. It may be that the event described or presented has actually never happened; but it is sought to be so presented that a particular event has happened and the happening of that event is sought to be indicated as being reasonably about the time of the publication, then there would be publication of news within the meaning of S. 18 (1) of the Act.

Where a pamphlet, which in part relates to matters which may be called matters of history, substantially presents material in the form of presentation of novel items of information, and it appears to have been intended that ordinary readers should regard the same as a novel item of information and the pamphlet also contains a mass of comment on that news, the pamphlet must be held to be a "news-sheet" within the meaning of S. 2 (6) and when that is made without being authorised by a Magistrate under S. 15, it constitutes an offence punishable under S. 18 (1). I.L.R. (1950) Bom. 181=52 Bom.L.R. 229=A.I.R. 1940 Bom. 246=51 Cr.L.J. 1230.

——S. 2 (6)—For matter published or commented on to fall within the definition of news-sheet, there must be an element of novelty about it. A.I.R. 1945 Mad. 317=(1945) 1 M.L.J. 314=1945 M.W.N. 205=58 L.W. 182=47 Cr.L.J. 88=221 Ind. Cas. 140=I.L.R. (1946) Mad. 70.

——S. 2 (6)—News—Leaflet containing references to events in Spain—Public exhorted to make themselves free—Leaflet, held news-sheet.

A leaflet in question purported to be an exhortation to the public to strive for freedom. Matters of historical importance were referred. It also stated that an agraian revolution was coming. Then, again, it said: The invincible desire of the nation for the attainment of independence did not weaken....."The people, disabled and dying through famine, flood and starvation are again waking up. The invincible desire for the attainment of independence is making the whole country restive; even to-day thousands of young men and women without trial are passing the moments that are not in their control behind the prison "walls". In conclusion, happening in Spain from which a moral was sought to be drawn was expressly referred to:

Held, that the matters contained in the leaflet could be described as news in the sense of information on definite events of topical interest. A.I.R. 1938 Cal. 222=I.L.R. (1937) 2 Cal. 670=39 Cr.L.J. 446=174 Ind. Cas. 393.

——S. 2 (6)—"Document", meaning of—Whether means the same thing as in Penal Code or Evidence Act.

When the word "document" has not been defined in the Press Emergency Powers Act itself except by saying that it includes also any printing, drawing or photograph or other visible representation, the definition of the word as contained in the Penal Code and the Evidence Act will apply. A.I.R. 1934 All. 1031=4 A.W.R. 488=36 Cr.L.J. 335=153 Ind. Cas. 411.

——Ss. 3, 7, 23 (1)—Local Government in forming opinion under Ss. 3 and 7, if subject to any limitations as to evidence—Hearing of application made under S. 23 (1)—Evidence other than words, if can be considered.

Per *Weston* and *Tyabji, JJ.* (*Davis, C.J.* contra)—Section

26 in nothing more than an enabling section permitting the words to be considered in their general context. It does not mean that the Court may consider no other evidence whatever. There is nothing in S. 26 or in any other section of the Act to suggest that, when forming its opinion under S. 3 or under S. 7, the Local Government is subject to any limitations as to the evidence it may consider. When hearing an application made S. 23 (1), it is open to the High Court to consider evidence other than the words themselves or their context, immediate or general, such as letters from aggrieved persons revealing the prohibited purpose of the articles published in a newspaper within S. 4 (1) (*e*) relied on by the Provincial Government in support of the issues of notices by it under Ss. 3 (3) and 7 (3) of the Act. A.I.R. 1942 Sind 65=I.L.R. (1942) Kar. 127=43 Cr.L.J. 838=202 Ind. Cas. 405 (S.B.).

——Ss. 3 and 7—Scope of Ss. 3 and 7.

Sections 3 and 7 clearly contemplate action against both the keeper of the press and the publisher of the paper, and no distinction is drawn between the case where the printer and publisher are two different persons or one and the same. Hence, where the printer and publisher is the same person, the maximum security of Rs. 6,000 can be demanded from him under Ss. 3 (3) and 7 (3). A.I.R. 1942 Sind 65=I.L.R. (1942) Kar. 127=43 Cr.L.J. 838=202 Ind. Cas. 405 (S.B.).

——S. 3—Joint keeper purchasing share of partner—Use of press continued under different name—Whether can escape liability to have press forfeited.

A joint keeper of a press on whom a notice has been served under S. 3 cannot, by purchasing the share of his partner, escape liability to have his press forfeited when he continues to use the press under a different name by pleading that he the present keeper had not been given notice as required by the Act. A.I.R. 1937 Lah. 482=I.L.R. (1937) Lah. 65=38 Cr.L.J. 841=39 P.L.R. 894=169 Ind. Cas. 1008 (S.B.).

——S. 3 (3)—Construction and scope—Power of Provincial Government to make order under—Amount deposited not forfeited and not refunded—Order under S. 3 (3)—Legality.

Under S. 3 (3) of the Press (Emergency Powers) Act, 1931, the Provincial Government can only act when security has not been required under the Act, or having been required, has been refunded under S. 3 (2). The powers of Government under S. 3 cannot be exercised when the security has become liable to be refunded. There must be an application by the keeper of the press and actual refund by the Government before Government can act under S. 3 (3). When Government have not forfeited the security, and the amount deposited as security still continues to be with Government, an order under S. 3 (3) is not justified and is illegal. 4 A.I. Cr.D. 247=52 Bom.L.R. 275=A.I.R. 1950 Bom. 210=51 Cr.L.J. 829 (S.B.).

——S. 3 (3)—Notice not specifying clause of S. 4 (1)—Validity.

Although a notice issued by the Provincial Government under S. (3) of the Press Act does not, specify clearly the clause of sub-S. (1) of S. 4, under which the offending articles fall, no objection can be taken to its validity if the Crown subsequently specifies the different passages to which exception is taken on behalf of the Government and the clauses which they are said to have infringed and the accused is not thereby taken by surprise. Pak. L.R. (1950) Lah. 406=51 Cr.L.J. 1049=A.I.R. 1950 Lah. 183 (S.B.).

——S. 3 (3)—Statement of objected words attached to notice—Statement is a statutory provision.

The statement of objected words attached to the notice is a part of the notice itself under S. 3 (3) which requires a "notice in writing to the keeper of the press stating or describing such words, etc". The statement is, therefore, a statutory provision and is in the nature of a charge which gives particulars about the specific clauses of the sub-section that are alleged to have been infringed. The Government cannot, in revision, go behind or enlarge those particulars which are an integral part of the notice. A.I.R. 1945 Bom. 207=47 Bom.L.R. 57=46 Cr.L.J. 643=219 Ind. Cas. 470 (S.B.).

——S. 3 (3)—Scope.

Section 3 (3) does not constrain the Provincial Government to do anything more than to state or describe the words, signs or visible representations. It does not require that every word to which objection is taken by Government should be reproduced *verbatim* in the notice. A.I.R. 1945 Oudh 245=1945 O.W.N. (C.C.) 25=20 Luck 235=1945 A.W.R. (C.C.) 26=46 Cr.L.J. 658=220 Ind. Cas. 118 (F.B.).

——S. 4—"Government established by law"—Congress Government in provinces and centre.

The Congress Government now in power in the various provinces in India and in the centre is the Government established by law within the meaning of S. 4 of the Press Act. Though the Government is a Government by members of the majority party, the Government as such has its existence quite apart from the party. A criticism of the Government in power in province is a criticism of the Government by law established in that province; though incidentally it may be a criticism of the policy of the majority party. The fact that the form of Government at the centre and in the province has changed since India attained independence does not make this statute inapplicable. A.I.R. 1950 Cal. 444=54 C.W.N. 334 (S.B.).

——S. 4—Construction—Legitimate criticism of Government—If stifled — Incompatibility with democratic constitution.

Per *Harries, C.J.*—Since independence and the adoption of a democratic form of Government it is practically impossible to place a construction on S. 4 of the Press Act which will not stifle a good deal of legitimate criticism of Government. The right to criticism is inherent in a democracy. The opposition are entitled, and indeed it is their duty in proper cases, to expose the misdeeds or acts of omission of the Government in power and this they are entitled to do with a view to winning over the electorate so that the Government in power will be thrown out and the opposition placed in power after securing a majority in an election. However, if the words in S. 4 of the Act are strictly applied then newspapers supporting the opposition to the Government in power are muzzled and can indulge in nothing but very mild criticism. Further, opposition newspapers might find it difficult to publish facts concerning the Government which were true because the publication of such facts might well tend to bring the Government into hatred or contempt or to excite disaffection against such Government. A Government may be guilty of inefficiency in administration or of something worse than that, namely, nepotism or dishonesty or corruption. Such a Government would lay itself open to criticism and indeed very severe criticism would be justifiable. Nevertheless such criticism might bring the writer within the mischief of S. 4 of the Act because exposing Government and showing to his readers that the Government was guilty of a serious act of nepotism or an act amounting to corruption would inevitably excite the readers to hold the Government in contempt and would excite hatred and discaffection towards the Government. The truer the charge made against a Government the surer it would be to excite hatred and contempt and disaffection.

Per *Chatterjee, J.*:—The publication in any newspaper of any words which end directly or indirectly to bring into hatred or contempt any of the Provincial or State Government or to excite disaffection towards the said

Government is punishable under S. 4 of the Press Act. If the words of the Act are to be taken literally, opposition newspapers would come within the mischief of that section almost every day. The attention of the Legislature, should be drawn to the incompatibility of the Act with the present democratic constitution in India. The Press has the right to discuss any grievances and it is the right and duty of the opposition press to do its best to overthrow the party in power by all constitutional means.

The liberty of the Press connotes in England complete freedom and right of publication without censorship or restriction, unless such writing or publication tends to impair or destroy the foundations of the society. It is for the Legislature or the Parliament to determine whether the law in democratic India should be brought into line with the law of seditious libel in England so as to make punishable writings maliciously and designedly intended to subert the constitution and to excite rebellion on or disorder. No writing should be penalised or brought within the mischief of any Press Act if it seeks to overthrow by constitutional means the party in power. But so long as S. 4 is retained by the Legislature on the Statute Books, it is impossible for the Courts to ignore it, although they attempt to whittle it down when a Government attempts to take action because its vanity is wounded or it becomes intolerant of strong or bitter criticism.

Per *Bannerjee, J.*:—There is no doubt that the right to freedom of discussion and "liberty of the press" are fundamental doctrines of democracy. Yet this is not a consideration which should weigh with the Court in construing the Press Act. The Court is bound to give effect to the language of the Act so long as the Act is in existence even though it thinks the result capricious or unjust. It is the right of the Legislature, if it so wishes, to be capricious or unjust. A.I.R. 1950 Cal. 444=54 C.W.N. 334 (S.B.).

——S. 4—Construction—Question if article in newspaper offends section—Considerations for Court—Difference between 1931 and to-day.

Per *Bannerjee, J.*:—In applying the Press Act to any particular article which appears in a newspaper the Court will take into consideration the public sentiment and the surrounding circumstances to find out whether the words used in the article tend, directly or indirectly, to bring into hatred or contempt the Government established by law of the land or to excite disaffection towards it.

It must be noted, however, that there is great difference between 1931, when the Act was passed and to-day. The Government to-day is the Government of the people, by the people and for the people, and the Press to-day must enjoy greater liberty than it enjoyed in 1931. But so long as the Act remains in force, it is the duty of the Judge to set to work on the constructive task of finding the effect of the article, and he must do so not only from the language of the article, but also from a consideration of the prevailing public sentiment, which is the context in which the article must be read, and then he must supplement the written words of the Act so as to give "force and life" to the intention of the legislature.

There can be no difference in the principle of construction of the Act, whether construed in 1931 or to-day. The difference must be in the manner in which the Act is to be applied. The Act undoubtedly permits the publication of statements meant only to show that the Government has permitted errors; or to point out defects in the Government or the constitution with a view to their legal remedy, or with a view to recommend alterations in the policy or measures of the Government by legal means. The Act sanctions criticism on public affairs which is *bona fide* intended to recommend the reform of existing institutions by legal methods. Criticism is allowed that far and no further.

It is impossible to lay down any hard and fast rule as to how, an article should be read, but there is no doubt that it must be read by the Court carefully, liberally, and not with a view to find fault with it. The Court must read the article as a whole, giving due weight to every part, and find out the true sense of the article. The first thing the Court has to do is not to take the words, *in vacuo*, so to speak and attribute to them what is called their natural or ordinary meaning. The method of construing the words is to read them as a whole and ask oneself the question: "In this context relating to this subject-matter, what is the true meaning of the words?". If reading the article in that way, the Court thinks that it was intended to be a criticism of the policy or the administration of the Government, with a view to obtain its change or reform, the article is sale. But, if, on the other hand, reading the article as a whole the Court comes to the conclusion that the article was really an attack on the Government beyond the permitted lines of criticism,it must hold that the article is within the mischief of the Act, and no argument is available in support of the article on the basis that the Act does not exist or that the Act should be otherwise. A.I.R. 1950 Cal. 444=54 C.W.N. 334 (S.B.).

——S. 4—Scope and object—Duty of Court.

S. 4 of the Press (Emergency Powers) Act, taken and read as a whole, is not to be regarded as intended to minister to the mere vanity or susceptibilities of the Government or its officers but permits reasonable criticisms, comments and ventilation of grievance although the same may generate or excite some amount of resentment or disapprobation against the government provided that such resentment or disapprobation does not generate or excite the more intense, or deeper passion or hatred, contempt or disaffection. To put the same thing in another way, the hatred, contempt or disaffection made culpable by the section must, in its intensity and depth, be more than a mere feeling of resentment or disapprobation which is generated by legitimate comments, criticism or ventilation of genuine grievances.

The Court should in every case consider the book or newspaper article as a whole, and in a fair, free and liberal spirit, not dealing to much upon insolated passages, or upon a strong word here or there, which may be qualified by the context, but endeavouring to gather the general effect which the whole composition would have on the minds of the public. 51 P.L.R. 234=3 A.I. Cr. D. 539=A.I.R. 1949 E.P. 305=50 Cr. L.J. 813 (S.B.).

——S. 4—Promotion of enmity between classes—Intention of writer—Relevancy.

Per *Achhru Ram, J.*—If the words actually used by the writer had the tendency contemplated by S. 4 of the Press (Emergency Powers) Act, it can be no defence to proceedings under the Act that the writer did not intend to promote feelings of ill-will or enmity between the two classes of His Majesty's subjects. Unlike S. 153-A, I. P. Code, under the aforesaid section the intention of the author of the offending words is wholly immaterial and irrelevant except, of course, in a case where he seeks to bring his case within the purview of explanation 4 to the section. I.L.R. (1947) Lah. 497=A.I.R. 1948 Lah. 161=49 Cr. L.J. 480 (F.B.).

——Ss. 4, 7 and 8—Forfeiture of security—Change of printer and publsher after publication of offending article—Security of new printer and publisher can be forfeited.

For purposes of demand or forfeiture of security, it does not matter who happends to be the printer of publisher of the newspaper at the time when the action is taken. Where an article of an offending nature has once been published, the fact that subsequently there is a

change in the printer and publisher does not affect the power to take action and action can be taken against the new printer and publisher though the offending article appeared in the newspaper before he became printer and publisher. A.I.R. 1946 Nag. 72=I.L.R. (1946) Nag. 90=1946 Nag. L.J. 1 (S.B.).

——S. 4, Expl. 4—(As amended in 1932), Expl. 4—Article in newspaper stating that Chettiyars possess the same essential characteristics as the crow—Motive—Malicious intention—Held, article was outside pale of Expl. 4.

In a newspaper article, reference was made to the alleged fact that *Chettiyars* possess the same characteristics as the crow. This appeared in the forefront of the article and was the motive that ran through it :

Held, that deliberately to ascribe in a Burmese newspaper the attributes of the crow to the *Chettiyars* necessarily tended to engender ill-feeling between the Burmans and the *Chettiyars* and that the article was outside the pale of Expl. 4 to S. 4, because the object with which it was published plainly was not to remove the sources of any ill-feeling that might exist between the *Chettiyars* and the Burmans but to remove the *Chettiyars* themselves by making their residence in Burma unprofitable, if not intolerable and hence the order to furnish security would not be interfered with. A.I.R. 1935 Rang. 219=157 Ind. Cas. 118 (1) (F.B.).

——Ss. 4 and 18—Poster headed 'Long Long Live Revolution'—Itself not encouraging violence directly or indirectly.

Where there is nothing in the "announcement" itself which can be said to encourage, directly or indirectly, the commission of any offence, much less murder or other cognizable offence involving violence, or which makes reference, explicit or covert, to any person who has, or is supposed to have committed crimes of this nature, the mere fact that the head-line of the poster contains words "Long Long Live Revolution" cannot lead to the conclusion that it was intended to produce literatures advocating violence. A.I.R. 1934 Lah. 264=35 Cr. L.J. 1447 (2)=151 Ind. Cas. 943.

——Ss. 4, 16 (d) (f)—Publication of news item—Opinion of a person about whose standing in the country and influence no evidence is adduced—Whether hit by Cl. (f) of S. 16—Words in newspaper—How to be construed—Effect of the words should be considered and not merely the meaning of the words.

A newspaper published as a news item, transmitted by a news agency, that in the opinion of a certain person M the suspension of the Civil Disobedience Movement amounted to an acknowledgment of defeat and that such acknowledgment of defeat was not likely to further the cause of what is called national progress. The person concerned stated that in an interview with a representative or representatives of the news agency and he went on to refer to certain opinion expressed somewhere in Europe by two persons and expressed the opinion that the fight be contintued till freedom was attained. There was no evidence as to who the interviewer was and whether the words expressed by him were likely to obtain acceptance among a considerable section of the intelligent public. On this, the Local Government ordered security to be deposited as the words were alleged to be hit by Cls. (*d*) and (*f*) of S. 16, Criminal Law Amendment Act, 1932 :

Held, that in the context, the "fight" that was referred to in the last sentence obviously had reference to the question of the continuance of the struggle by means of the Civil Disobedience ; but that the value of such an opinion on the part of this person depended upon a variety of circumstances, and that in the absence of evidence to show who the person was and whether the views expresed by him were worth listening to or whether they were, in the circumstances, calculated to directly or indirectly encourage or incite etc., what was referred to in sub-S. (*f*), it would be impossible to say that the words in question could have directly or indirectly the effect described or referred to in Cls. (*d*) and (*f*) of S. 16 of Act 23 of 1932 ;

Held also, that in arriving at a decision, the Cour has to consider the entirety of the words as they occur in the annexure in a fair and free spirit and not with an eye of narrow and fastidious criticism and the Court should not shut its eyes to the nature and manner of the publication of the words and discover as to whether a mere expression of disapproval of suspension of the Civil Disobedience Movement on the part of a person about whom nothing is known on the record could have the effect referred to in sub-S. (*f*) of S. 16 of Act 23 of 1932 and that although the editor published 'news' at his own risk, the words complained of were not hit in the circumstances of this case by sub-Cl. (*f*) of S. 16 of Act 23 of 1932.

Per *Mukerji, J.*—It is the effect of the words as published in the newspaper and not merely the meaning of the words taken by themselves that has to be considered in order to see whethr the statement which is complained of it is hit by S. 4. A.I.R. 1933 Cal. 754=34 Cr. L.J. 1095=58 C.L.J. 32=38 C.W.N. 56=61 Cal. 36=145 Ind. Cas. 881 (S.B.).

——S. 4—Ordinance 2 of 1932, S. 63—Ordinance 7 of 1932, Ss. 2, 4—Newspaper articles asserting that Government were abusing and misusing their powers—Whether bring Government into hatred and contempt—Truth of facts asserted, whether affords justification.

Where the general tendency of the articles in a newspaper was not to criticise the policy of the Government of India in promulgating the Ordinances, or the legitimate operation of the Ordinances by the Local Government but to assert that the Local Government were deliberately abusing and misusing the powers conferred upon them by the Ordinance and to appeal to them to cease from so doing :

Held, that they tended to cause hatred or contempt against Government in the minds of those who read the articles.

Held, further, that the Court was not concerned as to whether the facts asserted on which the charges were based, were true or false.

There is no exception in S. 4, Indian Press Act as amended by the Ordinance, making truth and public good an answer to a charge under the section, as in the case of Exception (1) to S. 499, Penal Code dealing with defamation.

The effect of the Ordinance is to bring within S. 4, Press Act every charge of misconduct by Government whether such charge is well-founded or not.

Where an article alleged that the Special Court was acting in co-operation with the executive and that Magistrates and Judges were not in a position to defend themselves :

Held, that such a charge tended to bring into contempt the administration of justice under the Ordinances. A.I.R. 1932 Bom. 468=34 Bom. L.R. 917=56 Bom. 472=33 Cr. L.J. 749=139 Ind. Cas. 262 (S.B.).

——S. 4 (1)—Liberal interpretation.

The provisions of the Press (Emergency Powers) Act must be interpreted liberally and in favour of the subject. S. 4 (1) taken and read as a whole permits reasonable criticisms, comments and ventilation of grievances although the same may generate or excite some amount of resentment or disapprobation against the Government provided that such resentment or disapprobation does not generate or excite the more intense or deeper passion of hatred, contempt or disaffection. The hatred, contempt and

disaffection made culpable by the section must, in its intensity and depth, be more than a mere feeling of resentment or disapprobation which is generated by legitimate comments, criticisms or ventilation of genuine grievances. 51 P.L.R. 234, Foll. 51 P.L.R. 356=4 A.I. Cr. D. 1=A.I.R. 1950 E.P. 150=51 Cr. L.J. 725 (S.B.).

——S. 4 (1)—Proceeding under—Specification of offending passages—Duty of Provincial Government.

Per *Cornelius, J.*—Having regard in particular to the extreme importance which properly attaches to the press and publicity in general in modern administrative organizations, it cannot be helpful to the Provincial Government that in a proceeding taken on its behalf under forms of law, involving severe penalties on persons connected with the Press, it should appear so patently that the discriminating mind has not been applied to the published matter in respect of which the action was taken, so as to separate that which was offensive and injurious from that which was innocuous. Pak. L.R. (1949) Lah. 643=A.I.R. 1950 Lah. 21=51 Cr. L.J. 316 (F.B.).

——S. 4 (1)—Articles to be read as whole in liberal spirit.

Per *Cornelius, J.*:—It is axiomatic that for the purposes of appreciating whether or not a particular piece of writing falls within the mischief of any of the prohibitions enumerated in S. 4 (1) Press Act, it is necessary that the article should be read as a whole in a fair, free and liberal spirit, not concentrating on isolated passages or words, but endeavouring to grasp the theme and intention of the writer from the words he has employed, and attempting to estimate at the same time the effect of those words, and the manner of their employment, upon the mind of the average reader. Pak. L.R. (1949) Lah. 643=A.I.R. 1950 Lah. 21=51 Cr. L.J. 316 (F.B.).

——S. 4 (1)—Scope—Attacks on individual police officers.

Attacks on individual police officers do not bring into hatred or contempt either the Government established by law in British India or any class or section of His Majesty's subjects, and cannot, therefore, be brought within the mischief of S. 4 (1) of the Press (Emergency Powers) Act. 48 Cr. L.J. 931=A.I.R. 1948 Lah. 6=49 P.L.R. 235 (S.B.).

——S. 4 (1)—Applicability—Writing to be considered as a whole.

Per *Muhammad Munir, J.*:—In order to determine whether a particular document, book or newspaper falls within the amibt of S. 4 (1) of the Press (Emergency Powers) Act, the Court should consider the writing as a whole and in a fair free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there which may be qualified by the context but endeavouring to gather the general effect which the whole composition would have on the minds of the public. I.L.R. (1947) Lah. 497=A.I.R. 1948 Lah. 161=49 Cr. L.J. 480 (F.B.).

——S. 4 (1)—Change of publisher after offending article—Security if can be forfeited.

A person who becomes a keeper of a printing press or a publisher of a newspaper is liable for acts previously done. It does not matter who the publishers happens to be at the time of the newspaper contains words coming within the mischief of S. 4 of the Press (Emergency Powers) Act, and the change of the publisher after the newspaper has inserted the offending article makes no difference. I.L.R. (1946) Nag. 90=226 Ind. Cas. 104=47 Cr.L.J. 835=1946 N.L.J. 1=A.I.R. 1946 Nag. 72 (S.B.).

——S. 4 (1)—News article whether offends against S. 4 (1)—Test.

In order to find out whether a news article offends against the provisions of S. 4 (1) the article has to be read in its entirety in a fair, free and liberal spirit and should not be viewed with an eye of narrow and fastidious criticism. A.I.R. 1946 Nag. 72=I.L.R. (1946) Nag. 90=1946 Nag.L.J. 1 (S.B.).

——Ss. 4 (1), 3 (1) and 7 (1)—*A*'s security deposited on 27th July, 1943 as printer and publisher of newspaper forfeited and *B* becoming printer and publisher of newspaper—Forfeiture set aside and on 22nd December, 1944, *A* again becoming keeper of press and amount of security instead of being refunded to him retained as security for him—Security held must be treated as having been deposited on 27th July, 1943 and not on 22nd December, 1944.

On 27th July, 1943, *A* deposited security as keeper of a press and publisher of a newspaper. This security was forfeited and *B* declared himself as keeper of the press and publisher of the newspaper. The forfeiture order was subsequently set aside and on 22nd December, 1944, *A* again became keeper of the press and the security which was to be refunded to him was retained as security for him. This security was forfeited in respect of a news item published by *B* in the newspaper before *A* became the keeper of the press. It was contended that the security having been furnished on 22nd December, 1944 subsequent to the published of the offending article could not be forfeited :

Held that though on 22nd December, 1944, there was an arrangement with the authorities concerned for the retention of the deposit made by *A* on 27th July, 1943 there was in fact a restoration of the *status quo ante*. A.I.R. 1946 Nag. 72=I.L.R. (1946) Nag. 90=1946 Nag. L. J. 1 (S.B.).

——Ss. 4 (1), 3 (3)—Narration of 35 years' old revolutionary movement in the biography of living person—Biography, if historical work.

The biography of a living person containing a narrative of the revolutionary movement in existence about 35 years ago which has now passed into history is a historical work and not merely a narrative of current events. A.I.R. 1945 Bom. 207=47 Bom.L.R. 57=48 Cr.L.J. 643=219 Ind. Cas. 470 (S.B.).

——S. 4 (1)—Distinction between historical or literary work and writings—Duty of Court in judging purpose of work.

The Legislature has drawn a clear distinction between a historical or literary work on the one hand and writing such as newspaper articles, pamphlets and similar publications on the other hand. In the case of the latter approval or admiration of an offence of murder or other violent crime is enough to attract the penal provisions of the Act but in the case of the former, mere approval or admiration of such offence is not enough but it must be shown that it has a tendency to encourage them at the time when the work is published. And that distinction is, indeed, necessary in the interests of the public. Otherwise, no true and faithful history of a country can be written. The history of almost every country abounds in violent upheavals of wars and revolutions including deeds of bravery which are held up for the admiration of posterity. No such historical work can be regarded as objectionable unless it has the present tendency to incite people to do such violent acts as may be punishable under the law of the land. That is the test which the Courts have to apply in determining the effect produced in the mind of an average reader after he reads the alleged objectionable passages in their proper context.

The Courts have to look to the circumstances in each case in judging such a tendency, *viz.*, the purpose of the work, the time at which it was published, the class of people who would read it, the effect it would produce in their minds, the context in which the objected words

appear and the interval of time between the incidents narrated and the publication of the work. A.I.R. 1945 Bom. 207=47 Bom.L.R. 57=46 Cr.L.J. 643=219 Ind. Cas. 470 (S.B.).

——S. 4 (1)—Provincial Government is not bound to specify particular item of Cl. (1).

Neither S. 3 (3) nor S. 7 (3) constrains the Provincial Government to do any thing more than to state or describe the words complained of. There is no obligation whatever on the Provincial Government to record its opinion in the notice as to which particular item of sub-S. (1) of S. 4 applies. A.I.R. 1944 Nag. 178=1944 N.L.J. 195=45 Cr.L.J. 657=I.L.R. (1944) Nag. 680=213 Ind. Cas. 397 (S.B.).

——S. 4 (1)—Immediate disorder need not be incited—Order is precautionary and not as punishment.

The words complained of need not necessarily incite to immediate disorder, and words which deliberately create or tend to create hatred and contempt for the Government may be the prelude to public disorder. The order passed by Provincial Government is not a punishment such as is provided in the Indian Penal Code, or by R. 38, Defence of India Rules, but a precautionary measure. A.I.R. 1944 Nag. 178=1944 N.L.J. 195=45 Cr.L.J. 657=I.L.R. (1944) Nag. 680=213 Ind. Cas. 397 (S.B.).

——Ss. 4, 19—Government's power of forfeiture irrespective of action taken against press.

Section 4 (1) is primarily concerned with printing press, but by reason of S. 19 the Government has the power of forfeiture irrespective of action being taken against the press. A.I.R. 1942 Mad. 690=44 Cr.L.J. 88=(1942) 2 M.L.J. 509=55 L.W. 844 (2)=I.L.R. (1942) Mad. 9=1943 M.W.N. 809=203 Ind. Cas. 498 (S.B.).

——S. 4 (1)—Disapprobation strongly worded.

Mere disapprobation, however strongly and flagrantly expressed, does not imply that the intention was to excite disaffection. A.I.R. 1935 Cal. 74=38 C.W.N. 674=61 Cal. 827=36 Cr.L.J. 432=153 Ind. Cas. 872 (S.B.).

——S. 4 (1)—'Reprisal', meaning of—"Retaliative"—Use of word without ascribing base motive to Government—Intention of writer.

Per *Mukerji, J.*—The word "reprisal" denotes an act of retaliation for some injury or attack, specially in warfare, the infliction of similar or severer punishment to the enemy. Divested from the context and used with reference to an act by the Government towards the people, the word would be objectionable inasmuch as it implies an idea of retaliation. "Reprisals" are admissible for international delinquencies only :

Held, on facts (Per *Mukerji* and *S. K. Ghose, JJ.*, *Costello, J.*, dissenting).

The offending passage, by using the word "reprisal" could not be taken to "tend to bring into hatred or contempt the Government established by law in British India"—or to excite disaffection towards the said Government" within S. 4 (1) of the Act 23 of 1931 as amended by S. 16, Act 23 of 1932.

The use of the epithet 'retaliative", with reference to the punishments that the Jail Code provides is not hit by the Press Act.

Per *Costello, J.*—The intention of the writer is a thing which Courts are not entitled to take into account ; the Courts are concerned with the effect of the words used by the writer.

Per *Costello, J.*—An offence may be constituted where the words used impute to the Government by law established in this country a base motive. It is very difficult to say that if the Government acts from any improper motive it is not acting from a base motive. To say that the Government is adopting measures in the nature of reprisals or retaliation against any body of persons who are subjects of the country in question or against any individual is to say in effect that the Government is not merely putting into operation the ordinary laws of the land and the normal procedure of penal administration but is also adopting some extraordinary and improper means of dealing with the persons concerned. A.I.R. 1935 Cal. 74=38 C.W.N. 674=36 Cr.L.J. 432=61 Cal. 827=153 Ind. Cas. 872 (S.B.).

——S. 4 (1)—Attack on one or two Police Officers.

A fortuitous concourse of one or two Inspectors or Sub-Inspectors and a few Policemen who happen to be employed at a particular place cannot be designated a section of His Majesty's subjects, much less a class thereof. A.I.R. 1932 Cal. 649=36 C.W.N. 962=138 Ind. Cas. 849 (S.B.).

——S. 4 (1) (As amended by Emergency Powers Ordinance (9 of 1932), S. 63 (d))—Seditious articles—Jurisdiction of High Court, scope of—Intention of writer, whether relevant—'Government', meaning of—Amending Ordinance—Omission to recite emergency, effect of—Imputing dishonest motive to Government—Sedition.

The jurisdiction of the High Court under S. 23, Indian Press (Emergency Powers) Act is of an extremely limited character, and in determining whether certain passages are or are not of the nature described in S. 4 (1) of the Act as amended by S. 63 (*d*), Emergency Press Ordinance, the High Court is not concerned with the intention of the writer but only with the effect of the words used. If the words used tend directly or indirectly to bring into hatred or contempt the Government or to excite disaffection towards the Government the accused are hit by S. 63 (*d*) of the Ordinance.

If there are omissions in an Ordinance, it is open to the Governor-General to repair the omissions by amending the Ordinance and it is not necessary in the amending Ordinance to recite the original emergency.

Once it is conceded that the Governor-General is the sole repository of the power of promulgating Ordinances, it must be conceded that he is the only Judge as to whether or not the provisions of an Ordinance can or cannot be made operative by reference to an original statute or otherwise.

So far as India is concerned, no distinction in substance can be drawn between Government established by law in British India and the Executive Government though, in England the state of things is different.

Where the words used are such as may be considered to impute unworthy or dishonest motive to the Government they fall within S. 63 (*d*), Emergency Powers Ordinance.

The 'exceedingly stringent nature of the Emergency Powers Ordinance of 1932 pointed out. A.I.R. 1932 Cal. 745=33 Cr.L.J. 839=60 Cal. 408=37 C.W.N. 104=140 Ind. Cas. 5 (S.B.).

——S. 4 (1)—Seditious article in newspaper—Circumstances in which it appears to be considered.

In a Tamil newspaper or small circulation in Rangoon appeared a leading article containing passages exhorting, its readers to free India from an alien Government with 'the Sword of *Ahimsa*';

Held (*i*) that in using these words, those responsible for the publication of this article intended to bring into hatred and contempt and to incite disaffection towards His Majesty and the Government established by law in British India ;

(*ii*) that in considering whether the words fall within S. 4, sub-S. (1), it is the duty of the Court to have regard to the surrounding circumstances ; for instance, the context in which the words appear, the persons to whom

the words were addressed, the political atmosphere in which the words were delivered and the place where they were published ;

(*iii*) that in the circumstances of the case, in spite of the seditious nature of the words of the article, they did not fall within S. 4 (1) of the Act. A.I.R. 1932 Rang. 69=10 R. 165=137 Ind. Cas. 655 (S.B.).

——S. 4 (1) (a) (d) (h)—" Class "—Section " classes" —Political party, or body—If covered by.

A political body or party like the Muslim League is not a " class " within the meaning of S. 4 of the Indian Press (Emergency Powers) Act and the words " class " and " section " in cl. (*d*) and the word " classes " in cl. (*h*) of sub-S. (1) of S. 4 are not applicable to political parties. I.L.R. (1947) Lah. 795=A.I.R. 1947 Lah. 340= 48 Cr.L.J. 915=49 P.L.R. 190.

——S. 4 (1) (a)—" Offence involving violence "—If includes violence to property—Opening bolts of railway line—If such offence.

The words "offence involving violence " in S. 4 (1) (*a*), Press (Emergency Powers) Act, are wide enough to include offences involving violence against property. Violence requires something more than force and may be defined as the use of force in an aggravated form. If a person opens the bolts of a railway line but in consequence no train is derailed and no lives are lost, he cannot be said to have committed an offence involving violence. The possibility of violence or violent consequences is not enough. Some violence must have been used, or consequences involving violence must have ensued. I.L.R. (1947) Kar. 60=A.I.R. 1947 Sind 114=48 Cr.L.J. 843 (F.B.).

——S. 4 (1) (a) and (b) and Expl. 1—Applicability and scope—Historical or literary work—Biography of living person narrating revolutionary movement of the past—If offends or is protected. I.L.R. (1945) Bom. 843 =46 Cr.L.J. 643=219 Ind. Cas. 470=47 Bom.L.R. 57=A.I.R. 1945 Bom. 207.

——S. 4 (1) (a)—Narrative.

If a narrative is written in such a way that it incites or encourages or tends to incite or encourage the crime referred to, the fact that it is a narrative does not provide any excuse. A.I.R. 1942 Mad. 690=(1942) 2 M.L.J. 509=44 Cr.L.J. 88=55 L.W. 844 (2)=I.L.R. (1942) Mad. 9=1942 M.W.N. 809=203 Ind. Cas. 498 (S.B.).

——S. 4 (1) (a) and (d)—Interpretation of document complained of—Poem entitled " Labourers, the mainstay of the world," urging labourers not to tolerate exploitation of their masters and inciting bloody revolution and destruction of present social order by force—Poem, held fell under S. 4 (1), cl. (a) and not under cl. (d).

A common-sense interpretation must be given to the document complained of, namely, the impression it gives to a man of ordinary common-sense.

In order to show that certain words come under S. 4 (1) (*a*), it is unnecessary to show that the words tend to incite to, or to encourage the commission of a particular offence or offences. It is sufficient if they tend to incite to or to encourage the commission of cognizable offences of violence in general.

A poem in Hindi was entitled " Labourers, the mainstay of the world ". It began by emphasising that labourers are the mainstay of the present world and then proceeded to describe their unfortunate and pitiful lot. The author subsequently pointed out that though speechless to-day, when organized, they would be as powerful as millions and this portion of the poem ended with these words : " Why are you helplessly tolerating the exploitation of your masters." The remaining lines were as follows :

" Labourers, Raise now the cry of Revolution.
The heavens will tremble, the Universe,
Will shake and the flames of revolution,
Will burst forth from land and water,
You, who have been the object of exploitation.

Now dance the fearful dance of destruction on this earth.

Truly, labourers ! only total destruction will create a new world order and that will bring happiness to the whole world ".

Held, that the words "masters or exploiters" are too wide and vague to denote a definite or ascertainable class so as to come within cl. (*d*) of S. 4 (1) of the Act :

Held, further that the poem contained words tending to incite to or to encourage bloody revolution, and the destruction of the present social order by bloodshed and force and clearly came within S. 4 (1) (*a*) of the Act. A.I.R. 1941 Pat. 132=22 P.L.T. 260=42 Cr.L.J. 548= 194 Ind. Cas. 273=7 B.R. 743 (S.B.).

——S. 4 (1) (b)—Scope.

Before S. 4 (1) (*b*) of the Press (Emergency Powers) Act can be properly applied it must be shown that a person held up for admiration has committed or is alleged or represented to have committed any such offence as in described in cl. (*a*) that is, an offence of murder or any cognizable offence involving violence. I.L.R. (1947) Kar. 60=A.I.R. 1947 Sind 114=48 Cr.L.J. 843 (F.B.).

——Ss. 4 (1) (b) and 7 (3)—Notices under held contained adequate description of offending words.

R was convicted of murder and sentenced to death in connection with the disturbances which took place in India in August, 1942. After *R* was executed an article referring to *R's* execution and bearing title " Truly He Died A Martyr's Death" was published in a newspaper on 15th December, 1944. In the notices issued by the Provincial Government under S. 4 (1) and S. 7 (3) there was the following para : " And whereas in the opinion of the Provincial Government the issue of the said newspaper dated 15th December contains in the columns published on the first page under the title " Truly He Died A Martry's Death" words which are of the nature described in cl. (*v*) of sub-S. (1) of S. 4 of the Indian Press (Emergency Powers) Act, 1931 ";

Held that the notices contained an adequate description of the offending words. The description clearly indicated that the article contained words of the nature described in S. 4 (1) (*b*). A.I.R. 1946 Nag. 72=I.L.R. (1946) Nag. 90=1946 Nag. L. J. 1 (S.B.).

——S. 4 (1) (b)—Offending article to be read in liberal spirit—Reference to person convicted of murder in connection with political disturbance as "martyr"—If objectionable.

Under S. 4 (1) (*b*) of the Press (Emergency Powers) Act, an offending article should be read in its entirety in a fair, free and liberal spirit and should not be viewed with an eye of narrow and fastidious criticism. A martyr is in every day parlance a person who suffers for his belief or one by his death bears witness to the truth, and when a writer of a newspaper article refers to a person sentenced to death on conviction for murder in connection with a political disturbance as a martyr, he expresses or implies his approval of the act or acts for which he is subjected to punishment. Even if the approval can be said to be indirect the liability of the keeper of the press and publisher remains in virtue of the terms of S. 4 (1) (*b*) and of S. 8 (1) of the Act. I.L.R. (1946) Nag. 90= 226 Ind. Cas. 104=47 Cr.L.J. 835=1946 N.L.J. 1= A.I.R. 1946 Nag. 72 (S.B.).

——S. 4 (1) (b)—Article held offended against S. 4 (1) (b)—Words "martyr" and "Shahid"—Meaning of—Words and phrases.

In connection with the disturbances which took place in India in August, 1942, *R* was convicted of murder and sentenced to death. He was executed on 9th December, 1944. On 15th December, 1944 an item of news referring to *R's* execution and bearing the title "Truly He Died A Martyr's Death" was published in a newspaper. At three places in the article *R* was referred to as "Shahid *R*". It was contended that the word "martyr" signified a man who faced his execution with fortitude and bravery and not one who was to be admired for the part played by him in the August, 1942 disturbances :

Held that (1) a martyr was in everyday parlance a person who suffered for his belief or one who by his death bore witness to the truth, and when a speaker or writer referred to a contemporary as a martyr, he in almost every instance expressed or implied his approval of the act or acts for which he was subjected to prosecution or punishment, capital or otherwise. So it was in the news item in question ;

(2) "shahid" meant a man who had died on the battlefield in a good cause, a cause so glorious that he was translated to heaven forthwith. It was, therefore, a term of great approbation ;

(3) there was therefore a direct approval of a man who had committed an offence of murder and not a mere expression of admiration for the manner in which he faced the ordeal of execution. Even if the approval could be said to be indirect, the publisher's liability remained in virtue of the terms of S. 4 (1) (*b*) and S. 8 (1) ;

(4) so far as the item was concerned *vis-a-vis* the offence of murder itself, the expression of approval was not direct but indirect and the publisher would also be liable on that account under S. 4 (1) (*b*) and S. 8 (1). A.I.R. 1946 Nag. 72=I.L.R. (1946) Nag. 90=1946 Nag.L. J. 1 (S.B.).

——S. 4 (1) (b), Expl. B (1)—Scope of the explanation—Article describing historical incident with no political or criminal significance—Article not applied to nor applicable to Indian conditions—Whether falls with S. 4 (1) (b).

The explanation to S. 4 (1) (*b*), Press (Emergency Powers) Act, provides an exception in favour of an historical or literary work which does not tend to incite to murder. Where an article in a magazine published entirely for women described an historical incident without any political or criminal significance and was meant to illustrate the sufferings of a woman who was prepared to sacrifice herself for what she considered to be right, and it was clear that it did not and could not apply to Indian conditions :

Held, that it could not be said that the story which described an event in Russia under the Czarist regime could be said to tend to incite any one to commit murder in India under wholly dissimilar conditions, and did not come within S. 4 (1) (*b*) of the Act. A.I.R. 1935 Lah. 338=16 Lah. 270=37 P.L.R. 107=36 Cr.L.J. 971=156 Ind. Cas. 674 (S.B.).

——S. 4 (1) (bb)—"Bring into hatred or contempt, or excite disaffection towards the Government established by law in British India"—Meaning and effect of—Offence—Essentials.

The words "to bring into hatred or contempt. . . . Government established by law in British India" are of wide import, but they are not meant to be construed too literally. They are to a certain extent terms of art which have acquired a definite legal meaning. It is enough under S. 4 to establish a tendency, direct or indirect, to sedition, whereas under S. 124-A, I.P. Code, it is necessary to establish sedition itself. The question in all cases is at least one of fact.

It is not sedition merely to criticise Government, however bitterly or forcibly, that may be done ; nor is it sedition to seek its overthrow by constitutional means in order that another Government equally constitutional may be substituted in its place in a constitutional way. It becomes sedition under S. 124-A, I.P. Code, only when the intention or the attempt is to induce people to cease to obey the law and to cease to uphold lawful authority, and it falls under S. 4 of the Press Act if the matter complained of tends to produce that result or is likely to do so. The place, the circumstances and the occasion of the publication have to be examined in order to decide whether the publication offends against S.4. The gravity of the subject-matter of the criticism is not the true test ; the test is whether there is an attempt to incite people to a disobedience of the laws and a flouting of the rules. So long as the endeavour is to obtain redress by constitutional means, there is no offence. I.L.R. (1946) Nag. 865=47 Cr.L.J. 994=226 Ind. Cas. 590=A.I.R. 1947 Nag. 1 (F.B.).

——S. 4 (1) (bb)—Prejudicial report—Determination of—Article in newspaper not to be isolated from other articles.

In order to determine whether the publication of an article in a newspaper was prejudicial to the war effort, not only the sentences complained of in the article are not to be isolated from the article as a whole but the article as a whole should not be isolated from other articles which have appeared in the same newspaper. I.L.R. (1947) Kar. 54=230 Ind. Cas. 454=A.I.R. 1947 Sind 81 (S.B.).

——S. 4 (1) (bb)—Applicability—Prejudicial act or report—Defence of India Rules (1939), R. 34 (6) (*a*) and (7)—Duty of Court to decide after perusal of book or publication.

If one of the rules in the Defence of India Rules, 1939, prohibits a certain act specifically, the Court must give effect to that prohibition, But where the word used is ambiguous and is not defined and is not clear as to its intepretation, it is open to the Court to look, to the object with which the Rules were framed under the Defence of India Act. Hence in order that a publication or a book should prejudice, His Majesty's Relation with a foreign power and be objectionable under S. 4 (1) (*bb*) of the Press (Emergency Powers) Act (1931) the publication must be such as in some way to affect one of the objects referred to in S. 2 (1) of the Defence of India Act. It is for the Court to decide on a perusal of the book or publication whether it comes within the mischief of S. 4 (1) (*bb*). 225 Ind. Cas. 572=47 Cr.L.J. 752=48 Bom.L.R. 155=A.I.R. 1946 Bom. 325 (S.B.).

——S. 4 (1) (bb)—Prejudicing relations with foreign Government—What amounts to—Test to determine—Duty of Court—Criticism of foreign Government—Offence.

In order to determine whether a book or a publication is likely to prejudice the relations between His Majesty and a foreign Government under S. 4 (1) (*bb*) of the Press (Emergency Powers) Act, the Court must look at the book or publication as a whole. To criticise the political system of a foreign Government, even though that Government may be on friendly terms with His Majesty, would not be sufficient to bring the book or publication within the mischief aimed at under Cl. (*bb*) of S. 4 (1) of the Act, as read with R. 36 (*a*) of the Defence of India Rules. It must be established that the particular publication is intended or is likely to prejudice His Majesty's relations with a foreign Government and the relations must be so prejudiced in such a way as to affect the public safety, the defence of British India, the maintenance of public order or the efficient prosecution of the war or maintaining supplies and services essential to the life of the community. A book in English entitled "Denationalisation of Goans", which historically traces the gradual decadence of the Goans, and which calls upon the Goans to free themselves from the historical background and their present outlook so that they should

be more fitted to aspire for freedom and to join hands with their fellow-countrymen in the rest of India cannot possibly be said to prejudice His Majesty's relations with the Government of Portugal within the meaning of S. 4 (1) (*bb*) of the Press Act. 225 Ind. Cas. 572=47 Cr.L.J. 752=48 Bom.L.R. 155=A.I.R. 1946 Bom. 325 (S.B.).

——S. 4 (1) (d).

Synopsis.

1. **Class or section.**
2. **Essentials and scope.**
3. **Government established by law.**
4. **Hatred and contempt.**
5. **Miscellaneous.**

1. Class or section.

——S. 4 (1) (d)—" Class or section of His Majesty's subjects "—Pakistan Army.

The Army of Pakistan constitutes for the purposes of S. 4 (1) (*d*) of the Press Act, a " class or section of His Majesty's subjects ". There can be no doubt that if it is sought to bring any persons within the expression " class or section of His Majesty's subjects ", it will be necessary first of all to look for well-ascertained, well-defined and sufficiently numerous groups. These conditions would undoubtedly be satisfied by a body of say 100,000 persons, which is the approximate strength of the Pakistan Army, who are collectively referred to in common parlance as " military personnel " and whose distinction from the civilian section of the population is thoroughly well-recognised. This large body of persons is subject to a common command, a common duty and loyalty and in external ways is kept as far as possible distinct from the rest of the population by living and messing together, and by their contact with the civilian population being restrained under military discipline to a very great extent. When this large body of persons thus bears all the external marks of an easily distinguishable class among the subjects of His Majesty in the Dominion, there is no reason why they should not be considered as falling within the meaning of the expression " class or section of His Majesty's subjects " in S. 4 (1) (*d*).

View of *Agha Haidar, J.*, in 1934 Lah. 219, disap. Pak.L.R. (1949) Lah. 545=51 Cr.L.J. 98=A.I.R. 1949 Lah. 218 (S.B.).

——S. 4 (1) (d)—Section of His Majesty's subjects—Rajas and Jagirdars.

Rajas and Jagirdars are a section of His Majesty's subjects within the meaning of S. 4 (1) (*d*) of the Press (Emergency Powers) Act. 49 P.L.R. 235=48 Cr.L.J. 931=A.I.R. 1948 Lah. 6 (S.B.).

——S. 4 (1) (d) and (h)—Political organization—Whether a " class ".

A political organization like the Congress cannot fall within the ambit of the expression " class " and a criticism of the leaders of such an organization does not attract the provisions of Cl. (*d*) or (*h*) of S. 4 (1) of the Press (Emergency Powers) Act. I.L.R. (1947) Lah. 795=49 P.L.R. 190=48 Cr.L.J. 915=A.I.R. 1947 Lah. 340 (S.B.).

——S. 4 (1) (d) and (h)—" Class or section "—Political body.

Per *Mohd. Sharif, J.*—A political body like the Muslim League, is not a " class or section " of His Majesty's subjects within S. 4 (1) (*d*) and (*h*) of the Press (Emergency Powers) Act as it requires some element of permanence which is wholly absent in the case of political organizations. They are too frequently changing in their complexion, composition and political objectives.

Per *Teja Singh, J.*—If a political party is well-defined and the number of persons owing allegiance to it is large enough, there is no reason why it should not be regarded as a class or at least a section of His Majesty's subjects.

Per *Bhandari, J.*—A political organisation cannot fall within the ambit of the expression " class or section " and a criticism of the organisation or its leaders cannot attract the provisions of S. 4 (1) (*d*) and (*h*) unless the article read as a whole has the tendency of producing or promoting class hatred. If that tendency is clearly discernible, the article must be deemed to contain words of the nature described in S. 4 (1) notwithstanding the fact that outwardly the article purports to be nothing more than the criticism of a school of political opinion. 48 Cr.L.J. 903=A.I.R. 1947 Lah. 366 (S.B.).

——S. 4 (1) (d)—" Class or section "—" Exploiters ' or " capitalists."

The words " class or section " in cl. (*d*) of S. 4 (1) must mean a definitely ascertainable body of individuals, not an indeterminate body or group having no clearly defined and non-variable characteristics or criteria by which they may be distinguished from any other body or group. Exploiters or capitalists as such, any more than, say, literates or illiterates, or the rich or the poor, do not constitute a " class " or a " section " within the meaning of this clause. A.I.R. 1937 Cal. 691=41 C.W.N. 1217=39 Cr.L.J. 190=I.L.R. (1938) 1 Cal. 455=172 Ind. Cas. 906.

——S. 4 (1) (d)—The rich definitely described as zamindars, millowners and landlords—Whether form a sufficiently ascertained class within S. 4 (1)—Attack on this class in news-sheets—Offence.

The rich as more definitely described as *zamindars*, millowners, and landowners form a sufficiently ascertained class to satisfy the requirements of the Act. The attack upon this class is clearly one which would tend in the minds of uneducated readers amongst whom the pamphlets were distributed, to bring His Majesty's subjects into hatred and contempt. A.I.R. 1936 Mad. 835=1936 M.W.N. 614=44 L.W. 381=I.L.R. (1937) Mad. 14=71 M.L.J. 357=38 Cr.L.J. 5=165 Ind. Cas. 860.

——S. 4 (1) (d)—Intention, question of, if arises in case under—Police, if a class or section of His Majesty's subjects—Attack in newspaper on Police as a whole—Whether brings Government into hatred and contempt.

In cases under the Press (Emergency Powers) Act, no question of intention arises. What has to be seen is whether the words complained of directly or indirectly tend to do what is set out in cls. (*d*), (*h*) and (*i*) of S. 4 (1), Press Act as amended by S. 77, Special Powers Ordinance.

Per *Addison* and *Monroe, JJ.*—The Police form a well-defined group of His Majesty's subjects ; they comprise a very large body of men ; they form a separable portion of the population of the country ; they consist of a number of persons possessing common attributes and are grouped together under the name " Police ". They thus form both a " section " as well as a " class " of His Majesty's subjects in British India. The Police form part of the Government established by law in British India as such as do the Magistrate, Judges and Secretaries. When the Police as a whole are attacked and not individual officers, the words also tend directly or indirectly to bring into hatred or contempt the Government established by law in British India.

Per *Agha Haidar, J.*—A certain amount of latitude must be allowed to the writers in the public press and it must be remembered that journalists are not necessarily constitutional writers or Parliamentary draftsmen and, therefore, are not expected to confirm to a high standard of scientific thought and precision of expression.

There is no reason why the words " class or section " is S. 4 (1) (*d*) should be construed to mean a fraction of the members of a particular department of the British Government in India. A.I.R. 1934 Lah. 219=35 Punj. L.R. 40=35 Cr.L.J. 966=149 Ind. Cas. 370 (S.B.).

2. Essentials and scope.

——S. 4 (1) (d) and (f)—Applicability—Newspaper article suggesting revolution to achieve purpose and asking readers to eliminate existing bad or evil influence in country—Propaganda in favour of Communist party—Offence.

In deciding whether a newspaper article offends against the Press (Emergency Powers) Act, 1931, the Court must look at the article as a whole and it would be wrong to submit it to a microscopic scrutiny. Unless it can be said of the article of publication that it tended or attempted to tend directly or indirectly to bring into hatred or contempt the Government established by law, the article or publication cannot fall under S. 4 (1) (*d*) of the Act. Nor can it be held to fall under S. 4 (1) (*f*) when it does not tend to incite any person to interfere with the administration of the law or with the maintenance of law and order.

It is open to a writer to suggest that the ordinary evolutionary method is either too slow or not adequate to achieve a particular purpose and that purpose can only be achieved by a revolution. But by advocating revolution, it does not necessarily follow that he is advocating the type of revolution which would come within the mischief of S. 4 (1) (*f*). It is neither wrong nor contrary to law for any editor or propagandist to draw the attention of his readers to the existence of a bad or evil influence in this country and to ask the readers to eliminate that influence. Whether the writer is right or wrong is another matter, but in advocating a particular cause and by using strong language in support of that cause the writer does not necessarily come within the mischief of the Press (Emergency Powers) Act.

It is essential that in a democracy the masses should be politically educated and they are entitled to know the pros and cons of every political system and every political ideology. So long as it is legal for a political party to place its views and its principles before the people, it would be improper for the Court to interfere with that right not only of the party but also of the people of the country where the article is nothing more than a very strong piece of propaganda in favour of the Communist party—and the Communist party has not been declared an unlawful association in this country—the article cannot be held to offend either Cl. (*d*) or Cl. (*f*) of S. 4 (1) of the Act.

Under the new Constituion of India the liberty of the press having been safeguarded, the press is entirely free to propagate any views, provided those views are not prohibited or are not likely to lead to any breach of the peace. There is nothing in law to prevent the Communists from carrying on propaganda with regard to their own philosophy and to extol its own ideology as against the Socialist or Congress ideologies. 4 A.I. Cr.D. 247=52 Bom.L.R. 275=A.I.R. 1950 Bom. 210=51 Cr.L.J. 829 (S.B.).

——S. 4 (1) (d)—Applicability—Article to be read as whole.

For the purpose of deciding whether an article falls within the mischief of S. 4 (1) (*d*) of the Press (Emergency Powers) Act, the article has to be read as a whole in a free, fair and liberal spirit, without unduly stressing a strong word here or there. Pak.L.R. (1950) Lah. 629=A.I.R. 1950 Lah. 243 (S.B.).

——Ss. 4 (1) (d) and 3 (3)—Incitement to violence—If essential ingredient of offence.

Incitement to violence is not an essential ingredient of the offence contemplated by S. 4 (1) (*d*) of the Press (Emergency Powers) Act, and therefore incitement to violence is not necessary before action can be taken under S. 3 (3) of the Act. 50 Cr.L.J. 756=A.I.R. 1949 E.P. 289=51 P.L.R. 82 (S.B.).

——S. 4 (1) (d)—Statements bringing a class of subjects into hatred or contempt—Truth of such statements—If relevant—Crown not controverting statements of fact in offending articles by affidavit—Effect of.

It is of course not necessary in order to bring a statement within the mischief of S. 4 (1) (*d*), Press Act, as bringing a class of subjects into hatred or contempt, that such statements should be untrue in fact. At the same time, the dissemination of correct information being one of the functions of the public press and equally of political propagandists, where a statement of the relevant kind is found to be true, its effect must be measured on an entirely different basis from that of a statement which is untrue.

Under R. 10 of the Rules framed by the Lahore High Court under the Press Act, the Crown is entitled to controvert statements of fact in the articles complained of by means of affidavit, and where there is no such affidavit by the Crown, the facts stated in the newspaper's report must be accepted as correct. Pak.L.R. (1949) Lah. 545=51 Cri.L.J. 98=A.I.R. 1949 Lah. 218 (S.B.).

——S. 4 (1) (d)—Scope of. *See* PRESS (EMERGENCY POWERS) ACT, SS. 18 AND 4 (1) (*d*). (1949) 2 M.L.J. 300=A.I.R. 1950 Mad. 27.

——(as amended by the Criminal Law Amendment Act, 1932), Ss. 4 (1) (d), 7 (3) and 23—Scope and applicability—Applicability of S. 4 (1) (d)—Test—Violent criticism of party in power by rival party—Attack on actions of police force—No allegation of Government's approval of such acts—Action under S. 7 (3) if justified—Truth or falsity of impugned matter—Relevancy—Failure to take action against other newspapers for similar articles—If a good plea in defence.

Before it can be held that the words of the impugned matter have the tendency set out in clause (*d*) of S. 4 (1) of the Indian Press (Emergency Powers) Act it must be clear to the Court that this tendency must be felt by the ordinary man in the street. It would not be sufficient that a member of a particular party on reading the matter in question will entertain feelings of enmity or hatred against the Government to bring the words within the mischief of the enactment. It will be really a dangerous doctrine to hold that any adverse opinion of the action of a particular party, then in power, by an organ or member of an opposite party should by itself be held to fall within the enactment. But if the language used is so violent and exciting as to lead to violence, insurrection or disturbance, it may fall within other provisions under which appropriate action might be taken against the authors of such writing. Where the utmost that could be said against an article is that it described the action of the Government as being definitely against a rival party and that it was inspired by capitalistic tendencies, such criticism of the action of the Government, even if the disapprobation is expressed in strong language, would not fall within S. 4 (1) (*d*) of the Act. For the purpose of S. 4 (1) (*d*), the cabinet of Ministers belonging to the particular party in power and administering the Government of the Province is Government established by law in British India.

The truth or falsity of the impugned matter is immaterial for a determination of the question arising under S. 23 of the Act.

The fact that the Government failed to take action against other newspapers which published matter similar to the impugned one cannot be a good plea in defence to action taken by the Government if the impugned matter is such that it would fall within any of the clauses of S. 4.

Where in an article criticising the acts of the police, there is nothing to suggest that the alleged high-handed and atrocious acts were committed under the orders of the

Government or with their approval express or tacit, action under S. 7 (3) would not be justified. I.L.R. (1949) Mad. 149=61 L.W. 306=1948 M.W.N. 362=49 Cr.L.J. 390=A.I.R. 1948 Mad. 326=(1948) 2 M.L.J. 165 (F.B.).

——S. 4 (1) (d) and (b)—Publication of news—Action if may be taken.

Per *Bhandari, J.*—The Press (Emergency Powers) Act was not enacted with the object of suppressing or stifling news, but with the object of preventing news and comments being published in a sensational form, and so long, therfore, as the report of news is fair, unbiassed and founded upon facts, no action can be taken under the Act. It follows as a corollary that action can be taken when the report is not fair and accurate or when there is an expression of opinion which has an undesirable tendency or an unfair colouring of report whether by emphasis or omission.

In the eye of law the headlines of a publication are considered to be a part and parcel of the publication and can render a publisher liable to punishment even though the publication itself (*minus* the headline) may be perfectly harmless, if the headlines are not founded upon facts. I.L.R. (1947) Lah. 795=49 P.L.R. 190=48 Cr.L.J. 915=A.I.R. 1947 Lah. 340 (S.B.).

——S. 4 (1) (d)—Newspaper article—Intention of writer—Relevancy.

Per *Teja Singh, J.*—It is of course true that the intention of the writer is not a deciding factor for the determination of the question whether or not a writing has a particular tendency referred to in S. 4 (1) (*d*) of the Press (Emergency Powers) Act, but it is not altogether irrelevant, particularly so when the plea is that the words used do nothing more than bring out the intention that was uppermost in the writer's mind. 48 Cr.L.J. 897=A.I.R. 1947 Lah. 361 (S.B.).

——S. 4 (1) (d)—Section 4 (1) (d) deals with offence of sedition as described in S. 124-A, Penal Code—Public disorder or reasonable anticipation or likelihood thereof is the gist of offence.

Section 4 (1) (*d*), Press (Emergency Powers) Act, is substantially in the same terms as S. 124-A, Penal Code, and deals with the offence of sedition as described in S. 124-A, Penal Code. Sedition has been described as disloyalty in action and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance or to lead to civil war, to bring into hatred or contempt the Sovereign or Government, the laws or the constitution of the realm and generally all endeavours to promote public disorder. Public disorder or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency. A.I.R. 1946 Lah. 22=47 Pun.L.R. 3=223 Ind. Cas. 120=47 Cr.L.J. 345 (S.B.).

——S. 4 (d) (1)—Actual violence need not have occurred. The words in the notices given, *held*, did tend to bring Government into such hatred and contempt as is covered by the definition of sedition. A.I.R. 1944 Nag. 178=1944 N.L.J. 195=45 Cr.L.J. 657=I.L.R. (1944) Nag. 680=213 Ind. Cas. 397 (S.B.).

3. Government established by law.

——S. 4 (1) (d)—Government established by law—Ministry, if constitutes.

Ministry as a whole constitutes Government as established by law, and any matter which tends to bring the Ministry into hatred or contempt comes, therefore, within the mischief of S. 4 (1) (*d*) of the Press (Emergency Powers) Act. 1945 P.C. 156; 1948 Nag. 1 and 35 P.L.R. 40, foll. 50 Cr.L.J. 756=A.I.R. 1949 E.P. 289=51 P.L.R. 82 (S.B.).

——S. 4 (1) (d)—"Government established by law in British India"—Handful of officers.

A handful of officers cannot be regarded as "Government established by law in British India" within the meaning of the expression appearing in S. 4 (1) (*d*) of the Press (Emergency Powers) Act. 49 P.L.R. 235=48 Cr.L.J. 931=A.I.R. 1946 Lah. 6 (S.B.).

——S. 4 (1) (d)—"Government established by law in British India"—If synonymous with British imperialism.

Per *Teja Singh* and *Sharif, JJ.*—"Government established by law in British India" referred to in S. 4 (1) (*d*) of the Press (Emergency Powers) Act has nothing to do with British imperialism which represents the cult of a particular class of politicians whose object is to maintain and safeguard the British Empire. An article confined to the criticism of the policy of the British imperialism does not therefore bring into hatred and contempt "Government established by law in British India" within S. 4 (1) (*h*). 48 Cr.L.J. 897=A.I.R. 1947 Lah. 361 (S.B.).

4. Hatred and Contempt.

——S. 4 (1) (d)—Article exciting hatred and contempt of Government—Truth of allegations or intention of writer—If relevant.

Though the object of the writer of an article may be merely to obtain the alteration of the measures criticised by lawful means, the matter may neverthelss come within the mischief of S. 4 (1) (*d*) of the Press Act if the criticism excites or attempts to excite hatred, contempt or disaffection towards the Government. The intention of the writer as also the truth of the allegations is immaterial. 56 B. 472, applied; 39 M. 1085, not foll.

It is not an essential ingredient of the offence that the words or acts complained of must either incite to disorder or must be such as they satisfy reasonable man that that is their tendency or intention. A.I.R. 1950 Cal. 444=54 C.W.N. 334 (S.B.).

——S. 4 (1) (d) and (h)—Feelings of—"Enmity", "hatred" and "contempt"—Meaning of.

Per *Cornelius, J.*—Any form of mere dislike is not enmity; the feeling must be one of hostility, antagonism and ill-will. *Similarly*, hatred is much stronger than mere opposition; it means aversion carried to the point at which there is a desire to injure or destroy the object of the emotion, and contempt means more than regarding the object as inferior; it involves an opinion that the object is of a vile, despicable or worthless character. To arouse feelings of this kind by a writing, it is necessary to write provocatively, employing the arts of emphasis, exaggeration, and misrepresentation so as to exclude all possibility of the action criticised being excused on any such innocent ground as mistake or misconception. The language commonly employed is immoderate, touching, if it does not exceed the boundary between fair criticism and abuse, and the appeal is rarely to the intellect by the processes of ratiocination, but almost always to ignorance and prejudice. Incitement to such violence of thought may of course be prefaced by a learned discourse on morals or theology, accompanied by reasoned analysis, but unless the incitement is perceptible in the writing, there can be no conclusion to that effect merely because the argument results in showing that in some respect, the activity under discussion is ill-advised or misguided.

Per *Mohd. Sharif, J.*—"Hatred" means abhorrence or ill-will and "contempt" means scorn or disdain, and these feelings over a particular matter should animate the large majority and not the insignificant minority, before they could be said to produce the repugnant

effects, to guard against which S. 4 (1) (*d*) and (*h*), Press (Emergency Powers) Act were enacted. Pak.L.R. (1949) Lah. 643=A.I.R. 1950 Lah. 21=51 Cr.L.J. 316 (F.B.).

——S. 4 (1) (d)—Manifesto of party proclaiming the grave consequences of partition of India—If brings into contempt State created thereby.

Where a manifesto published by a party proclaims to the public that the grave consequences of the partition of India into 'Bharat' and 'Pakistan' have been the massacre of fifteen lacs of Muslims, the uprooting of eighty-five lacs of persons, the detention of seventy thousand Muslim women in the hands of the non-Muslims and the loss of twenty-one Muslim States, any person reading the manifesto with an open mind would inevitably be driven to the conclusion that none of these calamities would have befallen the Mussalmans, if the country had not been divided. To put it in other words, there is a direct and a serious attack upon the concept which created Pakistan. The very idea of establishing a separate Muslim homeland is held up to ridicule. The manifesto, therefore, tends to bring into contempt the State itself and not merely some of the persons, who may be running the State and whose shortcomings may have been responsible for producing some unfavourable conditions in the country in respect of health and material welfare. The publication, therefore, is clearly covered by S. 4 (1) (*d*), Press (Emergency Powers) Act. Pak.L.R. (1950) Lah. 314=A.I.R. 1950 Lah. 138=51 Cr.L.J. 1180 (F.B.).

——S. 4 (1) (d)—Article accusing Government of wholesale corruption—If excites contempt or hatred against Government.

Where an article accuses Government of wholesale corruption from top to bottom and contains the extremely mischievous suggestion that Government had deliberately avoided rehabilitating refugees so that these distressed people had begun to harbour feelings of hatred against the class of Government servants in general and the day was not far off when the oppression to which they were subjected, would be avenged, the article has certainly the tendency of exciting contempt, hatred or disaffection against the Government established by law in this country and is not covered by any of the exceptions to S. 4 of the Press (Emergency Powers) Act. Pak.L.R. (1950) Lah. 629=A.I.R. 1950 Lah. 243 (S.B.).

——S. 4 (1) (d)—Criticism of Government—Latitude to Press—Limits.

Ideas of what constitute sedition have changed with the passage of time and a good deal of latitude should be allowed to the press so that healthy public opinion is fostered by frank and even forceful criticism of the Government in power, in this age of democracy and liberty. But liberty to criticise must not be confused with license to hold up the Government established by law, to hatred or contempt. Pak.L.R. (1950) Lah. 629=A.I.R. 1950 Lah. 243 (S.B.).

——S. 4 (1) (d)—Political pamphlets—Words employed in—Value to be attached.

In assessing the value to be attached to words employed in political pamphlets, and their effect upon the mind of the average reader, it is necessary to bear in mind this quality of the average reader, namely, that he is now so well accustomed to political claptrap that the words employed do not produce upon his mind the effect which their dictionary meaning might suggest. To suggest to the reader that it is right to save his motherland from "encroachment by foreign imperialists and exploitation by Jagirdars and capitalists" without in any way inviting him to act violently or illegally, does not have the effect ofbringing either the Government or the Jagirdars and capitalists into hatred or contempt within S. 4 (1) (*d*) of the Press (Emergency Powers) Act. Pak.L.R. 1949 Lah. 545=51 Cr.L.J. 98=A.I.R. 1949 Lah. 218 (S.B.).

——S. 4 (1) (d)—Hatred or contempt—What constitutes—Criticism of Public Safety Act as "lawless law".

To criticise an Act (*e.g.*) Public Safety Act, as "lawless law" does not bring the Government into contempt. Mere dislike or disapproval is not sufficient to constitute hatred or contempt. Contempt is the act of despising or viewing something as mean, vile or worthless. Hatred is a sustained feeling of bitter aversion, generally combined with a desire to injure, destroy or get rid of its object. There are strong feelings and strong words are required in order to arouse them. Pak.L.R. (1949) Lah. 629=A.I.R. 1949 Lah. 259=51 Cr.L.J. 24 (S.B.).

——S. 4 (1) (d)—Tendency to excite feelings of hatred—Accusations which are stock-in-trade of average politician.

Per *Teja Singh, J.*—Words which are very frequently met with in speeches delivered from public platforms and in writings in the public press and accusations which have become a stock-in-trade of an average politician cannot for that reason alone have the tendency to excite feelings of hatred against the Government. 48 Cr.L.J. 897=A.I.R. 1947 Lah. 361 (S.B.).

——S. 4 (1) (d) and (h)—Applicability.

Held, after considering the article in question and the criticism therein that there was nothing in it which might be taken to bring into hatred or contempt, His Majesty or the Government established by law in British India or to excite feelings of hatred between two classes of His Majesty's subjects. It was an honest criticism offered with a view to persuade the Government to take some drastic action in Waziristan in order to stop kidnapping and raids. It could not be said for a moment that in doing so, the author of the article had any malice or was trying to bring the Government into disrepute. The article did not, therefore, fall under S. 4 (1), (*d*) or cl. (*h*) of the Press (Emergency Powers) Act. A.I.R. 1939 Pesh. 6=180 Ind. Cas. 252.

5. Miscellaneous.

——S. 4 (1) (d)—Scope of—Criticism of Government—Limits—Newspaper article stigmatising Pakistan Government as "enemy of Islam" and as "irreligious"—If tends to excite disaffection against it.

There is nothing in law to prevent a person from attacking the Government for its short-comings in one or other respects with a view to remove them or correct them. It is also not prohibited to call upon the people to elect their representatives from one or the other political party which promises greater chances of religious or economic advancement. The State, however, is sacred, transcending all political parties and the Government as a whole could not be brought into hatred or contempt without fear of disastrous consequences to all and sundry living in the State. Where the newspaper articles in question call Pakistan Government as "enemy of Islam" and stigmatise it as "irreligious" and fostering a spirit of "indifference to God and the Prophet" they tend to excite disaffection against the Government and come within the mischief of S. 4 (1) (*d*) of the Press Act. Pak. L.R. (1950) Lah. 406=51 Cr.L.J. 1049=A.I.R. 1950 Lah. 183 (S.B.).

——S. 4 (1) (d)—Intention of writer—If relevant.

All that S. 4 (1) (*d*), Press (Emergency Powers) Act requires is that the impugned writing should have a tendency to excite contempt or hatred, and the alleged intention of the writer, inconsistent with the plain language employed by him, would be absolutely irrelevant. Even if he had acted from the best of motives, but the language employed brought the writing within the ambit of S. 4 (1) (*d*) of the Act, he could not be heard to say that his object was mere reform. After all the

intention of a person can be best judged from the intrinsic evidence of his writing. Pak.L.R. (1950) Lah. 629= A.I.R. 1950 Lah. 243 (S.B.).

——S. 4 (1) (d)—Newspaper article, if hit by Act—Surrounding circumstances—If may be considered.

Per *Teja Singh, J.*—In Judging whether a particular article offends against the law of sedition or is hit by the Press Act, the Court must take into consideration the surrounding circumstances. What was seditious fifty years ago, is not so now, and the reason for this is that the country has advanced politically. 48 Cr.L.J. 897=A. I.R. 1947 Lah. 361 (S.B.).

——S. 4 (1) (d)—Newspaper article, if hit by Act—Canons of interpretation.

Per *Teja Singh, J.*—It is a well-known cannot of interpretation that in order to find out whether a particular article appearing in a paper or a journal is hit by a penal enactment like the Indian Press (Emergency Powers) Act of 1931, because it produces or tends to produce a certain effect, the article must be read as a whole and in a free and liberal spirit. It is not fair to pick out a few words or even sentences. The standard to be applied is that of an average reader belonging to the class of people for whom the newspaper or the journal is intended or among whom it has circulation and not that of a critic. 48 Cr.L.J. 897=A.I.R. 1947 Lah. 361 (S.B.).

——S. 4 (1) (d)—Writing whether seditious within S. 4 (j) (d)—Test—Leaflet headed as "Independence Day Pledge" held did not tend to excite disaffection towards Government and did not fall within S. 4 (1) (d).

In order to determine whether a writing is seditious within the meaning of S. 4 (1) (*d*) the Court should in every case consider the writing as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there, which may be qualified by the context but endeavouring to gather the general effect which the whole composition would have on the minds of the public.

A leaflet which was headed "Independence day Pledge," in its preamble described the existing conditions of the country, it then proceeded to suggest remedies for bettering these conditions and concluded with an appeal to young men to take the pledge with the purpose of uniting them. In the introductory portion, it stated that the Bengal famine was the result of the political deadlock that existed in the country and of national disunity and had resulted in five million deaths in Bengal. The leaflet then went on to say: "The alien imperialists, clinging desperately to the policy of deadlock, keep them (the political leaders) behind the bars as their only chance to prevent our march to freedom and power." In the portion of the leaflet in which an appeal was made to young men to take the vow appeared the words: "In the name of the five million murdered in Bengal." Objection was taken that these words tended to excite disaffection towards Government established by law in British India as they involved the suggestion that five million people had been murdered in Bengal by the monster famine born out of the deadlock created by the policy of the Government who were intentionally sticking to this policy in order to prevent the march of freedom:

Held that, (1) expressions such as "the alien imperialists, clinging desperately to the policy of deadlock keep them (the political leaders) behind the bars as their only chance to prevent our march to freedom and power" were the usual stock-in-trade of political demagogues and had no tendency to excite disaffection against the Government. There was no sting left in them and they were of every day use and might be styled as political exaggerations;

(2) the criticism that certain policy of the Government was so unfortunate that it had created a political deadlock which had led to famine conditions resulting in a large number of deaths of people by hunger, could not be construed as meaning that the Government that pursued that policy was guilty of murder of the people who died owing to famine conditions in the country. Therefore the words "in the name of the five million murdered in Bengal" though they involved strong criticism of the Government's policy of deadlock could not be regarded as exciting disaffection towards the Government:

(3) the leaflet read as a whole did not come within the mischief of S. 4 (1) (*d*). A.I.R. 1946 Lah. 22= 47 Punj.L.R. 3=223 Ind. Cas. 120=47 Cr.L.J. 345 (S.B.).

——S. 4 (1), (d), (f)—Poster containing matter coming under cls. (d) and (f)—Common-sense interpretation should be put.

In dealing with a document like a poster under S. 4 (1), cls. (*d*) and (*f*), it is worse than useless to try and extract a meaning out of it by a laboured commentary. It is not a writing intended to be read and re-read at leisure, dotting the i's and crossing the t's till it yields up its secret meaning, nor even a work of art like high-class painting to be studied and pondered over to find its true interpretation, but it is at best a mere caricature or cartoon which, from the nature of things, must wear its heart on the sleeves as it were. The "common-sense interpretation" of such a document must be the impression it gives to a man of ordinary common-sense. A.I.R. 1937 Cal. 691=41 C.W.N. 1217=39 Cr.L.J. 190=I.L.R. (1938) 1 Cal. 455=172 Ind. Cas. 906.

——S. 4 (1) (d)—Asking people to remove the domination of Government—Whether an offence—Distinction between comment upon measures by Government and exhortation to turn out the Government—Emergency Powers Ordinance (2 of 1932).

There is a good deal of distinction between a comment upon the measures of Government and asking that steps be taken to have them changed and an exhortation to people to turn out the Government which has promulgated those measures. The one is innocent, and the other is an offence.

Where an article says that our first duty should be to make every effort to free the country from the dominion of non-Muslims and excites the Indian Musalmans to take steps to turn out the non-Muslim Government, calling upon the people to remove the domination of a Government amounts to calling upon them to turn out the Government itself and the article comes within S. 4, sub-S. (1) (*d*). A.I.R. 1934 Pat. 320=15 P.L.T. 286= 149 Ind. Cas. 838 (S.B.).

——Ss. 4 (1) (e), 25, 26—Under Act, High Court and Provincial Government is primarily concerned with whether words complained of have prohibited tendency and are of prohibited nature.

Under the Press (Emergency Powers) Act, what the High Court, and indeed what the Provincial Government is primarily concerned with is whether the words complained of have or have not the prohibited tendency and are of the prohibited nature. The Act does not require that it shall be proved that this is so. The expression, "whenever it appears to the Provincial Government" in Ss. 3 (3), 4 (1) and 7 (3) has or is intended to have the same use and purpose. The essential condition of action under the Act is that the words complained of must have the prohibited tendency and be of the prohibited nature. It is the printing or publishing of the prohibited words which is the offence and the words must speak for themselves. A.I.R. 1942 Sind 65= 43 Cr.L.J. 838=I.L.R. (1942) Kar. 127=202 Ind. Cas. 405 (S.B.).

——S. 4 (1) (e)—Duty of Judges in construing words.

In interpreting the meaning or the tendency of the

nature of the words, the Judges should use their knowledge and experience of the habits and customs and thoughts of those upon whose acts they are called to sit in judgment. Indeed S. 114, Evidence Act, permits Judge to use his knowledge of human conduct and affairs. The general context in which the words are used can also be looked into.

Per *Davis, C.J.*—In dealing with notices issued by Government under Ss. 3 (3) and 7 (3), in respect of an offence alleged to fall within S. 4 (1) (*e*), the High Court is not much concerned with the promptness or lack of promptness with which Government took action. What it is principally concerned with is the nature of the words used. Nor is the question of the expediency of the action of Government a matter for it to consider. A.I.R. 1942 Sind 65=I.L.R. (1942) Kar. 127=43 Cr.L.J. 838=202 Ind. Cas. 405 (S.B.).

——S. 4 (1) (e)—Offence under S. 4 (1) (e), when constituted.

For an offence under S. 4 (1) (*e*), it is sufficient if one of the purposes of an article published in a news-paper falls within this purview. It is sufficient if the words have the tendency referred to in S. 4 (1) (*e*) and if they are of the nature described in that section. A.I.R. 1942 Sind 65=I.L.R. (1942) Kar. 127=43 Cr.L.J. 838=202 Ind. Cas. 405 (S.B.).

——S. 4 (1) (e)—"Tend directly or indirectly," meaning of—Scope—Fact that person put in fear or annoyance has another remedy by way of civil or criminal action does not exclude application of S. 4 (1) (e).

The words "tend directly or indirectly" in S. 4 (1) (*e*), mean something more than 'have as a possible result'. There must be something more than mere possibility. The effect which words will produce upon the person to whom they refer may vary widely according to the nature and temperament of that person. Not every newspaper attack, defamatory though it may be, is made with the intention of obtaining payment of money from the victim, nor every such attack can be said to have the "tendency" to induce payment of money. Section 4 (1) (*e*) relates to private individuals and can be applied to protect private individuals. The words in S. 4 (1) (*e*) are wide enough to cover what is commonly known as blackmail, and the fact that the person put in fear or annoyance may have another remedy by way of civil or criminal action by a suit for defamation or a prosecution for extortion does not exclude the application of cl. (*e*) of S. 4 (1) in appropriate cases. A.I.R. 1942 Sind 65=I.L.R. (1942) Kar. 127=43 Cr.L.J. 838=202 Ind. Cas. 405 (S.B.).

——S. 4 (1) (f)—Applicability—Article or advertisement in newspaper inviting public to send official secrets to editor and offering payment for same—Offence—Official Secrets Act, S. 5 (1). *See* OFFICIAL SECRETS ACT S. 5 (1). 48 Bom.L.R. 151=A.I.R. 1946 Bom. 322 (S.B.).

——S. 4 (1) (f)—Article in newspaper inviting public to send in official secrets to editor comes within S. 4 (1) (f).

The expression 'official secret' is ordinarily understood in the sense in which it is used in the Official Secrets Act and has reference to secrets of one or the other department of the Government or the State and not to any secret of a private office or institution. Hence an article in a newspaper inviting the public to send in official secrets to the editor comes under S. 5 (1), Official Secrets Act, and therefore falls under S. 4 (1) (*f*), Press (Emergency Powers) Act, as it is an invitation encouraging or inciting any person to commit an offence. Where the publisher of a news magazine is ordered by the Government to deposit a sum as security under S. 7 (3), Press (Emergency Powers) Act, in respect of such article and the publisher applies to the High Court for setting aside such order the burden is on the applicant to prove that the tendency is otherwise than what is alleged to be and the Court is not concerned with the intention or the motive underlying the article but only with the direct or indirect tendency of the words used in the article itself. A.I.R. 1946 Bom. 322=48 Bom.L.R. 151=I.L.R. (1946) Bom. 454=225 Ind. Cas. 565=47 Cr.L.J. 744 (S.B.).

——S. 4 (1) (f)—Existence of Union Jack in poster—Whether can have reference to Government of British India.

Union Jack is not the emblem of the Government established by law in British India but the national flag of the British Empire, in which are combined in union Crosses of St. George, St. Andrew and St. Patrick. Where, therefore, a poster contains a pictorial representation describing the exploitation of labour by capital, having a Union Jack on the sleeve of the exploiter, it cannot be inferred, merely from the Union Jack that it has a reference to the Government established by law in British India.

And where such pictorial representation also contains slogans such as "unity and struggle", "the rich become richer" and "the poor become proper" they cannot come under the mischief of S. 4 (1), cl. (*d*) or (*f*) of the Act. A.I.R. 1937 Cal. 691=41 C.W.N. 1217=39 Cr.L.J. 190=I.L.R. (1938) Cal. 435=172 Ind. Cas. 906.

——S. 4 (1) (h) and Expl. (4)—Scope—Question whether writing in a newspaper contained words of the nature described in S. 4 (1) (h)—Tests for determining—Denouncing "brahmanism"—If falls under section—Be efit of doubt—Right to.

For deciding whether a newspaper which has been ordered to deposit a security did or did not contain any words of the nature described in S. 4 (1) (*h*) of the Press (Emergency Powers) Act, 1931, the Court should consider the writing as a whole in a fair, free and liberal spirit without attaching undue weight to isolated passages, sentences or phrases. The Court should gather the general effect which the whole composition is likely to produce upon persons who may be normally expected to read the newspaper in question. Flamboyant and exaggerated language and violence of expression ought to be certainly taken into account, but they can never be conclusive in determining whether the writing as a whole falls within the ambit of the enactment.

On an application to set aside an order deirecting security to be deposited by a newspaper the Court is not concerned with the tenability of the opinions expressed by the writer of the offending article. In all controversial matters, there is bound to be two opposing opinions and it is not the province of the Court to examine the soundness or otherwise of the reasons which the writer may give in support of a particular view. The question—and the only question—is to find out if there is anything in the article, which tends directly or indirectly to promote feelings of enmity and hatred between differen classes.

Where the writer is denouncing the system of "brahmanism" which he said should be destroyed, it cannot be said that the writing will fall under S. 4 (1) (*h*) of the Act.

Where a writer sets out to ventilate the grievances of a class or community there is *ex necessitæ* a likelihood of criticising adversely the action of the class or community which is alleged to be taking an unfair advantage. In all such cases it would be wrong to say that a writing which ventilates the grievances of a particular class or community would fall within the mischief of the enactment. When there is nothing in the language to excite hatred (or contempt of persons, Expl. (4) to S. 4 (1) (*h*) would cover the case.

As the security provisions of the Press Act are in a

sense penal, the benefit of the doubt, if there is any, should always be given to the person against whom action is taken.

(The order of Government directing deposit of security by the petitioner was set aside). I.L.R. (1951) Mad. 8=1950 M.W.N. 861=63 L.W. 633=A.I.R. 1950 Mad. 742=(1950) 2 M.L.J. 189 (F.B.).

——**S. 4 (1) (h)—Publication of news relating to communal riots—If actionable.**

Per *Muhammad Munir, J.*—The mere publication of news relating to a Hindu-Muslim riot in temperate and inoffensive language by a newspaper in the ordinary course of its business when the authenticity or the good faith of the report is not challenged and when there is nothing else to show any intention to promote class hatred thereby, is not actionable under S. 4 (1) (*h*) of the Press (Emergency Powers) Act. The reference to the communal disturbances need not be in the nature of mere information, as it is as important a part of the duty of a newspaper editor to comment on matters of public interest as to publish such matters as news. If the publication of the new is not within the clause, the mere fact that an incident is used as an argument in a journalistic comment, the comment itself not having the object or tendency to produce class hatred, cannot bring it within the clause.

Per *Achhru Ram, J.*, contra.—At times the mere publication of the news about a certain incident may be calculated to inflame communal passions throughout the length and the breadth of the country, or the province, and to led to most disastrous results. The very truth of the incident may have the effect of further aggravating the situation. I.L.R. (1947) Lah. 497=A.I.R. 1948 Lah. 161=49 Cr.L.J. 480 (F.B.).

——**S. 4 (1) (h)—"Different classes"—Meaning of—Political parties—Whether included.**

Per Full Bench (*Achhru Ram, J.*, dissenting) :—The words "different classes" in S. 4 (1) (*h*) of the Press (Emergency Powers) Act refer to religious, racial, tribal and possibly economic or functional, but not to political classes like the Congress, the Hindu Maha Sabha or the Indian National Congress. If the feelings of hatred are engendered or tend to be engendered by the publication in a religious, racial or social class as such, the publication would be hit by the clause but not where such feelings are engendered or tend to be engendered not in any such class as a whole but among the admirers or followers of a particular person, to whatever religious, racial or social class they might belong. And this position does not change either because the political leader who is criticised is accused the communalism in his policies or of partiality towards his own community or because his following consists of a preponderant proportion of the members of his own community. Any criticism of a person who is not a founder or leader of a religious community does not affect the members of a "class" and however deplorable and in bad taste the publication may be it does not come within the clause.

Apart from this, the enmity or hatred must be at least between two classes. Merely hurting the feelings or susceptibilities of a class is plainly insufficient unless such feelings are hurt by another class or by some one acting on behalf of another class or unless the community whose feelings are hurt might hold the other community responsible for the offence. If the publication may in certain circumstances be held to be a representative act of the community, the case may possibly fall within clause (*h*) but in the absence of any such evidence the case is clearly outside the terms of this clause, though clause (*d*) might apply when the class or section itself, as distinguished from its leader, is brought into hatred or contempt.

Per *Achhru Ram, J.*—Where in any given case the question arises whether two political parties can be regarded as two different classes of His Majesty's subjects within the meaning of S. 153-A, I.P. Code, or S. 4 (1) of the Press (Emergency Powers) Act, it has to be decided not on any *a priori* grounds, but like all other cases in which a similar question arises, on a consideration of the numerical importance of each party and the common attributes or characteristics binding its members together ; and if, on such considration, they are found to fulfil the tests mentioned above, *i.e.*, possess sufficient importance numerically and are bound together by common and *exclusive* attributes, there can be no reason not to hold them to be such classes.

The question whether the words used in a particular case, whether spoken or written, tend directly or indirectly to create feelings of hatred or enmity between two classes of His Majesty's subjects, or only tend to create feelings of bitterness and resentment in the minds of the members of one such class against the person responsible for uttering or writing those words individually, should be decided, in each case, having regard to the nature and the implications of the words used, the person who has used them, the occasion for the use, the state of feelings between the two classes at the material time and the manner of the publication of those words. I.L.R. (1947) Lah. 497=A.I.R. 1948 Lah. 161=49 Cr.L.J. 480 (F.B.).

——**S. 4 (h)—Mere publication of news relating to riot by newspaper in temperate and inoffensive language.**

What is intended to be penalized by cl. (*h*), S. 4, is language which in itself has a tendency to promote class-hatred and thus reveals (*prima facie*) an intention to promote class-hatred, Clause (*h*) was never intended to and does not cover the mere publishing of news relating to a Hindu-Muslim riot by a newspaper in the ordinary course of its business when the authenticity or the good faith of the report is not challenged and when there is nothing else to show any intention to promote class-hatred thereby. A.I.R. 1939 Lah. 81=41 P.L.R. 137=40 Cr.L.J. 497=180 Ind. Cas. 835 (F.B.).

——**Ss. 4 (1) (h), 7 (3)—Articles, held did not tend to promote feelings of enmity or hatred between different classes of His Majesty's subjects and order under S. 7 (3) could not be made.**

During riots between Indians and Burmans, a newspaper published two articles. The articles gave the facts and pointed out that those facts were already common knowledge, they were merely news reported generally in the press. One of the articles first mentioned the original clash between the procession of monks and laymen and the Police and said that this had developed into a communal affray. It then went on to state that there was no intention to apportion the blame for this affray as between the Burmans and the Indians. It also pointed out that the paper had previously published extracts from the pamphlet which had so grievously affronted the Buddhists and had called on the Government to proscribe it, but no action had been taken. It went on to state that the first clash was between monks and Indian and European Police, and that at a meeting of Indian and Burmese leaders, the Indian leaders gave an assurance that the Indians would not attack the Burmans ; but, in spite of this assurance, Indians had attacked two monks and grievously injured one of them ; another monk had been cut with a *dah* by Indians, a school boy had also been cut by Indians ; Indians had done damage on the Sule Pagoda and had sacked Burmese silk shops ; that Burmans in outlying parts of the city, on receiving information of these events, had risen in anger, armed themselves, killed Indians, set fire to mosques and sacked Indian shops. The article pointed out that it was only natural that Burmans in the suburbs of the city and in the districts should resent these acts of Indians in Rangoon, and concluded by expressing the hope that the natives

of Burma would live amicably and unitedly with all foreigners who had come to the country for the purpose of trade. The second articles pointed out that the locality round about certain street was notorious during the riots, that the Government knew that this locality was inhabited by Indian bad characters who lived by act of violence, and that although the state of the city had improved, these Indians were conspiring to engage persons to commit acts of incendiarism in the Burmese quarters of the city. It called upon the Government to expel these bad characters from Burma asserting that only then would Indians and Burmans be able to live in peace with one another. It stated that if the Government failed to take any action against these persons and there was a recrudescence of the rioting, the Government would be responsible. An order was made against the printer and publisher of the paper under S. 7 (3) read with S. 4 (1), Press (Emergency Powers) Act :

Held, that as regards the first article, the recitals in it were merely news, and as news, the facts were stated with restraint and not in violent or provocative language, and no attempt was made to gloss over the misdeed of one side in favour of the other. The article did not display such undue partisanship as to be objectionable on that ground. The article did not tend to promote feelings of enmity or hatred between different classes of His Majesty's subjects, and therefore, did not come within the scope of cl. (*h*) of S. 4 (1). As regards second article, Indian bad characters were not a "class of His Majesty's subjects" as contemplated by cl. (*h*) of S. 4 (1), and the article was directed against them only. That consideration alone was fatal to the order of Government but even if the article fell within the scope of cl. (*h*), it came within Expln. 4, and therefore, could not form the basis of an order under S. 7 (3). A.I.R. 1938 Rang. 417=178 Ind. Cas. 438 (S.B.).

——S. 4 (1) (h)—Words published without malicious intention and with honest purpose.

The Explanation to S. 4 (1) (*h*), as amended, expressly provides that certain words published without malicious intention and with a certain definite and honest purpose are not to be regarded as words tending to promote feelings of enmity between different classes though they might actually tend to promote such feelings. Words pointing out matters which are producing or have a tendency to produce feelings of enmity or hatred between classes must often, if not invariably, tend either directly or indirectly to promote such feelings, yet if such words are published without malicious intention and with an honest view to the removal of such matters, they are not within the amended S. 4 (1) (*h*) by reason of the provisions of Expl. 4 to that section :

Held, that the document could not be held to mean anything more than what it actually said and neither the language used nor the mode of publication suggested that the writer had any other motive or purpose in writing and publishing it than to point out to the *kisans* their present unfortunate position with a view to obtain support for his proposal for the amelioration of their lot and that the writer had no malicious intent. A.I.R. 1935 All. 369=1935 A.L.J. 321=1935 A.W.R. 127=36 Cr. L.J. 1019=156 Ind. Cas. 908.

——S. 4 (1) (j)—Scope of—Criticism of policy or administrative act of officer—Whether comes within S. 4 (1) (j), Expl. 5—Proof of malicious intention, if necessary.

Per *Young, C.J.*—When there is an attempt to excite hatred and contempt against an administration, malicious intention need not be proved as normally the attempt is moved out of malice.

Per *Addison, J.*—Criticism of the policy or administrative acts of a particular officer or officers may come within the mischief of S. 4. The question is one of fact whether the words employed, directly or indirectly, tend to bring into hatred or contempt or to create disaffection towards the administration established in any State of India. For Expl. V to apply, it is necessary to prove three things, namely ; (*a*) that the objectionable statements are statements of facts; (*b*) that they were made without malicious intention and (*c*) that the statements were made without attempting to excite hatred, contempt or disaffection. Proof of all three things is necessary before the Explanation comes into play and, if any one of these ingredients is lacking, the Explanation does not apply.

Per *Tek Chand, J.*—In S. 4 (1), Cl. (*j*), the words "administration established" are used in the same sense in reference to an Indian State as the words "Government established by law" are used in regard to British India and have the same meaning as the latter expression. Section 4 does not penalise a speech or publication which brings or attempts or tends to bring into hatred or contempt, the Minister or Ministers, or other official of an Indian State as such as distinguished from the system of administration esblished in that State. And with regard to speeches or publication against such an administration itself, there is the further protection afforded by Expl. 5 of S. 5, which governs Cl. (*j*) alone. Under the Explanation a *bona fide* recital of facts, if made without malice and without an attempt to excite hatred, contempt or disaffection towards the Administrator, is also protected. That is to say, in such a case, it will be necessary for the Court to find that the writer was not acting *bona fide* but that he did the wrongful act wilfully and without just cause or excuse :

Held, Per *Young, C.J.* and *Addison, J.*—(*Tek Chand, J., Contra*).—The passages in question in the book entitled "Report of the Enquiry Committee appointed by the Provincial Hindu Sabha, Lahore, to enquire in the Bahawalpur Affairs" came within the mischief of S. 4 (1) (*j*) of the Act. A.I.R. 1937 Lah. 513=38 Cr. L.J. 898=I.L.R. (1937) Lah. 445=39 P.L.R. 782=170 Ind. Cas. 439. (S.B.).

——S. 7—Stay.

High Court can stay order under S. 7 pending main application under S. 23. A.I.R. 1944 Pesh. 36=46 Cr. L.J. 190=217 Ind. Cas. 136.

——S. 7—Scope of S. 7 indicated—Printer and publisher same person—Maximum security of Rs. 6,000 can be demanded from him under Ss. 3 (3) and 7 (3). A.I.R. 1942 Sind 65=I.L.R. (1942) Kar. 127=43 Cr. L.J. 838=202 Ind. Cas. 405 (S.B.).

——S. 7—The fact that the maximum security of Rs. 3,000 has been demanded from the same person in his capacity as printer and as publisher is a matter for Government and not for the High Court. A.I.R. 1942 Sind 65=I.L.R. (1942) Kar. 127=43 Cr. L.J. 838=202 Ind. Cas. 405 (S.B.).

——Ss. 7, 4—Criminal Law Amendment Act (23 of 1932)—Magistrate not taking security under S. 7 (1)—Local Government, if debarred from taking action under S. 7 (3).

The Magistrate and the Local Government are completely independent of each other with respect to the functions exercised by each under the Press (Emergency Powers) Act. It is for the Magistrate and for him alone to decide what he is to do and it is for the Local Government to decide what it is to do, each acting within the respective powers conferred upon them within the Act. The fact, therefore, that the Magistrate does not require security under S. 7 (1) does not debar the Local Government from taking action under sub-S. (3) if it considers it proper to take action under the powers given to it under that sub-section. The Magistrate may not be aware of the article at the time and the hands of the Local Government cannot be tied by his action if the Local Government takes action under sub-S. (3) of

S. 7. A.I.R. 1937 Lah. 844=I.L.R. (1937) Lah. 438= 39 P.L.R. 842=38 Cr. L.J. 86=172 Ind. Cas. 200. (S.B.).

——Ss. 7, 4 (as amended by Criminal Law Amendment Act 23 of 1932)—Successor-in-office.

It does not matter who the publisher happens to be at the time of the notice if the newspaper contains words coming within the mischief of S. 4. A change of publisher after the newspaper has inserted the offending article makes no difference; and the new publisher can be required by the Local Government to deposit the amount. A.I.R. 1937 Lah. 844=I.L.R. (1937) Lah. 438=39 P.L.R. 842=39 Cr. L.J. 86=172 Ind. Cas. 200 (S.B.).

——S. 7—Appeal.

The refusal of the District Magistrate to refund the security under S. 7 is not appealable. A.I.R. 1934 Pat. 344=15 P.L.T. 291=35 Cr. L.J. 1022=13 Pat. 547=149 Ind. Cas. 841 (F.B.).

——Ss. 7, 4 (1) (d), (e), 23, 30—Emergency Powers Ordinance (II of 1932), S. 3—Notice to furnish security—High Court's power of interference—Application not filed before High Court within prescribed time—Effect of—Magistrate dealing with the Act—Whether Court or executive officer—Government of India Act, 1915 (5 & 6 Geo. V, c. 61), S. 107—Applicability of.

Where the Local Government issues notices to a newspaper, as, in its opinion, a certain article published in the paper came within the purview of S. 4 (1) (*d*) and (*e*) as amended by S. 3 of the Emergency Powers Ordinance, the order of the Local Government is liable to be set aside by the High Court on the ground that the article in question did not come within S. 4 (1) (*d*) and (*e*), if an application is filed within two months of the order. But when no such application is made within the time prescribed, the High Court has no jurisdiction to interfere with the order.

The High Court's power of interference in such matters is furnished by Ss. 23 and 30 of the Act for a limited purpose to decide whether the publication of article does or does not come within the purview of S. 4 (1) of the Act. Section 107, Government of Inida Act has also no application as the District Magistrate, when dealing with the Press (Emergency Powers) Act or similar Acts is not a Court but an executive officer carrying out the functions on behalf of the executive Government and as such, is not subject to the High Court's appellate jurisdiction. A.I.R. 1934 Pat. 344=13 Pat. 547=35 Cr. L.J. 1022=15 P.L.T. 291=149 Ind. Cas. 841 (F.B.).

——S. 7 (3)—Action by Provincial Government—When may be taken—Notice citing whole articles without specifying offensive portions—Validity.

S. 7 (3), Press Act, enables the prescribed action to be taken " whenever it *appears* to the Provincial Government that a newspaper.....contains any words..... of the nature described in S. 4 (1) ". The statute does not require that the words should be of a nature reasonably believed by the Provincial Government to fall within the description in S. 4 (1) of the Act; it is sufficient that those words should, at the time when the action in question is taken, *appear* to the Provincial Government to possess that character.

A notice issued under S. 7 (3) of the Act is not, therefore, vitiated in the eye of law by reason of citation therein of whole articles, when only small portions of which are specified at the hearing of the petition filed under S. 23 of the Act as being offensive in the relevant sense. It may very well be that at the time when the notice was issued, every word in the articles cited appeared to the Provincial Government to be offence in that sense. Pak. L.R. (1949) Lah. 629=A.I.R. 1949 Lah. 259=51 Cr. L.J. 24 (S.B.).

——(as amended by the Criminal Law Amendment Act, 1932), S. 7 (3)—Action under—If justified when attack is made on actions of the police force without any allegation of Government's approval of such acts. *See* PRESS (EMERGENCY POWERS) ACT (XXIII OF 1931) (AS AMENDED BY THE CRIMINAL LAW AMENDMENT ACT, 1932). (1948) 2 M.L.J. 165=A.I.R. 1948 Mad. 326 (S.B.).

——S. 7 (3)—Order for deposit made under S. 4 (1) (bb)—If ceases to be valid after deletion of Cl. (bb).

When Government has once ordered security to be deposited under the law then in force, that deposit is held generally for good conduct not only in the matter of the particular class of case which occasioned the order, but generally as security against offending under any of of the clauses of S. 4, Press (Emergency Powers) Act. Sub-S. (3) of S. 7 of the Act refers generally to 'words, signs or visible representations" described in sub-S. (1) of S. 4; it refers to sub-S. (1) of S. 4 and not to any particular Clause of that section. Therefore an order for depositing security made under Cl. (*bb*) of S. 4 (1) of the Press Act which was added by the Defence of India Act cannot be deemed to expire with the expiry of the Defence of India Act and the deletion of Cl. (*bb*) from S. 4 (1) of the Press Act. I.L.R. (1947) Kar. 54=230 Ind. Cas. 454=A.I.R. 1947 Sind 81 (S.B.).

——Ss. 7 (3), 4 (as amended by Criminal Law Amendment Act XXIII of 1932)—Notice under S. 7 (3)—Words, signs, etc., coming under S. 4 (1) (d), if should be described—Affixing of translation of whole article.

Where a translation of the whole article is annexed to the notice under S. 7 (3), as amended by the Criminal Law Amendment Act, this is sufficient compliance with the requirements of the law in this respect. It need not describe the words, signs or visible representation coming within the mischief of S. 4 (1) (*d*). A.I.R. 1937 Lah. 844=I.L.R. (1937) Lah. 438=39 P.L.R. 842=39 Cr. L.J. 86=172 Ind. Cas. 200 (S.B.).

——S. 7 (3)—Order for furnishing security under S. 7 (3)—Interpretation of words used—Attack on Police Officers, whether falls within S. 4 (1).

Where a newspaper contained a statement that the local Police Inspector and some other Police Officers arrested certain *satyagrahis* at the Congress office and used *lathis* on them as a result of which some of the *satyagrahis* became unconscious, and contained an enumeration of the several injuries inflicted by the Police Officers but there was no suggestion that the misconduct of these Police Officers was approved by the administration or was part of a deliberate policy of repression and there was no comment of any sort in fact, and the publisher of the newspaper was directed by the Local Government to deposit security under S. 7 (3) of the Indian Press (Emergency Powers) Act, 1931:

Held, that the words were not such as to bring, directly or indirectly, the Government of India or the administration of justice into hatred or contempt or to excite disaffection towards His Majesty or to promote feelings of hatred or enmity between different classes of His Majesty's subjects and the order of the Local Government directing furnishing of security was illegal. A.I.R. 1932 Cal. 649=36 C.W.N. 962=138 Ind. Cas. 849 (S.B.).

——S. 8—Publisher ceasing to publish at the time of service of notice—Forfeiture of deposit—If can be ordered.

S. 8 (1) of the Press Act requires the Provincial Government to serve notice of its intention to forfeit the deposit not on the publisher of the paper at the time when the notice is served, but on the person who was the publisher at the time the offending article was written. A publisher cannot, therefore, avoid the forfeiture of his deposit

by ceasing to publish after the offending article was written and before notice of the intention to forfeit the deposit was served on him. A.I.R. 1950 Cal. 444=54 C.W.N. 334 (S.B.).

——**S. 8**—A person who has printed and published the article is responsible for the effect of that article in both capacities. A.I.R. 1944 Nag. 178=1944 N.L.J. 195=45 Cr. L.J. 657=I.L.R. (1944) Nag. 680=213 Ind. Cas. 397 (S.B.).

——**S. 8**—The proper standpoint from which the article should be viewed in determining its tendency is how it is understood by an averege man who reads it as a whole and dispassionately. 1935 M.W.N. 6 (F.B.).

——S. 12—Keeper severing connection with press—Another depositing security—Forfeiture of press.

It was not the intention of the Legislature to enact that if a keeper who has notice served on him completely severed his connection with the press and sold his interests to a third party that the third party having deposited security and been accepted as keeper, should be penalized by having the press confiscated because the original owner refused to deposit the security demanded. A.I.R. 1935 Lah. 338=37 P.L.R. 107=36 Cr.L.J.971=156 Ind. Cas. 674 (S.B.).

——S. 17—Search without search warrant—Legality—Order forfeiting press in absence of person having custody of press.

Where the Police Officer, for the purpose of seizing the press under S. 17, is not armed with a search-warrant, as contemplated in S. 17, the search and the seizure of the press are illegal and the Magistrate cannot make the order forfeiting the press under S. 17 (3) of the Act.

An order declaring a press to be forfeited when not passed in the presence of the person who had the custody and control of the press, should be set aside. A.I.R. 1933 Cal. 792=37 C.W.N. 821=60 C. 1103=35 Cr.L.J. 84=146 Ind. Cas. 464.

——Ss. 18 and 4 (1) (d)—Prosecution under S. 18—Facts to be proved—Intention or motive in publishing the offending matter—Relevancy—Scope of S. 4 (1) (d).

In prosecutions under S. 18 of the Press (Emergency Powers) Act, the prosecution need only prove that document other than a newspaper has been intentionally made and published and that it contains either published news or eomments on published news or any matter described in sub-S. (4) of the Act without obtaining the necessary permission of the Magistrate under S. 15 of the Act. Sub-S. (1) (*d*) of S. 4 does not mention anything about the intention or motive in publishing such words but simply says that the document in question should contain words, signs, etc., which tend directly or indirectly to bring into hatred or contempt the Government established by law. In other words, it is the effect of the contents of the documents, the *objective aspect* that is covered by S. 4 (1) (*d*) and not the intention or motive or the *subjective aspect*, or the *mens rea* in uttering or publishing those words which would be material for a prosecution for sedition under S. 124-A, I. P. Code.

A pamphlet of four pages without any cover whether a "book" or not will fall within the definition of a "news-sheet" and where taken as a whole and without tearing any statements made therein out of their context, tends directly or indirectly to bring the Government into hatred or contempt, whatever be the intention or the motive of the author in publishing it, it will fall within the scope of S. 4 (1) (*d*). 1949 M..W.N. 834=A.I.R. 1950 Mad. 27=51 Cr. L.J. 241=62 L.W. 588=(1949) 2 M.L.J. 300.

——S. 18—'Maker', meaning of—Offence—What is—Persons liable.

The words 'maker' in S. 18, Press (Emergency Powers) Act means the author and not the printer. Therefore, printing a news-sheet is not an unlawful act; what is unlawful is to publish it without authority.

Under S. 18, the author, the sellers, the distributors and publishers are all equally liable. 1937 M.W.N. 1067.

——S. 18—"News-sheets" meaning—Photos of persons killed in Chittagong Armoury Raid whether news-sheets.

In the course of a search of the accused's house, some photographs representing persons killed in the course of the Chittagong Armoury Raid were found. Below the photographs were given their names and ages and the place where they met their deaths; in the case of one of them, there was also a statement that he committed suicide to escape arrest. Both the Courts below, found as a fact that the photographs were kept for distribution. The accused were convicted under S. 18 of the Indian Press Emergency Powers Act, 1931, for keeping for distribution unauthorised news-sheets:

Held, that the photographs were documents containing public news and therefore, news-sheets within the meaning of S. 2, sub-S. (6) and the convictions were not illegal.

Information is public news if it concerns a matter of public and topical interest as contrasted with purely historical interest. A.I.R. 1933 Cal. 458=60 Cal. 1089=34 Cr. L.J. 619=37 C.W.N. 990=143 Ind. Cas. 621.

——**S. 18**—Any Magistrate may try the offence under the Act. 1933 M.W.N. 911.

——S. 18 (1)—Conviction under on report of an illegal search and seizure—Legality.

A Magistrate can pass an order of conviction under S. 18 (1) of the Press Emergency Powers Act on the report of a search and seizure though the search might be illegal as made without a warrant and though forfeiture could not be ordered on such a report. 4 A.I. Cr. D. 520=A.I.R. 1940 Ajmer 15 (1)=51 Cr. L.J. 499.

——**S. 18 (1)**—Prosecution launched before Constitution of India came into force—If becomes illegal on ground of S. 18 (1) being void under Art. 13 (1) of the Constitution. *See* CONSTITUTION OF INDIA, ART. 13 (1). 52 Bom. L.R. 540=A.I.R. 1951 Bom. 188 (F.B.)

——S. 18 (1)—Pamphlet discussing Bengal famine which had become matter of history is not a news sheet.

For matter published or commented on to fall within the definition of news sheet, there must be an element of novelty about it. If, therefore, the pamphlet did, in fact, contain nothing but a discussion of food problems and the necessity for suppressing hoarding enforced by reference to the Bengal famine, which, at the date of the publication of the pamphlet, was not a very recent event and had become matter of history, it might well be said that the pamphlet was not a news-sheet within the meaning of the Act. A.I.R. 1945 Mad. 317=I.L.R. (1946) Mad. 70=(1945) 1 M.L.J. 314=1945 M.W.N. 205=58 L.W. 183=47 Cr. L.J. 88=221 Ind. Cas. 140.

——S. 18 (1)—Printer of news-sheet, whether its maker.

In the case of a newspaper, the printer cannot be described as the maker within the meaning of S. 18 (1). A newspaper is made by the combined efforts of several persons, including the author of the article, report, or other subject-matter of the newspaper, the editor and sub-editors who arrange the subject-matter for publication, and finally the printer who prints the newspaper. A news-sheet is, no doubt, a simpler type of publication, but in that case also, it is impossible to say that the printer is the maker. That would eliminate the author, who more than any other single person, can be described as the maker. A.I.R. 1942 Bom. 328=44 Bom. L.R. 799=44 Cr. L.J. 4=I.L.R. (1942) Bom. 844=203 Ind. Cas. 456 (D.B.).

——S. 18 (1)—Power of arrest—Exercise of.

Though an offence under S. 18 (1) is cognizable and therefore, the authorities are entitled to arrest, it is elementary that such powers ought to be exercised with discretion and arrests ought not to be made without necessity ; where what at most is only a technical offence, summons would be amply sufficient. A.I.R. 1942 Lah. 203=44 P.L.R. 26=43 Cr. L.J. 756=I.L.R. (1942) Lah. 553=201 Ind. Cas. 631.

——S. 18 (1)—Persons distributing unauthorised news-sheet—No connection with persons responsible for preparation and printing of news-sheet—Punishment.

Persons who merely help in distributing unauthorised news-sheet in public meetings should not be punished as severely as those who actually help in the preparation of the news-sheet, when no connection between them from before is shown.

Per *Henderson, J.*—Such persons should not be tried together. And where there has been such a misjoinder by their joint trial, but the accused do not desire the harassment of a new trial, the Court would not be justified in ordering a new trial. A.I.R. 1938 Cal. 222=I.L.R. (1937) 2 Cal. 670=39 Cr. L.J. 446=174 Ind. Cas. 393.

——S. 18 (1)—(Amendment by Act XXIII of 1932)—Requirements of.

What has to be decided on a charge under S. 18 (1) under Press (Emergency Powers) Act is the effect on the minds of the persons who are supposed to have read the pamphlet. The pamphlet must be considered as a whole and not by merely picking out the objectionable sentences or words here and there. Circumstances inlcuding time and place should also be taken into account in determining the effect. 1937 M.W.N. 175.

——S. 18 (1)—Construction of leaflet—If should be regarded as a whole—Intention of writer—Inference from language.

A leaflet which is the subject-matter of a charge under S. 18 (1) must be regarded as a whole, as it would be grossly unfair to take one sentence out of its context.

The intention of the writer may properly be inferred from the language of the document which he has written. The language used may be so scathing, inflammatory and exaggerated as to make it clear that the writer intended more than what he actually wrote. A document may, on the face of it, have an entirely innocent meaning, yet the style of writing or the mode of expression adopted and the language used may well indicate that the writer's real intention was something far from innocent, peaceful or lawful. A..I.R. 1935 All. 369=1935 A.L.J. 321=36 Cr. L.J. 1019=1935 A.W.R. 127=156 Ind. Cas. 908.

——S. 18 (1)—Pamphlet referring to labourers as against rich class—Pamphlet calling on labourers to meet at a place in large numbers—Likelihood of breach of peace.

Held, that the offence was punishable under S. 18 (1) of Press (Emergency Powers) Act read with Ss. 15 and 16 of the Criminal Law Amendment Act, 1932. A.I.R. 1934 All. 717=35 Cr. L.J. 1000=3 A.W.R. 831=149 Ind. Cas. 710.

——S. 18 (1)—Criminal Law Amendment Act (14 of 1908), S. 17 (1)—Painting 'Boycott British Goods' on roadway—Nature of offence—'Document' 'news-sheet' definitions of—Molestation, gist of —'Assist', meaning of.

Though painting the words "Boycott British Goods" on the roadway does amount to making a document, it does not amount to making an unauthorized news-sheet as defined in S. 2 (6) and a person who so paints the words cannot be held to be guilty of an offence under S. 18 (1) of the Press (Emergency Powers) Act. He may, however, be convicted under S. 17 (1) of the the Criminal Law Amendment Act if there is evidence to show that he was thereby assisting the operations of an unlawful association.

The word "assists" in S. 17 (1), must be construed in a reasonable way and means 'intentionally assists'. That section is obviously not designed to punish persons who acting quite innocently, happen, by accident, to do something which furthers the operation of an unlawful association. A.I.R. 1933 Mad. 123=63 M.L.J. 906=34 Cr. L.J. 90=1932 M.W.N. 1357=140 Ind. Cas. 767.

——S. 19—By reason of S. 19, the Government has the power of forfeiture irrespective of action being taken against the press. A.I.R. 1942 Mad. 690=44 Cr. L.J. 88=(1942) 2 M.L.J. 509=55 L.W. 844 (2)=I.L.R. (1942) Mad. 9=1943 M.W.N. 809=203 Ind. Cas. 498 (S.B.).

——S. 19—Objectionable passages, if should be set out.

Per *Addision* and *Tek Chand, JJ.*—All that S. 19 requires the Local Government to do is to state "the grounds of its opinion", and this is sufficiently complied with by mentioning the particular clause of sub-S. (1) of S. (4) which, in the opinion of the Local Government has been contravened. A.I.R. 1937 Lah. 513=38 Cr. L.J. 898=39 P.L.R. 782=I.L.R. (1937) Lah. 445=170 Ind. Cas. 439 (S.B.).

——S. 23. *See also* PRESS (EMERGENCY POWERS) ACT, S. 4.

——S. 23—Portion only of offending writing falling within S. 4—Action taken by Government—If must be upheld.

Even if a portion of the offending writing falls within the ambit of S. 4 of the Press (Emergency Powers) Act, action taken by the Government must be upheld. The Court cannot sit in judgment over the propriety of the action of Government even if some parts of the writing, which were considered offensive by them do not actually fall within the mischief of the Act, provided that other parts of the same writing clearly come within its purview. Pak. L.R. 1950 Lah. 629=A.I.R. 1950 Lah. 243 (S.B.).

——S. 23—Single objectionable sentence in article—Petition, if to be rejected.

According to S. 23 of the Press (Emergency Powers) Act all that the High Court has to decide is whether the article in question did or did not contain any words, etc., of the nature described in S. 4 (1), and if it is found that it contains a single objectionable sentence the petition must be rejected. 49 P.L.R. 235=48 Cr. L.J. 931=A.I.R. 1948 Lah. 6 (S.B.).

——(as amended by the Criminal Law Amendment Act, 1932), S. 23—Truth or falsity of impugned matter—Relevancy for determination of question arising under S. 23. *See* PRESS (EMERGENCY POWERS) ACT (23 OF 1931, AS AMENDED BY THE CRIMINAL LAW AMENDMENT ACT, 1932). (1948) 2 M.L.J. 165=A.I.R. 1948 Mad. 326 (S.B.).

——Ss. 23, 3 (3)—Application under S. 23—Power of High Court—Nature of inquiry—Intention of printer immaterial—Words complained of, whether must have brought about violence.

In proceedings on an application under S. 23, the High Court's powers are of a limited character, and the High Court is called upon only to determine whether the words in the publication did or did not tend directly or indirectly to bring into hatred or contempt the Government or any section of the people or to promote feelings of enmity between the subjects. The intention of the printer is foreign to such inquiry. The words complained of need not necessarily have brought about violence. They might well be a prelude to a public disorder. A.I.R. 1945 Oudh 245=1945 O.W.N. (C.C.) 25=

1945 A.W.R. (C.C.) 26=20 Luck. 235=46 Cr. L.J. 658=220 Ind. Cas. 118 (F.B.).

——**S. 23**—High Court can stay order under S. 7 pending main application under S. 23. A.I.R. 1944 Pesh. 36.

——**S. 23—"Order"—Period of two months—Computation.**

It is the duty of the Court to interpret a statute according to the ordinary meaning of the words used, unless this would lead to a manifest absurdity. The word "order" in S. 23, must be read as being the notified order because there can be no forfeiture until the declaration has been notified. Hence the two months should be computed, not from the date of passing of the order but from the date when the order is notified in the Local Gazette. A.I.R. 1942 Mad. 690=(1942) 2 M.L.J. 509=44 Cr. L.J. 88=55 L.W. 844 (2)=I.L.R. (1942) Mad. 9=1943 M.W.N. 809=203 Ind. Cas. 498 (S.B.).

——**Ss. 23 and 30, if ultra vires.**

Sections 23 and 30 of the Indian Press (Emergency Powers) Act, are not *ultra vires* merely because they contravene S. 561-A, Cr. P. Code. It does not give a power of superintendence or of revision in respect of matters which have been specially created by the Legislature at a later date. Nor are these sections *ultra vires* because of S. 107 of the Government of India Act of 1909 as amended in 1915, as S. 30. Indian Press (Emergency Powers)Act, does not contravene S. 107, Government of India Act, 1909. But apart from that, the High Court cannot be asked to exercise powers of suprintendence in order to prevent a Magistrate from doing that which the Act under which he is acting gives him power to do. A.I.R. 1941 Nag. 97=I.L.R. (1942) Nag. 107=42 Cr. L.J. 108=1941 N.L.J. 44=191 Ind. Cas. 206.

——**S. 23—Limitation—Application under S. 23, nature of—Period of two months' expiry when High Court closed for civil work—Application on re-opening day is in time.**

The proceedings under section 23, are in the nature of civil proceedings and the applications thereunder are treated as miscellaneous civil applications. Consequently, when the period of two months for applying under S. 23 to set aside an order made under S. 7 expires on a day when the High Court is closed so far as civil work is concerned such application, if made on the day when the High Court re-opens, will be in time. A.I.R. 1939 Pepsu 6=180 Ind. Cas. 252.

——**Ss. 3, 4 (1) (i)—Application to set aside order by Local Government under S. 4 (1) (i)—Matters to be considered—Effect of words and not merely meaning—Motive of writer, if nihil ad rem—Offending passage occurring in a letter in newspaper—Whether makes any difference.**

In considering applications under S. 23, Press Emergency Powers Act, to set aside orders passed under S. 4, (1) (*i*) of the Act, the Court should bear in mind two important public considerations, the undesirability of anything tending to excite sedition or to excite strife between classes and the undesirability of preventing any *bona fide* argument for reform. It is the effect of the words as published in the newspaper, and not merely the meaning of the words taken by themselves, that has to be considered in order to see whether the statement which is complained of is hit by S. 4. The motive or intention of the person against whom the order has been passed is *nihil ad rem* except in cases falling within Expl. IV to S. 4. What has to be considered is the effect likely to be produced upon persons who may be expected to read the passages in question, and for that purpose, not only ought the article to be read as a whole, but under S. 26 of the Act, it is permissible for the Court to have regard to what is contained in other issues of the same publication with a view to ascertaining what would be probable effect of the offending passages upon those persons who normally would see the articles that are published in the newspaper.

The fact that the offending passage occurs in a letter makes no difference for it is a common journalistic practice that a newspaper should set forth its political views and principles under the guise of an open letter published in its columns.

It appeared that no one among the persons likely to read the letter under consideration could fail to gather therefrom that the newspaper was counselling the Indians in Burma to give up their evil practice of attempting to exploit Burma as "the British" had exploited both Burma and India, and that the newspaper was calling upon the Indians in Burma to adopt the same policy as that which the Burmans ought to adopt, namely to refuse to take sides with the common foe, that is, "the British," whose policy it was to suck the blood of Burmans and to block their progress in life :

Held, that the letter tended directly or indirectly to promote feelings of enmity or hatred between different classes of His Majesty's subjects and hence the order passed by the Local Government could not be set aside. A.I.R. 1935 Rang. 120=13 R. 98=36 Cr. L.J. 871=156 Ind. Cas. 135 (S.B.).

——**Ss. 23, 4 (1)—Poem making a hero of a convict sentenced to death—Tendency to incite to or encourage commission of similar offences—Keeper of press directed to deposit security—Discretion of Local Government, if can be interfered with—Jurisdiction of High Court.**

Where a poem describes the feelings and recites the words of a convict sentenced to death and clearly expresses approval or admiration of a person who is represented to have committed the offence of murder, and the convict to whom the poem relates is termed a hero and the author desires the drum of his fame to reverberate in the whole universe, the poem should be considered to have a tendency to incite to or encourage the commission of similar offences. Such a poem must be held to contain words of the nature described in S. 4, sub-S. (1) and an order by the Local Government calling upon the keeper of the press, wherefrom the poem is published, to deposit security should not be set aside by the High Court.

Under the Press Emergency Powers Act, the High Court is given jurisdiction only to decide whether or not the matter published is of the nature described in S. 4, sub-S. (1). A.I.R. 1933 Nag. 148=29 N.L.R. 244=143 Ind. Cas. 119 (F.B.).

——**S. 23 (1)—Rules under S. 27—Applicability.**

Rules by Sind Chief Court under S. 27 relate also to applications made under S. 23 by printers and publishers.

Rules pertaining to forfeiture are not exhaustive and apply *mutatis mutandis* to order for deposit of security falling within the first part of S. 23 (1). A.I.R. 1942 Sind 65=I.L.R. (1942) Kar. 127=43 Cr. L.J. 838=202 Ind. Cas. 405 (S.B.).

——**S. 23** (1)—Per *Weston and Tyabali, JJ.*, (*Davis, C.J., contra*).—When hearing application under S. 23 (1), it is open to the High Court to consider evidence other than the words themselves or their context immediate or general such as letters from aggrieved persons revealing the prohibited purpose of the articles published in a newspaper within S. 4 (1) (*e*) relied on by the Provincial Government in support to the issue of notices by it under Ss. 3 (3) and 7 (3). A.I.R. 1942 Sind 65=I.L.R. (1942) Kar. 127=43 Cr. L.J. 838=202 Ind. Cas. 405 (S.B.).

——**Ss. 25, 3, 7—S. 25 is not exhaustive—Whether empowers High Court to reduce security demanded**

by Government—Security in excess of that permitted by law—Interference by High Court.

Section 25 is not exhaustive. When the security demanded by the Government under S. 3 (3) or S. 7 (3) is in excess of what is permitted by law, the High Court can interfere under S. 25. But S. 25 does not empower the High Court to reduce the security when the same is within the statutory limits. A.I.R. 1942 Sind 65= I.L.R. (1942) Kar. 127=43 Cr. L.J. 838=202 Ind. Cas. 405 (S.B.).

——Ss. 25 (1) and 3 (3)—Order of Provincial Government—If can be justified on basis of words not specified in notice—Reference to unspecified parts of publication to elucidate intention—Permissibility.

S. 25 (1) read with S. 3 (3) of the Press (Emergency Powers) Act must be interpreted to mean that the Provincial Government's order shall be set aside by the Special Bench if in its opinion " the words, signs or visible representation " in respect of which the order in question was made, do not fall within S. 4 (1) and this interpretation clearly precludes the possibility of the Crown seeking to justify its order on the basis of any " words, signs or visible representations " not in fact specified by its statement or description in the notice conveying its order to the keeper of the press. This is, however, not to say that in contending that the effect of the passages specified in the notice is of a kind described in of one the clauses of S. 4 (1) the Crown is precluded from referring to any part of the " newspaper, book or document " other than the parts specified. To appreciate the injurious effects of the passages cited in the notice, reference may be made to the remainder of the publication in order to elucidate what exactly was the intention and purpose behind the particular passages. Pak. L.R. (1949) Lah. 545=51 Cr. L.J. 98=A.I.R. 1949 Lah. 218 (S.B.).

——S. 26—Applicability and scope of.

S. 26 of the Press (Emergency Powers) Act would apply where the article in question is to be read in its context with a previous or subsequent article, just as different parts of one article or different passages, in one book are to be read along with the impugned article in order to ascertain its meaning. S. 26 is an enabling section permitting the words to be considered in their general context. I.L.R. (1946) Bom. 454=225 Ind. Cas. 565= 47 Cr. L.J. 744=48 Bom. L.R. 151=A.I.R. 1946 Bom. 322 (S.B.).

——S. 26—Applicability—First article complete by itself—Writer writing second one to clear wrong impression likely to be created by first article—S. 26 does not apply.

Section 26 would apply where the article in question is to be read in its context with a previous or a subsequent article just as different parts of one article or different passage in one book are to be read along with the impugned article in order to ascertain its meaning. Section 26 is an enabling section permitting the words to be considered in their general context. Where there is no context between the two articles in the sense that they cannot be properly understood except in reference to each other and the first article purports to be complete by itself and the second article is written only because the writer thought that a wrong impression was likely to be created by the first article, S. 26 does not apply. A.I.R. 1946 Bom. 322=47 Bom. L.R. 151=I.L.R. 1946 Bom. 454=225 Ind. Cas. 565=47 Cr. L.J. 744 (S.B.).

——S. 26—Construction of.

Section 26 is merely an enabling section ; it is not exhaustive. It merely permits the words to be considered in their general context. A.I.R. 1942 Sind 65= I.L.R. (1942) Kar. 127=43 Cr. L.J. 838=202 Ind. Cas. 405 (S.B.).

——S. 27—Method whereby fact is or is not proved is matter of procedure—Rules under S. 27 framed by Sind Chief Court—Applicability—R. 5, setting aside forfeiture order.

The method whereby a fact is or is not proved is a matter of procedure or procedural law. Section 27 itself indicates the manner in which, apart from S. 26, the tendency of the words complained of may be proved. It does not contemplate the examination or cross-examination of witnesses. The procedure contemplated is the procedure of revision applications or references to the High Court. But even in revision applications, the Court may look at statements of fact testified to in affidavits as is clear from Chap. 15, R. 9, Rules of the Sind Chief Court.

The rules framed by the Sind Chief Court under S. 27 and which are to be found in Chap. 16 of the Chief Court Rules do not, of necessity, relate to the notices issued by the Provincial Government. They relate to the applications made under S. 23 of the Act by the printers or publishers.

The rules framed under S. 27 relating or pertaining to order of forfeiture are not exhaustive and apply *mutatis mutandis* to orders for deposit of security falling within the first part of S. 23 (1).

The applicant is entitled under R. 5 to support by statement of facts in affidavits the grounds on which he relies for the order of forfeiture to be set aside.

The rules framed under a statute cannot govern or control the words of the statute. A.I.R. 1942 Sind 65= I.L.R. (1942) Kar. 127=43 Cr. L.J. 838=202 Ind. Cas. 405 (S.B.).

——S. 30—Powers of High Court in respect of orders passed and action taken under the Act—S. 561-A, Cr. P. Code, if applies.

The powers of the High Court in respect of orders passed and action taken under the provisions of Indian Press (Emergency Powers) Act are of a very limited character. Where a proceeding which is questioned purports to be taken under S. 7 (1), under S. 30 the jurisdiction of the High Court is expressly barred unless the application can be brought within S. 23. Section 561-A, Cr. P. Code, has no application to a matter of this knid. A.I.R. 1941 Nag. 97=42 Cr. L.J. 108=1941 N.L.J. 44=I.L.R. (1942) Nag. 107=191 Ind. Cas. 206.

——S. 30—If ultra vires.

Sections 23 and 30 are not *ultra vires* merely because they contravene S. 561-A, Cr. P. Code. Nor are they *ultra vires* because of S. 107, Government of India Act, 1909, as amended in 1915. A.I.R. 1941 Nag. 97= 43 Cr. L.J. 108=1941 N.L.J. 44=I.L.R. (1942) Nag. 107=191 Ind. Cas. 206.

——S. 30—Where a proceeding, which is questioned, purports to be taken under S. 7 (1), under S. 30 the jurisdiction of the High Court is expressly barred unless the application can be brought within S. 23. Section 561-A, Cr. P. Code, does not apply to such matter. A.I.R. 1941 Nag. 97=43 Cr. L.J. 108=1941 N.L.J. 44=I.L.R. (1942) Nag. 107=191 Ind. Cas. 206.

——S. 32—Order for security—Petition to set aside security order—Onus of proof—Interpretation of article—Guiding principles—Sedition, what is.

An order for security cannot be held bad merely because it did not state the particular clause in sub-s. (1) of S. 4 of the Act of 1931, as amended against which the article in question was found to have offended.

Per *C.C. Ghose, J.*—Where an application is made under S. 23 of the Press Emergency Powers Act of 1932, to set aside an order to deposit security under the Act, the onus is on the petitioners who have to prove a negative

but there is no reason to hold that a canon of construction, different from what is ordinarily applicable to matters which form the subject of prosecutions under S. 124-A, Penal Code, must be applied. The article complained of must, as a matter of law, be read as a whole on a fair, free and liberal spirit and should not be viewed with an eye of narrow and fastidious criticism.

In the case of an article in a newspaper, so long as criticism or expression of opinion of any sort is allowed, it is not right that isolated expressions should be subjected to scrutiny under the microscope as it were and a sinister meaning ferreted out and drastic action taken under the Emergency Powers Ordinance, 1932.

What was considered seditious under S. 124-A, Penal Code, in 1897 may not necessarily be held to be so in 1932; one cannot shut one's eyes to changes in political conceptions due to the march of events and to the declared objectives of the Government of the day. A.I.R. 1932 Cal. 738=56 C.L.J. 157=33 Cr. L.J. 919=37 C.W.N. 166=140 Ind. Cas. 304 (F.B.).

PRESS ORDINANCE (2 OF 1930) S. 4—Forfeiture of security—Grounds—Expressing pride at editor's arrest — Blaming Government for making free journalism impossible—Printing photographs of satyagraha prisoners—Publishing reports of speeches advocating social boycott of voters—Construction of seditious articles—Principles—Forfeiture—Power of Court to interfere.

Where a newspaper from which security has been demanded under the Ordinance II of 1930 drew the attention of its subscribers to the improvements that had been effected in it and expressed pride in the sufferings of its editor in the cause of the nation and exhorted its readers to continue in future, the strong support it had enjoyed :

Held, that the object of the paper was to advertise itself and to secure the patronage of its readers, the sentence relating to the arrest of the editor should not be divorced from its context, and the paragraph read as a whole cannot reasonably be held to be obnoxious to Cl. (*e*) of sub-S. (1) of S. 4 of the Ordinance.

The Court should, in every case, consider the book or newspaper article as a whole, and in a fair, free and liberal spirit, not dwelling too much upon isolated passages, or upon a strong word here or there which may be qualified by the context, but endeavouring to gather the general effect which the whole composition would have on the minds of the public.

Security cannot be demanded from a printer or a publisher who had made his declaration prior to the date of the commencement of the Ordinance, unless the newspaper has been used, subsequent to that date, for the purpose of publishing an objectionable matter. A requisition for security proceeding on a writing published before that date would be wholly illegal.

If a man is smarting under a grievance, he cannot be expected to discuss a subject in as clean a manner as if he were discussing matter in which he felt no interest.

The mere printing of the photograph of a *satyagraha* volunteer imprisoned for an offence under the Ordinance with a description to identify it unaccompanied by any objectionable remarks is not a ground for forfeiting security.

The law does not excuse the publication in a newspaper of writings which are in themselves seditious, merely because they were received from a correspondent whose name was disclosed at the time of the publication. nor is the fact that no action was taken against other newspapers in which the same report was published a valid excuse for publishing a report of a seditious nature.

Publishing a report of a speech which advocate social boycott of persons taking part in election to legiss lative bodies comes within the orbit of S. 4 (1) (*d*) of the Ordinance.

Even a single sentence, if obnoxious to S. 4, sub-S. (1), would entail forfeiture of the security, and it is not open to the Court to apportion punishment or to reduce the penalty on any other ground. A.I.R. 1931 Lah. 283=12 Lah. 345=32 Cr. L.J. 997=32 P.L.R. 676=132 Ind. Cas. 889 (S.B.).

PRESUMPTION. See (1) EVIDENCE ACT, Ss. 101 TO 104 AND 114.
(2) GRANT—LOST GRANT.
(3) HINDU LAW—JOINT FAMILY.
(4) MADRAS ESTATES LAND ACT S. 3.

PRESUMPTIONS — Official Acts — Official notification — Infringement of—Presumption of publication in the manner prescribed—Same person giving direction for publication and actually signing it—No need for further evidence to prove the correctness of official act.

Where in a case the prosecution has not let in evidence to prove that the order infringed has been published in the manner in which the officer who passed the order had directed it to be published,

Held, that because the person who is said to have directed the notification to be published and the person who signed the notification which was actually published in the official Gazette happened to be the same person, the Court was justified without any further evidence in acting on the presumption that it was directed to be published in the manner in which it was published. 226 Ind. Cas. 423=47 Cr.L.J. 948=1946 M.W.N. 474 (1)=A.I.R. 1946 Mad. 449=(1946) 1 M.L.J. 397.

PREVENTION OF CORRUPTION ACT (II OF 1947)—Sanction to prosecute Railway Station-master for accepting illegal gratification — Full facts not placed before sanctioning authority—No valid sanction and no jurisdiction to take cognizance of case.

Sanction to prosecute a station-master under S. 161, I. P. Code, is a matter of importance which constitutes a condition precedent to the institution of the prosecution and the Government have absolute discretion to grant or withhold the sanction.

Where the sanction in a case against the station-master for having accepted illegal gratification on its face did not contain the facts constituting the offence charged nor was there any evidence given that those facts were placed before the sanctioning authority.

Held: That under Act II of 1947 there was no valid sanction and the lower Court had no jurisdiction to take cognizance of the offence. 62 L.W. 398=1949 M.W.N. 450=A.I.R. 1949 Mad. 710=3 A.I.Cr.D. 658=51 Cr.L.J. 156=(1949) 1 M.L.J. 600.

——S. 3—Applicability to Bombay City—Arrest by Sub-Inspector of Police followed by investigation and charge-sheet by him—Trial by Presidency Magistrate — Legality — Bombay Cr. P. Code Amendment Act (30 of 1946), S. 3—Cr. P. Code, Ss. 156 (2), 190 (1) (a) and (b).

Prevention of Corruption Act (2 of 1947) passed by the Central Legislature cannot be held

applicable to the City of Bombay or to any of the Presidency Towns. So far as the City of Bombay is concerned Bombay Act 30 of 1946, amending the Cr. P. Code would be the only law applicable in respect of the arrest, detention and trial of offenders under S. 161, I. P. Code. There can therefore be no question of any repugnancy between the provisions of S. 3 of the India Act 2 of 1947 and those of S. 3 of the Bombay Act 30 of 1946. The matter would be different if the India Act of 1947 were to apply to the city of Bombay. Since however, that Act does not apply to the City of Bombay, a Sub-Inspector of Police is competent to investigate a case of bribery and arrest the offender, and it would be no irregularity. The case would clearly fall under S. 190 (1) (b), Cr. P. Code, and it cannot be held that the arrest of the petitioner, the investigation following and resulting in the charge-sheet and the trial by a Presidency Magistrate on such charge are all illegal or without jurisdiction. Assuming that the India Act applies to the City of Bombay, S. 156 (2), Cr. P. Code would cure the defect or irregularity in the arrest or investigation, if any. In any case, the charge-sheet submitted by the Sub-Inspector can be regarded as a complaint within the meaning of S. 190 (1) (a), Cr. P. Code, and taken cognizance of by the Magistrate. I.L.R. (1948) Bom. 66= A.I.R. 1948 Bom. 163=49 Cr.L.J. 196=49 Bom.L.R. 821.

——S. 3, Proviso—Failure to comply with proviso to S. 3—Effect.

The failure to comply with the proviso to S. 3 of the Prevention of Corruption Act is an irregularity which falls within the ambit of sub-S. (2) of S. 156, Cr. P. Code and hence the proceedings cannot be called in question on the ground that the case was one which the particular officer was not empowered under the section to investigate. I.L.R. (1950) A. 382=1949 A.L.J. 441=1949 A.W.R. 454.

——S. 4—Presumption under—When arises.

The presumption referred to in S. 4 of the Prevention of Corruption Act arises as soon as the prosecution has proved that the accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself or any other person any gratification or any valuable thing, from any person, provided in the former case it has further proved that such gratification was not accepted or obtained or agreed to be accepted or attempted to be obtained, by way of legal remuneration. I.L.R. (1950) A. 382=1949 A.L.J. 441=1949 A.W.R. 454.

——S. 5 (2) and Penal Code, S. 161—Habitual misconduct—Proof required.

Before a Court could find a person guilty of habitually obtaining and accepting gratification other than legal remuneration as a motive for doing an official act under S. 5 (2) of Act 2 of 1947 it is necessary for the prosecution to establish a settled tendency or practice, on the part of such a person. Payment of bribe by three persons in the same transaction is not sufficient to show a settled tendency or practice. 2 D.R. 276.

——S. 5 (2)—If retrospective — Act of misconduct or omission amounting to misconduct committed before Act—Offence — Charge — Sustainability.

Act 2 of 1947 which came into existence on 11th March, 1947, is not retrospective in effect or operation; and that Act cannot therefore be applied to wrongful acts or omissions committed before that date. The offence of criminal misconduct by a public servant in the discharge of his duty having been created for the first time on 11th March, 1947, where no act of misconduct or omission involving such conduct is committed on and after that date a charge under S. 5 (2) of that Act is unsustainable and must fail. 52 Bom.L.R. 648=A.I.R. 1951 Bom. 233.

——S. 5 (2)—Jurisdiction — Charge under—Power to try.

A charge under S. 5 (2) of the Prevention of Corruption Act, 1947, is exclusively triable by a Court of Session, under S. 29, read with Sch. II, Cr. P. Code. 29 Pat. 935=A.I.R. 1950 Pat. 550.

——S. 5 (2) and (3)—Proof permitted by prosecution—Presumption — Duty of Court—Proof of contrary by accused.

Section 5 (3) of the Prevention of Corruption Act permit the prosecution to prove in a trial for an offence under S. 5 (2) of the Act a fact, which would not be relevant under the Evidence Act—the fact that the accused (or anybody else on his behalf) is in possession of pecuniary resources or property, disproportionate to his known sources of income, and that for such possession the accused person cannot satisfactorily account. To prove this fact the prosecution will have, in practice, to prove what the pecuniary resources in the possession of the accused is, then to prove what is known about his sources of income; and then to prove that the accused person cannot satisfactorily account for this possession. If the Court is satisfied as regards these three things and also finds that the property is disproportionate to the sources of income, the prosecution will have proved the fact, which S. 5 (3) gives it the right to prove. Thereupon it will become the duty of the Court to presume that the accused has committed the offence of criminal misconduct in the discharge of his official duty unless the contrary is proved.

To prove the contrary of these allegations, the accused would have to show at least that these allegations were probably false. The failure of the prosecution to prove affirmatively the truth of these allegations does not justify a finding that that they are probably false.

Where an allegation of receiving money by corrupt and illegal means is made against the accused, it is extremely difficult—if not impossible for him to prove the contrary, except by showing, (a) that he had no opportunity of receiving any such money, or (b) that his financial position shows that he could not have received such money. 51 Cr.L.J. 10=53 C.W.N. 887=A.I.R. 1949 Cal. 641.

——S. 6—Sanction—Facts in regard to.

In the case of a sanction to prosecute under the Prevention of Corruption Act, it is essential for the prosecution to show that the sanction in question related to the acts committed by the accused

in respect of which the prosecution is launched against him. 1950 A.W.R. 205=4 A.I.Cr.D. 295=A.I.R. 1950 A. 377=51 Cr.L.J. 1031=1950 A.L.J. 639.

——S. 6—Sanction — Legality of — Use of abbreviation "Sd" for "sanctioned."

Where the sanction required by S. 6 of the Prevention of Corruption Act has been accorded on the charge-sheet which contained all the material particulars of the case and there is no reason to suppose that the sanctioning authority did not read the charge-sheet when he accorded the sanction, the use of the abbreviation "Sd" for "sanctioned" would not vitiate the sanction, though such practice is not desirable. 1950 A.L.J. 764=51 Cr.L.J. 1363=A.I.R. 1950 All. 507.

——S. 6—Validity of sanction — Mention of wrong place among places of occurrence or of longer period of offence—Inclusion of period prior to Act coming into force.

A sanction granted under S. 6 of the Prevention of Corruption Act in respect of an offence under S. 5 (2) of the Act, is not rendered invalid by an unnecessary and incorrect mention of a place among the places of occurrence. Such a sanction cannot be said to have been obtained by misrepresentation when the order itself indicates that the sanctioning authority had before it substantially those very allegations of fact, which form the prosecution case at the trial.

The fact that a longer period of offence is mentioned in the order of sanction and that the charge at the trial was limited to a part of that period only, does not also make the sanction invalid.

A sanction which mentions that an offence under S. 5 (2) of the Act has been committed during a period commencing before the Act came into force, is undoubtedly defective, but this defect does not make the sanction wholly invalid. It is certainly invalid as regards the period prior to the date when the Act came into force but is not for that reason invalid even as regards the period from that date. 53 C.W.N. 887=A.I.R. 1949 Cal. 641=51 Cr.L.J. 10.

——S. 6—Proceedings without sanction — Validity—Cr. P. Code, S. 530 (p).

Under S. 6 of the Prevention of Corruption Act the sanction of some authority is necessary before the Court could take cognizance of the offence. If no such sanction is accorded the proceedings are void under S. 530 (p), Cr. P. Code. A.I.R. 1949 Assam 3=50 Cr.L.J. 540.

——S. 6—Prosecution of public servant under S. 161, I. P. Code—Previous sanction of authority competent to remove him, not obtained—Legality of conviction.

For the prosecution of a public servant in respect of an offence under S. 161, I. P. Code, the previous sanction of the authority competent to remove him is necessary under S. 6 of the Prevention of Corruption Act. In the absence of such sanction, his conviction, is liable to be set aside. 2 D.R. 147.

——S. 7—Scope — Failure of Court to inform accused of his right to give evidence on oath in disproof of charge—Effect.

S. 7 of the Prevention of Corruption Act gives a person accused of an offence punishable under Ss. 161 and 165 of the T. P. Act a right to give evidence on his own behalf. The failure of the Court to inform such an accused of his right to give such evidence is a grave irregularity, the effect of which would depend upon whether, in the opinion of the Appellate Court, it has in fact occasioned a failure of justice. If it has, the trial is bad and the Court will consider whether the circumstances are such that a retrial should be ordered; if the Court is satisfied that there has been no failure of justice the conviction will not, on account of such irregularity, be set aside. I. L.R. (1950) A. 382=1949 A.L.J. 441=1949 A. W.R. 454.

PREVENTION OF CRUELTY TO ANIMALS ACT (11 OF 1890)—Agent of society appointed as Additional Police Officer by Police Commissioner—No duration of appointment — Power of appointment vesting in Local Government but subsequently again delegated to Police Commissioner—Appointment, held did not lapse.

An agent of the society for the prevention of cruelty to animals had been appointed in the year 1934, by the Commissioner of Police to act as an Additional Police Officer for the purposes amongst other sections of S. 3 of the Act. No time for the duration of the appointment was specified. Subsequently, the power of appointing Additional Police Officers became vested in the Local Government and in 1938, the Local Government again delegated the power to the Commissioner of Police:

Held, that the appointment would continue during the life of the agent, or until the appointment was revoked by competent authority and that the appointment had not lapsed. A.I.R. 1942 Bom. 32=43 Bom.L.R. 958=14 R.D. 297=43 Cr.L.J. 341=198 Ind. Cas. 259 (D.B.).

——Applicability.

The prevention of Cruelty to Animals Act does not apply to the District of Saran in Bihar and Orissa. Consequently an accused committing an offence within that area, under the Act is not punishable. 65 Ind. Cas. 439=23 Cr.L.J. 87 (Pat.).

——S. 1 (3) Effect.

The mere extension of the Prevention of Cruelty to animals Act (11 of 1890), where there is no notification under S. 1 (3) of that Act, does not repeal S. 62 of the Bombay District Police Act. 63 Ind. Cas. 824=45 Bom. 203=22 Cr.L.J. 696 =A.I.R. 1921 Bom. 249.

——S. 2 (2)—'Public place'—Goods yard of a railway station.

The goods yard of a railway station is a place accessable to the public although the Company's orders be that men on business alone should be admitted there. (1902) 4 Bom.L.R. 290=26 B. 609.

——S. 3—Determination by Government of maximum weight to be carried by animals—Overloading is question of fact.

The determination by the Local Government of the maximum weight to be carried by pack ponies, and publication of the District Magistrate's orders in the local Gazette to that effect are not necessary requirements for a determination of the case under S. 3 (a), on the merits. It is for the Magistrates to decide whether as a matter of fact there was overloading or not, and decide the cases in

accordance with their finding on that point. A.I.R. 1938 Mad. 949=1938 M.W.N. 912=48 L.W. 382=(1938) 2 M.L.J. 659=40 Cr.L.J. 172=179 Ind. Cas. 159.

——S. 3—Overloading and overdriving — Means of determining.

The words "cruelly and unnecessarily" in S. 3 (a), govern the three verbs that follow, namely, "beats, overdrives and overloads."

There is no practical means of determining what is over-driving or over-loading, except by considering whether under the circumstances the over-loading or over-driving was cruel and unnecessary. A.I.R. 1932 Bom. 427=34 Bom.L.R. 595=56 Bom. 264=36 Cr.L.J. 689=138 Ind. Cas. 703.

——Ss. 3 and 6—Applicability.

Working a lean pony and using bridles with leather disc studded with nails deserves conviction under S. 3 in preference to S. 6. 3 Bur.L.J. 155 =A.I.R. 1924 Rang. 373.

——S. 3—Public place, torture of cows in—Offence.

A torture of cows for getting "piri" dye in a place where the animals' sufferings could be witnessed by persons from the streets falls within S. 3 of the Act. 17 C.W.N. 332=14 Cr.L.J. 132=18 Ind. Cas. 884.

——S. 3 (a)—The question whether the victoria was overloaded within the meaning of S. 3 (a) and caused unnecessary suffering and pain to the horse is merely a question of fact, and the High Court would not interfere in revision on finding of fact. A.I.R. 1942 Bom. 32=43 Bom.L.R. 958=43 Cr.L.J. 341=198 Ind. Cas. 259.

——S. 3, Cl. (a) (c)—Starving a cattle to death—Ill-treatment, if includes starvation.

The mere starving a calf to death is not an offence within the meaning of S. 3, Cl. (c), which applies only where a person offers, exposes or has in his possession **for sale** any live animal. Starvation, however, is in view of the collocation of words in the said section, one kind of ill-treatment, and the words "otherwise ill treats any animal" in S. 3, Cl. (a) includes starvation of animal. (1905) 2 C.L.J. 624=3 Cr.L.J. 116.

——S. 3 (b)—Master and servant — Cruelty to animals—Liability of the master.

There is no indication in the Act to show that a master is penally liable, though the cruelty was practised in the course of his master's employment, if the master was ignorant of the cruelty and especially where this was done contrary to the master's orders. When a Railway Company's servant inflicts cruelty to animals in spite of the Company's instructions to the contrary the Company cannot be prosecuted for the acts of its servants under S. 3 (b) of the Act for Prevention of Cruelty to Animals, 1890. (1902) 4 Bom.L.R. 290=26 B. 609.

——S. 3 (c)—Ram-fight.

To compel or permit two rams to go on fighting after one of them had been hurt is "ill treatment". 1934 M.W.N. 535.

——S. 6—Besides the punishment of the offender under S. 6 (1), animal which is capable of being cured must be sent to infirmary—Confiscation of the animal is not contemplated by the Act. 1939 N.L.J. 356.

——S. 6—Offence by servant—Liability of owner —"Permits," "employs," meanings of — Cr. P. Code, S. 190 (c)—Charge against servant—Power to issue process against master also.

The word "permits" in S. 6 does not involve any conscious act on the part of the person who is held to be liable under the section. The fact that the accused was absent and ignorant of the use of the animal by his servant is, therefore, no defence to a charge under S. 6.

Where an animal is the property of the accused and is employed in the work of the accused, it is nonetheless employed by the accused by reason of the fact that the accused employs a driver to drive the animal.

Where a complaint is made against a bullock-driver, it is open to the Court to take cognizance of the offence against the owner of the animal also under S. 190 (c), Cr. P. Code. A.I.R. 1932 Pat. 65=10 Pat. 847=13 P.L.T. 44=33 Cr.L.J. 232=136 Ind. Cas. 59.

——S. 6—Sentence.

Offences under S. 6 of the Act are punishable with fine only. 3 Bur.L.J. 155=A.I.R. 1924 Rang. 373.

——S. 6—Liability—Act done in spite of reasonable precaution.

If a man takes all reasonable precautions to prevent the doing of an act and such act is done in spite of his precaution, it cannot be said that he has permitted the doing of that act. 9 A.L.J. 262=13 Cr.L.J. 274=14 Ind. Cas. 658.

PREVENTION OF FOOD ADULTERATION.

See LOCAL PREVENTION OF ADULTERATION ACTS.

PREVENTION OF INTIMIDATION ORDINANCE (5 OF 1930)—Effect of.

Ordinance No. 5 of 1930 and the notification thereunder making the offence under S. 188, Penal Code, cognizable and non-bailable do not get rid of the requirements imposed by S. 195, Cr. P. Code. A.I.R. 1931 Cal. 122=32 Cr.L.J. 511 =35 C.W.N. 257=53 C.L.J. 461=58 Cal. 971 =130 Ind. Cas. 241.

——S. 3—Offence under S. 3—Mere attempt to dissuade people from resorting to liquor shops, whether offence—"Molestation", definition of.

A person who merely stands near a liquor shops in order to dissuade would-be customers if he could from resorting for drink to that shop cannot, without definite evidence, be held to have done so with a view to cause the shop-keeper to close his shop within the meaning of S. 3 and cannot, therefore, be convicted of the offence of molestation under S. 4. Further, in order that molestation may constitute an offence under the Ordinance, the person molested must be the same person as the person to whose legal rights obstruction is caused. A.I.R. 1931 Bom. 70=55 Bom. 220 =32 Bom.L.R. 1506=32 Cr.L.J. 283=129 Ind. Cas. 346.

——S. 3—Peaceful picketing, whether punishable—"Cause", meaning of—Gravity of offence.

The word "cause" in S. 3 does not imply anything like coercion, force or intimidation of some kind; the words of the section cover the operation known as peaceful picketing. If a person loiters about a place with a view to cause any person to abstain from doing something which he has a right

to do, even though it be by the mere sight of him, he comes within the mischief of the Ordinance.

Gravity of the offence under S. 3 depends upon the circumstances existing at the time when the offence is committed and the Magistrate is the best judge of this matter. A.I.R. 1931 Cal. 633=33 Cr. L. J. 28=35 C.W.N. 436=134 Ind. Cas. 1129.

——S. 3—Molestation, meaning of—Loitering at liquor shop to cause persons to abstain from purchasing liquor, whether amounts to "molestation".

Loitering at a liquor shop with a view to cause persons to abstain from purchasing liquor comes within the definition of "molestation" as given in S. 3 of the Prevention of Intimidation Ordinance. A.I.R. 1931 Lah. 469=32 Cr.L.J. 878=132 Ind. Cas. 393.

——S. 3—"Molestation".

B, a shop-keeper, has a legal right to keep his shop open. **A** must intend to interfere with the exercise of such legal right by the shop keeper; and **A** must obstruct or intimidate or use violence to him or loiter near his place of business. If all these three facts are proved, **A** is guilty of molestation. 32 Bom.L.R. 1506=1931 Cr.C. 78=A. I.R. 1931 Bom. 70.

——S. 3—"Person molested".

The person molested must be the same person as the person to whose legal rights obstruction is to be caused. The accused cannot be held to have loitered with a view to cause loss to the shop-keeper simply from the fact that he accosted the customer and persuaded him about the evils of drink. He cannot be presumed to have in view the idea of causing any loss to the shop keeper or interfering with the rights of the shop-keeper. On the contrary, in the case of the ordinary temperance worker, it is the welfare of the drinker which occupies the mind of the worker and not the gain or loss to the shop-keeper. 32 Bom.L. R. 1506=1931 Cr.C. 78=A.I.R. 1931 Bom. 70.

——S. 11—Cr. P. Code, S. 195 (a)—Prosecution for disobedience of order of public servant—Complaint of public servant, nece sity of—Ordinance, whether abrogates necessity of complaint.

The provision contained in S. 11 of Ordinance No. 5 of 1930 that an offence under S. 188, Penal Code, shall be cognizable means that it shall be cognizable in the sense that the Police can arrest without warrant, and that it must, after arrest, be dealt with as a cognizable offence throughout the Code. But there is nothing in the Ordinance which provides that it shall not be necessary to take the preliminary step pointed out by S. 195 (a) of the Code, and obtain a complaint in writing from the public servant concerned. A.I.R. 1931 Bom. 135=55 Bom. 322=33 Bom.L.R. 59=32 Cr.L.J. 507=130 Ind. Cas. 396.

——S. 11—Order by Magistrate under S. 144, Cr. P. Code — Disobedience of—Trial for, under S. 188, Penal Code—No sanction under S. 195 (a) of the Cr. P. Code—Conviction—Invalidity of. 55 Bom. 322=130 Ind. Cas. 396=1931 Cr.C. 183 =32 Cr L.J 507=A. I. R. 1931 Bom. 135=33 Bom.L.R. 59.

PREVENTION OF MOLESTATION AND BOYCOTTING ORDINANCE (5 OF 1932)—Picketing — Mere fact that accused is Dictator of District Congress Committee—Whether sufficient for conviction.

The mere fact that a person is the Dictator of the District Congress Committee and that ordinarily picketing takes place under his directions, is not sufficient to prove an offence under Ordinance 5 of 1932, in the absence of proof of his presence at the time of picketing or that it took place under his instructions. A.I.R. 1933 Lah. 233=34 Cr.L.J. 587=143 Ind. Cas. 356 (1).

——S. 3—"Molestation"—Gist of the offence.

The gist of the offence of molestation, as defined in S. 3 (a) is the doing of certain acts "with a view to cause a person to abstain from doing or to do any act which such other person has a right to do or to abstain from doing...." Those words govern the whole of S. 3 (a). A.I.R. 1933 Mad. 147=34 Cr.L.J. 96 (1)=140 Ind. Cas. 773.

——S. 3—Cognizance of offence — Opinion of Police Officer—Accused going from shop to shop asking dealers not to deal in foreign cloth.

Under S. 5 of Ordinance 5 of 1932, a Magistrate may only take cognizance of an offence punishable under S. 4 on a report in writing of facts which constitute such offence made by a Police Officer but the opinion of the Police Officer as to whether such facts justify the taking of cognizance under the Ordinance is irrelevant. It must always be for the Magistrate to decide in what particular manner cognizance shall be taken.

The accused, along with two volunteers, went from shop to shop asking shop-keepers not to deal in foreign cloth and actually prevented them from what they had a right to do:

Held, that under the circumstances, the action of the accused amounted to the offence described in S. 3 of the Ordinance. A.I.R. 1933 Pat. 50 =13 P. L. T. 753=34 Cr. L. J. 303=142 Ind. Cas. 180.

——S. 4—Sentence of fine in addition to imprisonment.

A person who loiters around foreign shops intentionally interfering with the obstructing customers in their legitimate rights is guilty under S. 4 of the Ordinance.

The principle, that where a substantial term of imprisonment has been inflicted, it may be inappropriate to add a fine, does not apply to an offence under S. 4 more especially when the Ordinance provides for the imposition of a fine either separately or along with a substantial term of imprisonment. A.I.R. 1933 Cal. 333=34 Cr.L.J. 1189=146 Ind. Cas. 174.

——S. 4—Sentence of fine—Recovery of fine from father, legality of.

A fine imposed on a person above 18 years on conviction under S. 4 cannot be recovered from the property of his father, though he lives and works jointly with his father. (1933) 142 Ind. Cas. 846=34 P.L.R. 432=34 Cr.L.J. 467.

——S. 4—Legal acts.

A conviction under S. 4 cannot be sustained where there is nothing to show that the act which the complainant was prevented from doing was an act which the latter had a right to do. A.I.R. 1933 Mad. 147=34 Cr. L. J. 96 (1)=140 Ind. Cas. 773.

——S. 4—Where a person has been charged under S. 17 (1), Criminal Law Amendment Act, 1908, for picketing foreign cloth shops and under S. 4, Ordinance 5 of 1932, of molestation in respect of the said picketing and has been convicted under both the sections, it is illegal to award separate sentences in respect of each of the convictions. A.I.R. 1933 Mad. 337=34 Cr.L.J. 277 =37 L.W. 476=64 M.L.J. 351=1933 M.W.N. 540=142 Ind. Cas. 21.

PREVENTION OF SEDITIOUS MEETINGS ACT (10 OF 1911), S. 6—"Promoting"—Promoting means action anterior to thing promoted.

The word "promotion" implies some action a anterior to the existence or occurrence of the thing promoted and, therefore, when the things is actually taking place. it cannot be said to have been promoted. There is a distinction between the promotion and conduct of a public meeting. 76 Ind. Cas. 689=25 Cr.L.J. 225=A. I. R. 1923 Lah. 342.

PREVENTIVE ACTION. See CR. P. CODE, SS. 106 TO 109.

PREVENTIVE DETENTION ACT (4 OF 1950)—Grounds of detention—When not precise.

The ground that a detenu attended a secret meeting and tried to chalk out a programme for the "breach of the peace" is vague and indefinite. The words "breach of the peace" are of the vaguest character possible. From the use of those words, the necessary inference cannot be drawn that what the detaining authority had in mind was a breach of public order. Such a ground has no casual or direct connection with the maintenance of public order and is far too vauge and indefinite for the detenu to make an effective representation.

Similarly the ground that the detenu helped another to go "underground" is vague and indefinite. A.I.R. 1950 All. 709.

——Grounds of detention supplied to the detenu —Power of Court to look into—Scope of—Grounds—Conditions to be satisfied.

Courts can look into the grounds supplied to a detenu to see whether they are precise and definite. The grounds must be of such a nature as to enable the detenu to make an effective representation to the appropriate authority. It is competent to the Court to discover for itself whether on the grounds supplied the detaining authority could be honestly satisfied that the detenu was about to act in a manner prejudicial to public tranquillity. Though it is not open to the Court to question the reasonableness or otherwise of the satisfaction of the detaining authority, it is certainly competent to the Court to satisfy itself on the materials supplied to the detenu, the detaining authority could be honestly satisfied as to the correctness of the order passed by it.

Where the ground mentioned in the order of detention is "maintenance of public order" it is incumbent upon the Court to examine the grounds to see whether there is any direct and casual connection between them and the maintenance of public order. A.I.R. 1950 All. 709.

——S. 3—Validity of. See PREVENTIVE DETENTION ACT (4 OF 1950), Ss. 3, 7; 12 AND 14 AND THE CONSTITUTION OF INDIA, ARTS. 12, 13, 14, 19, 21, 22 AND 32 (1). (1950) 2 M.L.J. 42=1950 S.C.J. 174=A.I.R. 1950 (S.C.) 27 (S.C.).

——Ss. 3, 7, 12 and 14 and the Constitution of India; Arts. 12, 13, 14, 19, 21, 22 and 32 (1)—Validity of the Preventive Detention Act—Tests to be applied for determination of question—Preventive detention—If covered by Art. 19—'Law' in Art. 21—Meaning — Art. 22, if to be construed as a complete code.

In an application under Art. 32 (1) of the Constitution for a writ of Habeas Corpus against the detention of the applicant by the Madras Government under S. 3 (1) of the Preventive Detention Act (4 of 1950), the legality of the order was challenged on the ground that the Act contravened the provision of Arts. 13, 19 and 21 of the Constitution and that the provisions of the Act were not in accordance with Art. 22 of the Constitution. The contention was that the impugned legislation abridges or infringes the rights given bv Arts. 19-21 and is also not in accordance with the permissive legislation on preventive detention allowed under Art. 22 (4) and (7) and in particular is an infringement of the provisions of Art. 22 (5).

Held (Fazl Ali and Mahajan, dissenting).—The Preventive Detention Act is not invalid as in any way affecting the Articles of the Constitution.

By the **Full Court.**—The provisions of S. 14 of the impugned Act when it prohibits the disclosure of the grounds of detention contravenes or abridges the right given under Art. 22 (5) and are therefore invalid. But this decision would not affect the validity of the rest of the Act as the section can be severed from the rest of the Act.

Per **Kania, C.J.**—If there is a legislation directly attempting to control citizen's freedom of speech or expression or his right to assemble peacefully and without arms, etc., the question whether the legislation is saved by the relevant saving clause of Art. 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of the sub-clauses is abridged, the question of the application of Art. 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life.

On a true construction of Art. 19, both preventive and punitive detention are outside the scope of Art. 19.

There is no justification to give the meaning of 'jus' to 'law' in Art. 21. The deliberate omission of the word 'due' from Art. 21 lends strength to the contention that the justiciable aspect of 'law', i.e., to consider whether it is reasonable or not by the Court does not form part of the Indian Constitution.

It cannot be said that Art. 22 is a complete Code in itself. Article 21 has to be read as supplemented by Art. 22.

Bearing in mind the provisions of Art. 22 read with Art. 246, and Sch. VII, List I, Entry 9 and List III, Entry 3, it is clear that Parliament is empowered to enact a law of preventiv detention.

Section 3 of the Preventive Detention Act is

no delegation of legislative power to make laws. It only confers discretion on the officer to enforce the law made by the Legislature. It cannot be said to be ultra vires.

Section 7 of the Act runs on the same lines as Art. 22 (5) and (6) and infringes no provision of the Constitution. Cl. (5) of Art. 22 cannot be read as giving a fundamental right to be heard by an independent tribunal.

Section 12 of the Act cannot be challenged on the ground that it does not conform to the provisions of Art. 22 (7).

Section 14 of the impugned Act appears to be a drastic provision which requires considerable support to sustain it in a Preventive Detention Act. Its provisions abridge the right given under Art. 22 (5) and are therefore ultra vires.

Fazl Ali, J.—"Freedom of movement" is the essence of personal liberty and any restraint on freedom of movement must be held to amount to abridgment or deprivation of personal liberty as the case may be, according to the nature of the restraint. Freedom of movement is in the last analysis the essence of personal liberty. Preventive detention amounts to a complete deprivation of the right guaranteed by Art. 19 (1) (d). The proper juristic conception is that personal liberty and freedom of movement connote the same thing and the words used in Art. 19 (1) (d) must be construed according to this conception. Art. 19 (v) (d) guarantees the right of freedom of movement in its widest sense, that freedom of movement being the essence of personal liberty, the right guaranteed under the Article is really a right to personal liberty and preventive detention is a deprivation of that right. The law of preventive detention is subject to such limited judicial review as is permitted under Art. 19 (5). The scope of the review is simply to see whether any particular law imposes any unreasonble restrictions.

It cannot be said that the word "law" in Art. 21 means only State-made law.

The authors of the Constitution have made it necessary that the Parliament should put certain specifications into the Act which it is empowered to pass under Art. 22 (7) (d), so that by means of these specifications, the necessity for enacting so drastic a law should be apparent on the face of it and its application should be confined to the classes and circumstances specified.

Section 12 of the impugned Act takes away a most important safeguard conferred on the subject by the Constitution and is not a valid provision, since it contravenes the very provision in the Constitution under which Parliament derived its competence to enact it.

There is nothing wrong or unconstitutional in either S. 3 or S. 7 of the Act.

The real sections which offend the Constitution are Ss. 12 and 14 of the impugned Act. Though S. 14 may be severable from the rest of the Act, S. 12 goes to the very root of the legislation in as much as it deprives a detenu of an essential safeguard.

Per **Patanjali Sastri, J.**—Art. 19 guarantees protection for the more important civil liberties of citizens who are in the enjoyment of their freedom, while at the same time laying down restrictions which the Legislature may properly impose on the exercise of such rights and it has nothing to do with the deprivation of personal liberty or imprisonment which is dealt with by the succeeding three Articles.

It cannot be said that the word "Law" in Art. 21 means the immutable and universal principles of natural justice. It means "positive or State-made law".

The language of Art. 21 is perfectly general and covers deprivation of personal liberty or incarceration and would therefore be applicable to preventive detention as well.

It cannot be said that S. 12 of the impugned Act does not comply with the requirements of clause (7) of Art. 22.

S. 14 of the Act contravenes the provisions of Art. 22 (5) and Art. 32 in so far as it prohibits the person detained from disclosing to the Court the grounds of his detention communicated to him by the detaining authority or the representation made by him against the order of detention, and prevents the Court from examining them for the purposes aforesaid and to this extent it must be held under Art. 13 (2) to be void. This does not however affect the rest of the Act which is severable.

Per **Mahajan, J.**—Preventive detention in substance is a negation of the freedom of locomotion guaranteed under Art. 19 (1) (d) and it cannot be said that it merely restricts it. Be that as it may, the question for consideration is whether it was intended that Art. 19 would govern a law made under Art. 22. On all important points that could arise in connection with the subject of preventive detention provision has been made in Art. 22, and that being so, the only correct approach in examining the validity of law on the subject preventive detention is by considering whether the law made satisfied the requirements of Art. 22 or in any way abridges or contravenes them and if the answer is in the affirmative then the law will be valid, but if the answer is in the negative, the law would be void.

It cannot be said that in making "satisfaction of the Government" as the standard for judging prejudicial acts of persons who are subject to the law of preventive detention, S. 3 of the impugned Act in any way contravenes Art. 22 of the Constitution.

S. 7 of the Act gives full effect to the provisions of Art. 22 (5).

No circumstances as required by Art. 22 (7) has been stated in S. 12 of the impugned Act and it does not fulfil the requirements of Cl. (7) of Art. 22 and is not a law which falls within the ambit of that clause and so it is void.

S. 14 of the Act when it prohibits the disclosure of the grounds contravenes or abridges the right given by Part III of the Constitution to a citizen and is ultra vires the powers of the Parliament to that extent.

Per **Mukherjea, J.**—The question that has to be considered is whether a law relating to preventive detention is justiciable in a Court of law on the ground of reasonableness under Art. 19 (6) of the Constitution inasmuch as it takes away or abridges the right to free fovement in the territory of India guaranteed by Cl. (1) (d) of the Article.

What Cl. (1) (d) of Art. 19 contemplates is not freedom from detention either punitive or pre-

ventive; it relates to and speaks of a different aspect or phase of civvil liberty.

The Court is not entitled to examine the reasonableness or otherwise of the Preventive Detention Act and see whether it is within the permissive bounds specified in Cl. (5) of Art. 19.

The contention that the Preventive Detention Act is invalid, by reason of the fact that the procedure it lays down is not in conformity with the rules of natural justice does not fall for consideration. It is enough if the law is a valid law which the Legislature is competent to pass which does not transgress any of the fundamental rights declared in Part III of the Constitution.

Though S. 12 of the Preventive Detention Act has not been framed with due regard to the object which the Constitution had in view, it cannot be said that the section is invalid as being **ultra vires** the Constitution. It is not obligatory on Parliament to prescribe both the circumstances and the classes of cases.

S. 14 of the Act does materially affect the fundammntal rights declared under Part III of the Constitution and for this reason it must be heid to be illegal and **ultra vires**, but as it can be severed from the rest, the whole Act is not affected.

Per Das, J.—The purpose of Art. 19 (1) (d) is to guarantee that there shall be no State barrier. It has nothing to do with the freedom of the person as such.

A lawful detention, whether punitive or preventive does not offend against the protection conferred by Art. 19 (1) (a) to (c) and (g) for those rights must necessarily cease when the freedom of the person is lawfully taken away. In short, those rights and where the lawful detention begins. The validity or otherwise of preventive detention does not depend on and is not dealt with by Art. 19.

There is no scope for the introduction into Art. 21 of the Constitution of the doctrine of "due process of law" even as regards procedure.

If some procedure is provided as envisaged by Art. 21 and the compulsory requirements of Art. 22 are obeyed and carried out nobody can under our Constitution complain of the law providing for preventive detention. Therefore the preventive detention law which provides some procedue and complies with the requirements of Art. 22 (4) to (7) must be held to be a good law, however odious it may appear to the Court to be. 1950 S.C.R. 88=63 L.W. 638=A.I.R. 1950 S.C. 27=1950 M.W.N. 495=51 Cr.L.J. 1383 =(1950) 2 M.L.J. 42=1950 S.C.J. 174 (S.C.)

——Ss. 3 and 12—Order of detention not prescribing period of detention—Legality.

It is essential for a Magistrate who passes an order of detention that he should have exercised his own mind and arrived at a finding about the period for which the detention of the person concerned was necessary for the purposes mentioned in S. 3 of the Preventive Detention Act. If he did not do so, it cannot be said that the maximum period permissible under S. 12 of the Act is the period for which the Magistrate desired the person to be detained. Detention under an order not fixing the period of detention is not in accordance with procedure prescribed by law. 1950 A. L.J. 518=1950 A.W.R. 527=A.I.R. 1951 A. 357.

——S. 3—Grounds for detention—Spreading disaffection against a party Government.

Spread of disaffection against a party Government cannot be said to be a ground for inferring that the public order would not be maintained. It is the legitimate exercise of a right by a citizen in a democratic State. But it is subject to the condition that the disaffection should not be so spread as to result in violence and there should be really no incitement to use violence or to resort to other illegitimate course. Detention on such a ground cannot be justified. 1950 A.L.J. 521=A.I.R. 1951 A. 459.

——S. 3—Detention under — Satisfaction of authority passing order of detention—Grounds of detention—Province of High Court in regard to.

As the Legislature has under the Preventive Detention Act empowered the authorities to make an order of detention on being satisfied that one of the conditions laid down in S. 3 of the Act exists, it is entirely at the discretion of the authority making the order to satisfy itself in that behalf by whatever means that may be available to it. After the authority making the order of detention has so satisfied itself, the propriety of that satisfaction in some respects comes for scrutiny by the procedure laid down by the Act.

The question of the correctness of the grounds of detention cannot be enquired into by the High Court in an application for a writ of **habeas corpus**. All that the High Court can see is whether the District Magistrate's satisfaction was **bona fide** or not. In fact the Act itself provides the forum where the correctness of the grounds of detention is to be examined. 1950 A.L.J. 526 (2)=A.I.R. 1951 A. 456.

——S. 3—Considerations of State in making order of detention—Province of Court in regard to detentions made under the Act.

The considerations which guide the State in taking action under the process of preventive detention are not necessarily the same as those which guide Courts in punishing persons disobeying the laws of the State. With executive considerations the High Court has no concern. All that the High Court has got to see is (a) whether the grounds given are of a sufficiently precise nature to enable the detenu to make an effective representation; and (b) whether the detaining authority was honestly satisfied, on the materials before it, of the reasonableness of the order that it was passing. 1950 A.L.J. 608.

——S. 3—Grounds—Sufficiency.

It is certainly open to a citizen to advocate any particular policy in a peaceful manner and to point out that a particular policy is not fair to a particular community. A citizen cannot be said to overstep the limits of the law by subjecting Governmental policies to a searching criticism. If it is not fair, it is immaterial. But it is certainly not open to any member of the public to incite feelings of hatred and disaffection against any particular creed or community. It is also certainly open to objection if feelings of ill-will and disaffection are created against a neighbouring State. 1950 A.L.J. 608.

——S. 3—Applicability — Order for detention for purpose of investigation of crime—Legality.

Investigation of a crime is no ground for deten-

tion under the Preventive Detention Act; an order under S. 3, for such a reason is improper and illegal and cannot be allowed to stand. A.I.R. 1950 Hyd. 68.

——S. 3—Applicability — Person already in jail —Proceedings in respect of punitive detention pending in Court—Order of detention under Act —Legality—Detention — Habeas corpus.

'Preventive detention' means restraint whose object is to prevent probable, and in some cases possible, activity on the part of a person which is deemed objectionable and which is apprehended from him on grounds of his past conduct. Where such conduct on the part of that person is impossible, he being already in jail, the exercise of power under the Preventive Detention Act is not only meaningless but improper. Where proceedings relating to punitive detention are pending in Court of Law, the use of the powers of punitive detention is wrong and illegal. Hence in such a case, an order under S. 3 of the Preventive Detention Act is illegal and detention under such an order is illegal. The High Court in such a case will order the release of the detenu by a writ of **habeas corpus**. A.I.R. 1950 Hyd. 66.

——S. 3—Grounds for detention — Satisfaction —Nature and requisites of—Past activities—Relevancy—Duty of detaining authority.

The satisfaction that the law requires under S. 3 (1) and (2) of the Preventive Detention Act is that there must be at least a reasonable probability of the person against whom an order is sought to be made acting in a prejudicial manner. It is not necessary that the detaining authority must feel absolute certainty that if the person concerned was not detained he would act in a prejudicial manner. He must, however, from the materials placed before him, be in a position to say that there was reasonable probability of his acting in a prejudicial manner. The satisfaction has got to be of the detaining authority and the Court cannot question that satisfaction. But the satisfaction must be arrived at on materials placed before the detaining authority and on a judgment which he himself has come to at the date when the order was made. The detaining authority must be satisfied on that date that it was necessary to detain the person concerned. It is not sufficient that some other authority at some previous time thought that the detention of that person was necessary. Though past activities of the detenu may afford a ground for detention to the detaining authority, such past activities must be related to the situation existing at the moment when the detaining authority makes the order, the requirement under the law being that the satisfaction must be of the detaining authority making the order at the time when the order is made. In other words it is not open to the detaining authority in 1950 to fall back upon the satisfaction of the detaining authority in 1948. 52 Bom.L.R. 711=I.L.R. (1950) Bom. 736=52 Cr.L.J. 62=A.I.R. 1951 Bom. 161.

——S. 3 (2)—Satisfaction of the authority making the order of detention—Province of Court in regard to.

The satisfaction of the authority making the order of detention as to the matter specified in the Preventive Detention Act is the only condition for the exercise of his powers and the Court cannot substitute its own satisfaction for that of the authority. It is, however, open to the detenu to establish if he can that the order was made **mala fide** and in abuse of process. The recourse to the drastic order of detention rather than to a preventive order under S. 144, Cr. P. Code, may lend some colour to a contention that the order is **mala fide**. But suspicion, however, is not proof and in the circumstances of the case, it cannot be said that the act of District Magistrate was actuated by any improper or indirect motive.

Per **Mukherjea, J.**—The order of detention may be declared invalid if it could be proved to have been made by the authorities concerned in **mala fide** exercise of their power. The burden of proving the absence of good faith is upon the petitioner and in cases of this description is certainly a heavy burden to discharge. Though there could be no better proof of **mala fides** on the part of the executive authorities than a use of the extraordinary provisions contained in the Preventive Detention Act for purposes for which ordinary law is quite sufficient, in the circumstances of the case, it could not be definitely held that there was want of good faith on the part of the authorities.

I can only hope that the authorities will take care to see that no instances occur which might savour of injustice or oppression through misuse of those extraordinary powers which the Parliament has vested in the executive in the interests of the State itself. (1950) S.C.J. 433=63 L.W. 1142=(1950) 2 M.L.J. 555 (S.C.).

——S. 3 (2)—Construction — Powers of Officers under—Commissioner of Police—Power of to make order as to person resident outside Greater Bombay.

Though, under S. 3 (2) of the Preventive Detention Act, the District Magistrate, the Subdivisional Magistrate and the Commissioner of Police, are invested with, and may exercise, the same power as the Union Government or the State Government can exercise under S. 3 (1) of the Act, there is a territorial limitation to their jurisdiction and the power that they can exercise must be limited to persons who reside within their jurisdiction. The jurisdiction of these officers is not and cannot be co-extensive with that conferred upon the Central Government and the State Government. Although these officers may exercise all the powers which are conferred upon the Union Government or the State Government so far as the exercise of the powers are concerned, they cannot exercise them beyond their own by territorial jurisdiction. None of them can detain a person against whom he has passed the order in a place over which he has no jurisdiction. It would not therefore be open or competent to the Commissioner of Police to pass an order with regard to person who is residing outside Greater Bombay, or to the District Magistrate to pass an order with regard to a person who is not resident within the District of which he is the District Magistrate. 52 Bom.L.R. 711=I.L.R. (1950) Bom. 736=52 Cr.L.J. 62=A.I.R. 1951 Bom. 161.

——S. 7—Validity of. **See** PREVENTIVE DETENTION ACT (4 OF 1950), SS. 3, 7, 12 AND 14 AND THE CONSTITUTION OF

INDIA, ARTS. 12, 13, 14, 19, 21, 22 AND 32 (1). (1950) 2 M.L.J. 42=1950 S.C.J. 174=A. I.R. 1950 S.C. 27(S.C.).

——S. 7—Scope — Non-compliance — Effect — Failure to communicate grounds—Legality of detention.

Curtailment of personal liberty can only be subject to conditions which must be complied with strictly. The person detained must, both under S. 7 of the Preventive Detention Act and under Art. 22 of the Constitution of India, be informed of the grounds of his arrest and detention, and failure to communicate such grounds makes the detention illegal. A.I.R. 1950 Hyd. 68.

——S. 7—Grounds of detention not affording sufficient particulars — Release of detenu—Power of Court—Constitution of India, Art. 22 (5).

A Court can order the release of a detained person if the grounds of detention served on that person are vague and indefinite and do not afford sufficient particulars to enable him to make an effective representation. 4 A.I.Cr.D. 747=55 C.W.N. 27=A.I.R. 1951 Cal. 194.

——S. 7—Grounds of detention — Contents to—Grounds not containing adequate information or not given within reasonable time—Legality of detention—Procedure to be observed—Duty of detaining authority—Power of High Court—Constitution of India, Art. 226.

Per Thadani, C.J.—An order of detention might be based on two kinds of information received by the detaining authority—one kind of information might be such as the detaining authority is empowered to withhold from the detenu in the public interest; another kind might be such as the disclosure of which the detaining authority does not regard as being against the public interest. In the first class of cases, a High Court will find it impossible to hold that the grounds are insufficient, for the plain reason that some thing has been lawfully withheld which, if disclosed, might well demonstrate that the grounds of detention are quite sufficient. In the second class of cases, where the detaining authority is in possession of information which it does not think fit to withhold in the public interest, a High Court will naturally be guided by the connection between the grounds and the information upon which they are based. If a reasonable connection can be said to exist between the grounds of detention and the information upon which they are based, a High Court will not be justified in saying that the grounds are vague or insufficient, for, the foundation of a detention order is the satisfaction of the detaining authority and not the High Court. If, on the other hand, no reasonable connection can be said to exist between the grounds of detention and the information upon which they are based, it would not be difficult for a High Court to say that the grounds are insufficient.

The Detention Act contains a provision whereby a detenu is entitled to make a representation to Government on receipt of the grounds of detention. If a detenu considers that the grounds as supplied to him are not sufficient to enable him to make a representation, he must inform the detaining authority accordingly and require the detaining authority to disclose the information upon which the grounds are based. On receipt of such a requisition by the detenu, the detaining authority is bound to disclose to the detenu all information in its possession, except the information which it considers, in the public interest, to withhold, and when a detaining authority withholds such information, it must say so without disclosing the information.

Where the ground of detention given refers to the detenu's holding of secret meetings and inciting students and villagers to resort to unconstitutional activities in order to bring about the disruption of the present order by violent means, and the detenu has not required the detaining authority to disclose the information which it could disclose without prejudice to the public interest, the High Court cannot say that there is no connection between the ground and the information upon which it is based and that the ground by itself is insufficient to warrant an order of detention.

Per Ram Labhaya, J.—There may be some reasonable interval between the other of detention and the communication of the grounds to the detenu as is evident from S. 7 of the Preventive Detention Act. An order which is not accompanied by the grounds of detention would not be in contravention of the provisions contained in the Act, and it would be perfectly legal and valid. The failure of the detaining authority to give the grounds of detention within a reasonable time would make further detention illegal but the order would not be bad **ab initio**. Where grounds supplied to a detenu are vague and indefinite and he is, as a consequence of that fact, deprived of the opportunity of making a representation, the result would practically be the same as if no grounds have been supplied to him. Giving of vague and indefinite grounds would not be a strict compliance with the requirements of S. 7. The result, even in such cases, would be that further detention would be illegal. Detention which has become illegal by the failure of the detaining authority to furnish ground within a reasonable time or by reason of the vague and indefinite character of the grounds given, cannot be made legal by obtaining grounds or further information from the detaining authority for the benefit of the detenu. The detenu too is under no obligation to apply for grounds or for the further information before coming to Court in such circumstances. He can ask for his release on the basis of the failure of the detaining authority to comply with provisions contained in S. 7 of the Act.

The law gives the detaining authority the power to withhold information, the disclosure of which it considers prejudicial to the public interest. Where detaining authority considers the exercise of this privilege necessary, it should indicate that other information not included in the grounds of detention has been withheld in public interest. If this is not done and the grounds supplied are vague and indefinite, the Court would be justified in holding that further detention of the detenu is illegal. 54 C.W.N. 917=52 Cr.L.J. 1186=A.I.R. 1951 Assam 29.

——S. 7—Grounds supplied to detenu vague and indefinite—Legality of detention — Proper course for Court to adopt—Court, if can direct fresh grounds to be supplied.

There is no doubt that vagueness and indefiniteness in the grounds of detention communicated to

the detenu under S. 7 of the Preventive Detention Act for the purpose of enabling him to make a representation to the State is a ground for holding the detention to be invalid and ordering his release. The Court instead of ordering the immediate release of the detenu, should not direct fresh grounds of detention containing fuller particulars to be supplied to him to enable him to submit an effective representation to the Government. To adopt this course might serve as an encouragement to the authorities to supply only vague grounds of detention in the first instance, and then to go on grudgingly supplying further detailed particulars as required by the Court, with the result that a detenu would be kept in detention, whether lawfully or unlawfully, for quite a long period before the validity of the order for his detention would be decided. 42 P.L.R. 340= A.I.R. 1951 Simla 8.

——**S. 12**—Validity of. **See** PREVENTIVE DETENTION ACT (4 OF 1950), Ss. 3, 7, 12 AND 14 AND THE CONSTITUTION OF INDIA, ARTS. 12, 13, 14, 19, 21, 22 AND 32 (1). (1950) 2 M.L.J. 42=1950 S.C.J. 174=A. I.R. 1950 S.C. 27 (S.C.).

——**S. 12—If conforms to Art. 22 (7) of Constitution.**

Section 12 of the Preventive Detention Act conforms to the provisions of Art. 22 (7) of the Constitution. 1950 N.L.J. 233.

——**S. 12—Period of detention — Date of commencement—Date of order under Act or date of original detention under previous law.**

Every Act must be regarded as prospective unless it is expressly made retrospective. On that view, the detention contemplated by S. 12 of the Preventive Detention Act must be deemed to be detention under the new Act and not detention under the previous law. Therefore the period of one year under S. 12 (1) should commence from the date on which the detention order is passed under the new Act, and not from the date of the initial detention made prior to the commencement of the Act. 1950 N.L.J. 233.

——**S. 14**—Validity of. **See** PREVENTIVE DETENTION ACT (4 OF 1950), Ss. 3, 7, 12 AND 14 AND THE CONSTITUTION OF INDIA, ARTS. 12, 13, 14, 19, 21, 22 AND 32 (I). (1950) 2 M.L.J. 42=1950 S.C.J. 174= A.I.R. 1950 S.C. 27 (S.C.).

——**S. 14**—If **ultra vires** of Parliament. **See** CONSTITUTION OF INDIA, ARTS. 21, 22, 19, 32 AND 226. 1950 N.L.J. 233.

PREVENTIVE DETENTION (EXTENSION) ORDER, 1950—Scope and effect—If makes valid Bihar Act (3 of 1950). **See** BIHAR MAINTENANCE OF PUBLIC ORDER ACT, 1950, Ss. 2, 4 AND 5. A.I.R. 1950 Pat. 265= 29 Pat. 335=51 Cr.L.J. 1081.

PREVIOUS ACQUITTAL. **See** CR. P. CODE, S. 403.

PREVIOUS CONVICTION. **See** (1) CR. P. CODE, SS. 211, 403 AND 511.
(2) PENAL CODE, S. 75.

PRIEST. **See** (1) HINDU LAW — RELIGIOUS ENDOWMENT.
(2) RELIGIOUS ENDOWMENT.

PRIMOGENITURE. **See** (1) HINDU LAW —IMPARTIBLE ESTATE — SUCCESSION.
(2) IMPARTIBLE ESTATE.

PRINCIPAL AND AGENT. **See also** (1) CIV. P. CODE, S. 20.
(2) CONTRACT ACT, Ss. 182 TO 238.
(3) INSURANCE.

Synopsis.

1. **Authority of Agent.**
See CONTRACT ACT, Ss. 186 TO 189 AND 201 TO 210.
2. **Agent's duty.**
3. **Del Credere agent.**
4. **Discharge or renunciation.**
5. **Duties and liabilities of agent.**
6. **Liability of heirs.**
7. **Measure of damages.**
8. **Negligence.**
9. **Pakka Arhatia.**
10. **Place of accounting.**
11. **Powers and rights of agent.**
12. **Principal's liability.**
13. **Proof of agency.**
14. **Ratification.**
See also (1) CONTRACT ACT, SS. 196 TO 200.
(2) PRINCIPAL AND AGENT — PRINCIPAL'S LIABILITY.
15. **Relationship.**
16. **Remuneration and Commission.**
See PRINCIPAL AND AGENT—POWERS AND RIGHTS OF AGENT.
17. **Revocation**
18. **Sub-agent.**
See CONTRACT ACT, Ss. 190 TO 195.
19. **Suit for accounts.**
See also C. P. CODE, O. 20, R. 16.
20. **Suits.**
21. **Termination of agency.**
22. **Third parties.**
See CONTRACT ACT, Ss. 226 TO 238.
23. **Undisclosed agent.**
See CONTRACT ACT, S. 231.
24. **Miscellaneous.**

1. Authority of Agent.

See CONTRACT ACT, Ss. 186 TO 189 AND 201 TO 210.

2. Agent's duty.

See CONTRACT ACT, SS. 211 TO 221.

3. Del Credere agent.

——**Del credere agent is one, who, guarantees performance and must be party to contract—Dubash is not one.**

A del credere agent is defined as one, who, in consideration of extra remuneration, called a del credere commission undertakes that persons with whom he enters into contracts on the principal's behalf will be in a position to perform their duties. It is necessary that before a person can claim to be a del credere agent he must have brought about the contract in question. A dubash who gets a commission does not thereby become a del

credere agent in respect of contracts entered into without his intervention. 27 M.L.J. 501, Exp. 95 Ind. Cas. 154=40 Mad. 156=23 M.L.W. 432 =A.I.R. 1926 Mad. 544.

——Del credere agent—Brokers in Bombay share market are del credere agents.

The plaintiff, the registered owner of some shares in the Central India Mills Co., sold the said shares through a certified broker of the Bombay Native Stock and Shares Brokers' Association. The defendant had purchased one share in the same company through another certified broker. Plaintiff's broker undertook to deliver one share to the defendant's broker on the settlement day. The plaintiff duly signed a transfer as seller of one share and it was handed over by his broker to the defendant's broker. On the settlement day the defendant's broker paid the price of the one share purchased to the plaintiff's broker and received from him a share certificate. Plaintiff's broker absconded without paying the plaintiff the price of his shares. The plaintiff thereupon filed this suit against the defendant for a declaration that he was entitled to his share certificate and for the consequential relief.

Held: that certified brokers of the Bombay Native Stock and Shares Brokers' Association are **del-credere** agents of their constituents. Their duties are strictly to adhere to the position of the agents, **held,** further that the plaintiff dealt with his broker as principal with agent and as the plaintiff put forward his broker as his agent in the market to make representations to innocent third parties to the effect that the broker was authorised to transfer the plaintiff's title in the share and to receive the purchase price, the plaintiff could not be heard to say, if those representations were acted upon by innocent third parties, that his broker obtained the share certificate by cheating him. Assuming that the plaintiff dealt with his broker as principal with principal, the plaintiff having handed ever the transfer form and the share certificate to his broker before the settlement day, in due performance of his contract and not by reason of any fraud of the broker, the plaintiff's title both legal and equitable passed to the broker who validly transmitted that title to the defendant. Supposing the plaintiff was induced to deliver the share certificate on the fraudulent representation of his broker which amounted to cheating, it was the performance of the contract and not the contract itself that was obtained by fraud or cheating, and the plaintiff's title both legal and equitable passed to the broker and the broker having passed that title to the defendant, a **bona fide** purchaser for value without notice, the latter was entitled to retain the share and to get it registered in his name in the books of the Company. 66 Ind. Cas. 726=46 Bom. 489=23 Bom.L.R. 1144=A.I.R. 1922 Bom. 303.

4. Discharge or renunciation.

——Discharge or renunciation.

If negotiations carried on by broker have ceased and have been abandoned at time his employment as broker has ceased, the agency of the broker ceases too. A.I.R. 1934 Bom. 158=36 Bom.L.R. 119=58 B. 583=150 Ind. Cas. 871.

——Discharge or renunciation — Custom allowing agents to discard his capacity of agent at will cannot be recognized.

A custom was asserted which entitled the corn agents or brokers of Hapur to discard their capacity of agents and to assume that of principal, without either the knowledge or the consent of their own principals just when and how they please.

Held: the alleged custom is unreasonable, it is immoral in the sense that it is likely to lead to gross frauds and in any event, puts an agent in double capacity in which his duty and interest must necessarily conflict and is contrary to the general principle of agency and therefore needless to say, highly unreasonable. The suggestion that any agent, without the consent of his principal, without a term in his contract authorising him to do so, can turn himself into a principal and use his own principal's money and the advantages which he has obtained from his position as agent, to make a profit for himself is unheard of in a Court of Law, and is outrageous. This is a contract of agency, and as between principal and agent the custom alleged is unreasonable even impossible as a matter of law. 67 Ind. Cas. 231=A.I.R. 1923 All. 242.

——Discharge or renunciation — Co-principals—Discharge by one is not valid as against the others.

Co-principals may jointly appoint an agent to act for them and in such cases become jointly liable to him and may jointly sue him. The agent is not bound to account separately to one of several co-principals and if he has done so he is not thereby discharged from liability to the other or others unless the co-principals are also partners. Where the moneys are received on behalf of joint principals, the agent is liable to account to them jointly and is not discharged by payment to one or more of them only, unless by authority of all. 75 Ind. Cas. 1022=4 P.L.T. 531=1923 P.H.C.C. 177=2 Pat. 585=A.I.R. 1923 Pat. 464.

5. Duties and liabilities of agent.

——Duties and liabilities of agent—Contract by agent in his own name—Agent, if bound—Right of principal to sue.

An agent who contracts in his own name does not cease to be contractually bound because it is proved that the other party knew when the contract was made that he was acting as agent. Both the agent and the principal can sue on the agreement. 54 C.W.N. 770 (P.C.).

——Duties and liabilities of agent — Broker and client—Broker wrongfully closing client's accounts —Remedies open to client.

When a broker closes the transactions of his client wrongfully, the client cannot complain except (1) on the ground that the broker had made a profit for himself out of the transaction, in which case he would have to account for it, or (2) on the ground that the broker had not sold his shares at the market price, in which case he might be liable for damages. 230 Ind. Cas. 461=48 Bom.L.R. 727=A.I.R. 1947 Bom. 135.

——Duties and liabilities of agent—Agent in possession during agency — Agency terminated — Agent continuing enjoyment — It cannot be assumed that the legal possession has passed to

principal. A.I.R. 1944 Mad. 221=1944 M.W.N. 531=(1944) 1 M.L.J. 87.

——Duties and liabilities of agent.

Person contracting in capacity as broker cannot sue or be sued personally. A.I.R. 1944 Nag. 279 =I.L.R. (1944) Nag. 749=1944 N.L.J. 283.

——Duties and liabilities of agent — Rendering of accounts.

Per **B. J. Wadia, J.**—Every contract of agency imposes on the agent the duty of rendering a true and complete account regarding the subject matter of the agency. A.I.R. 1941 Bom. 108=I.L.R. (1941) Bom. 273=43 Bom. L.R. 53=196 Ind. Cas. 732.

——Duties and liabilities of agent — Interest — Agent, when liable to pay on sums due from him to principal.

No interest is payable by an agent in respect of money received by him on his principal's behalf, except under some contract, express or implied, or where there has been some default on his part, such as a dealing with the money in breach of duty, or a failure to pay it over at the principal's request, in which cases interest is payable from the date of default. The agent must also pay interest in all cases of fraud, and on all bribes and secret profits received by him during his agency. A.I.R. 1940 All. 69=1939 A.W.R. 842=1939 A.L.J. 1065=187 Ind. Cas. 277.

——Duties and liabilities of agent — Agent using principal's name for benami transaction of his own —Onus to prove that money was his own.

Where an agent uses his principal's name for a **benami** transaction of his own, the agent must prove beyond all doubt that the money was his money and not the principal's and that the transaction was truly a **benami** one. Where an agent mixes up his moneys and the moneys of his principal, the onus clearly lies on the agent to prove that any particular transaction which is claimed by him to belong to himself really represented his money. A.I.R. 1940 Mad. 299=1939 M.W.N. 1046 (2)=188 Ind. Cas. 626.

——Duties and liabilities of agent—Debts due to principal from third party—Duty of agent—Whether bound to receive cash settlement of debts—Negligence on part of agent—Onus to prove negligence.

The duty of an agent in a case where the third party, debtor to the principal, is financially embarrassed, is to do his best to collect all he can in the circumstances. It may be that it is more prudent not to press the debtor into immediate bankruptcy, but to take what he can in cash at the moment and to give time for the balance; the true principle is that the duty which the agent owes to his principal is to exercise due care, skill and judgment in getting in what he can by making the best bargain possible under the circumstances.

An agent's authority is at least presumptively to settle in cash, in the absence of express authority to the contrary effect or of an authority by custom or usage. An agent has no right to give credit without express instructions from his principal. But where the debtor, being in financial difficulties, the agent gets all the cash he can and does his best to secure cash for the residue of the debt thinking it best to give the debtor some time to pay and there is not any question of an authority limited to receiving cash, nor is the agent giving up any valuable thing or right which he should not have given up save against cash, in fact his duty being to do the best he can to get cash, the onus is on the principal to prove that the agent has failed in that duty and that the principal has suffered damage which he can only do by showing that the agent could have realised more cash in the circumstances of the case than he actually did. The onus is on the principal to prove the breach of duty and the damage. The agent does not become guarantor of the debts on the debtor's insolvency. He can only be made responsible for the debts to the extent that it could be established (1) that he was negligent in seeking to realise them and (2) that loss resulted to the principal from that negligence:

Held, that the principal had failed to prove that the agent was negligence and the loss resulting to the principal was from that negligence.

Held, also that question of interest claimable on the sums actually received was not such as in the facts of the case to be a proper subject for invoking the appellate jurisdiction of Privy Council. A.I.R. 1938 P.C. 292=1938 A.W.R. 212=43 C.W.N. 87=5 B.R. 154=68 C.L.J. 497=20 P.L.T. 61=49 L.W. 248=1939 M.W.N. 1=(1939) 1 M.L.J. 56=41 Bom.L.R. 128=1939 O.W.N. 272=41 P.L.R. 310=66 I.A. 12=I.L.R. (1939) Kar. (P.C.) 35 Sup.=I.L.R. (1939) Lah. 56=178 Ind. Cas. 425 (P.C.).

——Duties and liabilities of agent — Fraudulent disposal of security deposited by principal—Whether conversion—Principal, if entitled to damages —Principal not knowing of conversion receiving the very goods or equivalent—Effect.

Fortunately for the commercial community, the law has many effective forms of relief against dishonest agents and no injustice is done if the principal benefits as he occasionally may by the superior astuteness of an unjust steward in carrying out a fraud.

Agents who engage in a fraudulent scheme to defraud their principal forfeit their right to an indemnity in respect of transactions which form part of the fraud. Where the securities deposited by the principal with agents are fraudulently disposed of by the agents, their disposal of the deposited shares amounts to nothing short of conversion; and the principal on each occasion on which the shares were sold has vested in him a right to damages for conversion which would be measured by the value of the shares at the date of the conversion. Where not knowing of the conversion, the principal receives from the wrongdoer and has retained the very goods converted or their equivalent, he must give credit for the value of what he has received at the time he received it and the damages are reduced by this amount. A.I.R. 1938 P.C. 23=47 L.W. 73=177 Ind. Cas. 754 (P.C.).

——Duties and liabilities of agent — Commission agency—Agent, when can claim indemnity — His duty to account.

In a commission agency, it is the duty of the agent, before claiming an indemnity to account to his principal. This obligation of accounting can-

not be assigned. As long as accounts have not been stated between them, the agent cannot assign his claim against the principal. A.I.R. 1938 Cal. 377=62 C. 510=39 C.W.N. 606=164 Ind. Cas. 111 (2).

——Duties and liabilities of agent—Power-of attorney giving authority to act without instructions—Principal personally making journey to see things for himself—Agent's liability for expenses —Business obligation of agent.

Money entrusted with defendant for investment —Defendant investing it and giving loans through brokers — Business going on well but subsequently depression coming—Default by one of brokers in paying interest—Defendant informing plaintiff but expressing opinion that if time given, the broker would improve in position — Plaintiff agreeing — Situation getting worse — Insolvency of broker, just after plaintiff's instruction to defendant to sell defaulted scrip—Sale of shares resulting in loss—Plaintiff undertaking journey to defendant's place to know the real situation.

Held, that the fact that the motives of the defendants were untainted by fraud did not make their conduct anytheless a breach of their duty. Business duty and the statutory recognition of it both required of them that they should tell the plaintiff truly all the facts as to his affairs and they did not do so. In these circumstances it was not unnatural that the plaintiff failed through solicitors to unravel the facts as to his affairs and took the journey for the expenses of which the defendants were liable. Though the power-of-attorney gave the defendants authority to act without instructions; it did not relieve them from a business obligation enforced by statute to give to the plaintiff correct and timely information as to his affairs.

Held, however, that upon information given earlier and more adequately than it was given, the plaintiff would have done precisely what the defendants did and with the same result; all the more because the defendants would have been bound in duty to express their own opinion and upon the expression of that opinion that the plaintiff would have fallen in with a view which coincided with that which he formed for himself when he knew all the facts that mattered for a decision. The only thing to do was either to sell the shares against the brokers or to give time. The defendants did the latter and the plaintiff would have done the same if it had been left to him and consequently, the defendants were not liable for the loss resulting on the sale of shares. A.I.R. 1937 P.C. 314=1938 M.W.N. 156=171 Ind. Cas. 487 (P.C.).

——Duties and liabilities of agent—Agent dealing on his account without obtaining consent of principal — Whether constitutes misconduct.

It is misconduct on an agent's part to deal on his own account in the business of the agency without first obtaining the consent of his principal and aquainting him with all material circumstances which have come to his knowledge on the subject. (1937) 169 Ind. Cas. 827=41 C.W.N. 460=I. L.R. (1937) 1 Cal. 757.

——Duties and liabilities of agent—Attorney in conduct of litigation purchasing property in name of son.

If an attorny who is in charge of the conduct of the litigation can show that he is entitled to purchase, yet, if instead of openly purchasing he purchases in the name of his son without disclosing the fact, no such purchase as that can stand for a single moment.

And the attorney must be presumed to have known that the onus of supporting this transaction would rest upon him, and if he desires that it should be upheld, he must preserve the evidence which would be required to support it, so that the descendants of the attorney cannot plead that due to lapse of time, no such evidence could be produced. A.I.R. 1937 Oudh 87=1936 O.W.N. 1033=12 Luck. 435=164 Ind. Cas. 945.

——Duties and liabilities of agent—Right of third party to recover moneys from agent received to his use.

Even a third party has a right to sue to recover from an agent moneys had and received to his use. A.I.R. 1933 Sind 235=150 Ind. Cas. 483.

——Duties and liabilities of agent.

R, an agent, sued his employers P after he had left service to recover Rs. 100 being security deposited by him, P also sued R to recover Rs. 119 being the price money of books entrusted to him for sale and sold by him on credit.

Held, it was the duty of R to satisfy the employers that he had actually supplied the books to the persons mentioned by him and should have obtained their acknowledgments and till this was done he was not entitled to recover his security money.

Held: further that the suit of P should have been a suit for accounts. 31 P.L.R. 319=A.I.R. 1930 Lah. 794.

——Duties and liabilities of agent—Agent, insurer of goods made over to him—Validity of arrangement.

It is quite possible that an agent might make himself responsible for loss or damage to goods belonging to his principal. There is nothing in law which would prevent an agent undertaking to be an insurer of goods consigned to his care provided that there is consideration for that insurance and this consideration would have to be something outside the terms of the employment at the ordinary rate. A.I.R. 1930 Rang. 332.

——Duties and liabilities of agent—Property entrusted by principal to agent for principal's use——Agent cannot dispute principal's title.

As between principal and agent there is a contractual position forfeited by fiduciary relations, and one of contractual terms is that the agent should render an account to the principal of his dealings with the property entrusted to in the course of the mandate. This obligation cannot disappear except by transfer of the contractual right by novation or operation of law; and it subsists, notwithstanding that the property proves to belong to someone other than the principal. An agent therefore entrusted with money or goods by a principal to be applied on his (principal's) account cannot dispute the principal's title unless he proves a better title in a third person and unless he is defendinng on behalf of and with the authority of the third person. 115 Ind. Cas. 729=1929 A.L.J. 471=33 C.W.N. 609=10 Lah. 352=31 Bom. L.R. 762=49 C.L.J. 576=30 M.L.W. 21=1929 M.W.N. 449=56 I.A. 170=30 P.L.R. 484=A.I.R. 1929 P.C. 119=56 M.L.J. 799 (P.C.).

——Duties and liabilities of agent—Agent entering into understanding with third party — Agent must disclose such understanding to principal.

Where there is conflict between duty and interest, the servant or agent must disclose any understanding likely to result in gain to him, arrived at between the servant or agent and a third person who enters into a contract with the master or principal, otherwise such a secret bargain being a fraud on the master or principal will entitle him to rescind the contract with such third person. 119 Ind. Cas. 837=26 A.L.J. 1119=A.I.R. 1929 All. 87.

——Duties and liabilities of agent—Agent entrusted with principal's moneys—Agent making use of those moneys for other purposes—Agent's liability in respect of such money is that of trustee.

Per Coutts-Trotter, C.J.—In certain circumstances an agent may be placed in a position closely analogous to that of a trustee and the rules applicable to a trustee may then be applicable to him. The test is whether the agent is entrusted with funds of his principal for the purpose of their being employed in a particular manner, which it is his duty to keep distinct and separate from his own moneys. If he then makes use of them for any other purposes than those to which he has instructions to apply them, his liability is that of a trustee. If the terms upon which the agent receives the money are that he is bound to keep it separate either in a bank or elsewhere and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his **cestui que trust**. If, on the other hand, he is not bound to keep the money separate but is entitled to mix it with his own money and deal with it, as he pleases, and when called upon to hand over an equivalent sum of money, then he is not a trustee of the money but merely a debtor. 102 Ind. Cas. 561=1927 M.W.N. 118=38 M.L.T. 56=38 M.L.T. 256=A.I.R. 1927 Mad. 478.

——Duties and liabilities of agent—Agent getting advances for purchases — Balance of advance — Agent charged witn fraudulent transfer—Balance if a debt.

When a person, whose duty it is to purchase supplies as an agent on behalf of a principal and who is remunerated by a commission upon the price of the supplies, is given advances from which to purchase the supplies and pay cash for them, any balance of the advance in the hands of the agent cannot be considered as a debt due to the principal in such a matter as to convert the agent into a debtor and the principal into a creditor when the point for the decision is whether the agent, when he has made an endowment of his own property, has made such an endowment with the intention of defrauding his creditor. 102 Ind. Cas. 77=4 O.W.N. 360=A.I.R. 1927 Oudh 162.

——Duties and liabilities of agent—Agent contracting undisclosed principal — Third party may sue either.

Where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent or he may sue the principal; but if he sues the agent and recovers judgment he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt. 4 A.C. 504 and 3 H. & C. 977, Foll. 99 Ind. Cas. 742=1926 M.W.N. 832=4 O.W.N. 1=25 M.L.W. 163=A. I. R. 1926 P.C. 136 (P.C.).

——Duties and liabilities of agent—Architect employed for supervising building operations—English practice does not apply.

In India the work of the persons engaged to supervise a building is not to be measured by the standard applied to architects and engineers in England. The English practice does not obtain in India, except to a very small extent. In India the question of employee's liability for defects in the completed building has to be determined with reference to the relationship between him and his employer. 97 Ind. Cas. 200=43 C.L.J. 479=A.I.R. 1926 Cal. 988.

——Duties and liabilities of agent.

The common law rule that a debtor must seek out his creditor has no application to a case between principal and agent. A.I.R. 1924 All. 530 and 12 S.L.R. 93, Foll. 94 Ind. Cas. 287=A. I.R. 1926 Sind 238.

——Duties and liabilities of agent.

It cannot be laid down that in India a principal is entitled to recover the proceeds of a bet which has been received on his behalf by his agent; to permit him to do so would be to act in opposition to the dictates of public policy relating a betting transactions. 90 Ind. Cas. 59=52 Cal. 677=A. I.R. 1925 Cal. 1007.

——Duties and liabilities of agent—Agent in possession of funds of principal with direction to pay to creditor—Agent's liability to the creditor.

Where there are funds in the hands of an agent belonging to his principal and when his principal gives a mandate to the agent to deliver them in extinguishment of an obligation of the principal to a third party and when that mandate is communicated to the creditor, then there arises on the part of the agent an obligation on which apparently he can be sued both in law and equity—in law as on a contract and in equity as upon an implied assignment of such funds as there may be in his hands to satisfy **pro tanto** with those funds which he had in his hands the claim of the creditor. 9 M. & W. 411 and 9 Bing. 372, Foll. 75 Ind. Cas. 161=18 M.L.W. 674=A.I.R. 1923 Mad. 713=45 Mad.L.J. 83.

——Duties and liabilities of agent.

A commission agent is not liable to supply goods at a particular rate or otherwise than at the rate prevailing in the market at the time of supply. 64 Ind. Cas. 6=A.I.R. 1922 All. 400.

——Duties and liabilities of agent.

The plaintiff who was one of judgment-debtors under the decree asked the defendant his agent to take an assignment of the decree on his behalf and to execute the decree against the other judgment-debtors and the defendant realized in execution certain assets. By an agreement it was provided that the defendant will submit accounts to the plaintiff of the amount spent in collecting the money, and of the amount realized, and after deducting a commission of 20 per cent. pay over the balance to the plaintiff.

Held, that plaintiff could recover the money so realised from defendant. (1885) 15 Q.B.D. 363, Foll. 60 Ind. Cas. 127=44 Mad. 334=A.I.R.

1921 Mad. 334=12 M.L.W. 609=1920 M.W.N. 776=29 M.L.T. 59=39 M.L.J. 692.

——Duties and liabilities of agent.

Where the act done or to be done by the agent is imposed by law, the employer is not liable. 14 Bom.L.R. 654=16 Ind. Cas. 714.

——Duties and liabilities of agent—Agent's liability to account to principal—If divisible.

An agent's liability to his principal is to render an account of the sums received by him; the account is one and indivisible, and he cannot plead limitation as to any particular item as against his principal. 12 Bom.L.R. 951=8 Ind. Cas. 637.

——Duties and liabilities of agent—Payments made by agent—How proved—Moneys taken to pay illegal gratification must be accounted for.

When an agent's account is being taken items of payment alleged to have been made by him cannot be passed without a voucher or a clear account of the facts. An agent is bound to prove that moneys drawn by him for payment as illegal gratifications reached their destination. (1908) 13 C.W.N. 212=4 Ind. Cas. 556 (2).

——Duties and liabilities of agent — Accounts — Agent's liability—Extent—Limitation.

It is the duty of an agent to be constantly ready with his accounts, he must further be always ready to explain them and produce vouchers, and not only that, but also to be constantly ready to pay the money that may be found due by him. (1905) 32 C. 719=1 C.L.J. 232.

——Duties and liabilities of agent—Suit by landlord for illegal cesses collected by agent—Contract Act, Ss. 217 and 218.

A landlord's agent is liable to pay the landlord any sums collected by the agent from the tenants as Khurcha as illegal cesses, and a suit by a landlord for recovery of sums against his agent will lie. (1903) 7 C.W.N. 535=30 C. 1011.

——Duties and liabilities of agent—Profit made by an agent unknown to principal—How far such profit enures to principal's benefit. See CONTRACT ACT, S. 216. 4 Bom.L.R. 469=26 Bom. 689.

——Duties and liabilities of agent—Wagering contract—Suit by principal to recover from agent money received on account of wagering contract. See CONTRACT ACT, S. 30. 1903 A.W.N. 161=25 A. 639.

——Duties and liabilities of agent—Property purchased by agent claimed as principal's — Course —Taking of accounts.

Where property purchased by an agent is claimed by the principal on the ground that it was purchased with his funds, an account must be taken of the principal's money in the hands of the agent in order to see whether the principal's money in whole or in part has been utilised for the purchase. If, in the whole or in part, the purchase money belonged to the principal the property also should be declared wholly or in proportionate part to belong to the principal. (1901) 11 M.L.J. 149=5 C.W.N. 585=3 Bom.L.R. 311=23 A. 383=28 I.A. 111 (P.C.).

——Duties and liabilities of agent—Fraud of Agent — Judgment-debtor, fraud of — Auction purchase by such agent in sale brought about by his fraud—Principal's right to sue agent for benefit so derived by agent.

Where an agent of a judgment-debtor brings about a sale of the judgment-debtor's property by fraud and purchased the property the principal judgment-debtor has the right to sue the agent to give him the benefit of such purchases. 18 M. 436, foll. (1901) 6 C.W.N. 279.

6. Liability of heirs.

——Accounts — Legal representatives of deceased agent—Liability of—Remedy of principal.

It is well settled on principle that the liability of an agent is personal and the deceased agent's legal representative's cannot be required to render accounts in the same sense in which the agent himself might have been called upon to do. It is equally well-settled that the remedy of principal is to sue the representatives of the agent for any losses he may have suffered by reason of the negligence, misconduct, misfeasance or malfeasance of his agent; in other word's the suit is not one for accounts strictly so called but a suit for money payable by the representatives of the agent out of his assets in their hands. A suit for recovery of a specified sum of money does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. The sole foundation for a suit for account is the obligation to account and where that does not exist, the suit for money cannot be regarded as a suit for accounts. A.I.R. 1950 Dacca 13 (2).

——Liability of heirs — Accounts — Suit for—Death of agent pending suit—Right of principal to continue suit against his legal representatives—Manner of taking accounts.

Where a suit is brought by a principal against his agent for accounts and the agent dies during the course of the trial, the principal is entitled to continue the suit against the legal representatives of the deceased agent but the burden of proof would fall upon the principal in the first instance who must prove each item of the account which he claims. 47 Ind. Cas. 371 approved. 52 P.L.R. 182=A.I.R. 1950 E. P. 250.

——Liability of heirs — Accounts — Death of agent—Suit against legal representatives of agent —Maintainability—Burden of proof—Liability of representatives—Nature of.

A suit for accounts will lie against the legal representatives of a deceased agent after the death of the latter without rendering accounts, with this difference that unlike the agent, his representatives would not be personally liable and the burden of proof will be, unlike in the case of a suit against the agent when alive himself, will be on the plaintiff in the first instance. A.I.R. 1929 Lah. 362, foll. 54 Mys.H.C.R. 161.

——Liability of heirs — Suit against heirs of agent—Negligence of deceased.

Where a suit for accounts against the heirs of an agent was tried in the Courts below on the basis that the heirs were liable for the plaintiff's articles and sums realised by the agent but no question was raised in either of the Courts below as to the defendants' liability for the failure

of the deceased to collect sums due to the plaintiff:

Held, that an objection on the latter basis cannot be raised in second appeal. A.I.R. 1933 All. 73=140 Ind. Cas. 106.

——Liability of heirs — Death of agent—Legal representatives are liable to account to principal to the extent of agent's assets—Burden is on plaintiff's principal to prove each item claimed—Legal representative must place before Court all accounts in his possession.

The nature of an ordinary suit by the principal against his agent for rendition of accounts is well known. In such a suit the plaintiff has to prove in the first instance that the defendant is an accounting party. If the finding of the Court on this point is in favour of the plaintiff then a preliminary decree is immediately passed in favour and the burden of proof is placed upon the agent to show what amounts he has received and what disbursements he has made for and on behalf of the principal. And the final decree declares the amount, if any, which is found due to the plaintiff from the agent.

A suit for rendition of accounts, pure and simple, brought by the principal against his agent is a personal action in the sense that it is founded upon that trust and confidence which the principal has perforce to repose in his agent, and it is owing to this fiduciary relationship between the parties that the burden of proof is cast upon the defendant, the moment that it is established that he is the agent and accounting party. After the death of the agent different considerations arise. There is no relationship of trust and confidence between the principal and the legal representatives of the deceased agent although the estate of the agent, in the hands of his legal representative continues to be liable to the principal for any sum of money which the agent might have realized for the plaintiff and failed, to pay to the plaintiff to credit to account.

The legal representatives of a person, according to the maxim of the English law **"Actio personalis moritur cum persona,"** are not liable for a mere tort, but the case is different where they are sought to be made liable for the breach of a quasi-contract and where the claim is founded on breach of a fiduciary relation or on failure to perform a duty on the part of their predecessor. In other words, if the agent has misappropriated the moneys, which he had realized for and on behalf of his principal, without accounting for the amount during his lifetime, his legal representatives would be liable to make good the losses of the principal to the extent of the assets which they might have received from the deceased agent. They are not, however, personally liable for the declarations of their predecessor.

But after the death of the agent it would be extremely unjust to call upon his legal representatives to render an account in the same manner in which the agent would be liable if he were alive. Therefore the burden of proof should fall upon the plaintiff in the first instance who must prove each item of the amount which he claims. On the other hand, it is the duty of the legal representative to place before the Court all the accounts in his possession and power which the deceased agent might have prepared during the period of his agency. 117 Ind. Cas. 233=30 P. L.R. 298=11 L.L.J. 66=A.I.R. 1929 Lah. 362.

——Liability of heirs.

Unless the members of the agent's family knew that he was making improper and secret profits or otherwise abstracting the money of his principal and persuaded him or got him to send those moneys and use them for the benefit of the family they cannot be liable. 102 Ind. Cas. 551=1927 M.W.N. 118=38 M.L.T. 56=38 M.L.T. 256 =A.I.R. 1927 Mad. 478.

——Liability of heirs—Suit against agent's legal representatives for moneys received by agent and not accounted for and for moneys recoverable by him is maintainable.

Even as against the representatives of an agent the principal is entitled to a decree for sums actually due to him on account of the agent having received and failed to account for them and also for sums which he negligently failed to collect when it was his duty to collect. The only difference in substance between a suit for an account against an agent and the same suit against the agent's representatives will be that the burden of proof will be upon the plaintiff to establish his case. 17 C.W.N. 5 and 17 C.W.N. 695, Foll. 61 Ind. Cas. 530=44 Mad. 214=A.I.R. 1921 Mad. 407.

——Liability of heirs—Agent appointed by Administrator—Right of suit against agent or his representatives.

A was appointed administrator of an estate. He appointed **B** as agent to manage the estate. **C** who was the person ultimately entitled to the estate brought a suit against **B's** son, for an account of the agency.

Held, that the suit framed was not maintainable; also that the fact that **A** obtained letters of administration as agent of **C's** mother did not affect the matter. (1907) 30 M. 243=2 M.L.T. 326.

7. Measure of damages.

——Measure of damages—Agents converting goods wrongfully—The measure of damages is to depend on the circumstances of each case.

In determining the measure of damages for wrongful acts, there is no fixed rate to follow invariably. The consideration must depend upon the circumstances of each case. In the case of wrongful conversion of goods of ordinary merchandise by the agent, the highest market value on any day between the date of conversion and the date of verdict, is not always the proper measure of damages. Where the principal can repurchase the goods after getting information of the wrongful sale the market value of the goods on some subsequent day should be the measure of damages; of course reasonable time must be allowed to him for making the repurchase. 115 Ind. Cas. 153=29 M.L.W. 419=A.I.R. 1928 Mad. 1152=55 M.L.J. 586.

——Measure of damages — Pledge — Rights of pledgee to sell goods—Principal and agent—Agent for sale — Direction to sell only on instruction—Sale in contravention of direction—Loss—Agent's liability—Damages, measure of—Nominal and substantial—Acquiescence—Personal liability.

A contract of pledge will entitle the pledgee

to sell without instructions from the pledgor. But a contract creating only the relation of principal and agent and authorising the agent to sell the principal's goods for commission with the latter's instructions would not authorize the agent to sell in contravention of the principal's directions. A sale made by such agent in contravention of the principal's directions is wrongful and the principal will be entitled at least to nominal damages. The principal will also be entitled to recover substantial damages if he succeeds in proving the damages, i.e., such damages as would place the principal in the position in which he would have been if the agent had not wrongfully sold the goods. The principal is under no obligation to the agent to replace the goods wrongfully sold by the agent by entering into a speculative transaction to reduce the damages claimable from the agent. The measure of damages in such a case is the difference between the price the goods fetched at the agent's sale and that which the goods would have fetched at the time when the principal might reasonably be held to have been willing to sell. Where there is evidence of acquiescence on the part of other members, to a contract by the managing member, the persons so acquiescing will also be treated as contracting parties and will be personally liable on such contract. (1901) 12 M.L.J. 375.

8. Negligence.

——Negligence of agent — Liability for damages for loss caused to principal—Condition precedent to—Misconduct or disregard of instructions and direct connection between negligence and loss — Duty to principal to prove.

Although an agent may have been guilty of negligence or dereliction of duty, it does not necessarily follow that he is liable to make good to the principal all loss caused to the principal by such negligence, due to misappropriations by clerks and other subordinates. The principal must prove not only that the agent was negligent but also that his negligence caused or materially contributed to the loss by misappropriation. The injury must be capable of being traced as an effect to the negligent act or omission. The guiding principle is that a person is liable for all the consequences which in fact flow directly from his negligence. If it can be shown that a loss sustained by the principal is directly traceable to disregard on the part of the agent of directions issued to him regarding the conduct of business, even though such disregard may have been due to nothing worse than negligence, or over-confidence in the honesty of others, such misconduct on the part of an agent is clearly actionable. The principal must establish a direct connection between the negligence and all or of any of the items of loss due to misappropriation, because he can be entitled to damages. 46 All. 175, Foll. I.L.R. (1950) Cut. 174=A.I.R. 1950 Orissa 241.

——Negligence — Accounts of rent collected — Some rent becoming time-barred due to negligence of agent—Liability of agent.

A landlord brought a suit for accounts of rent of certain year against an agent engaged by him to collect rent from the tenants. The evidence showed that the agent had not properly collected rent and had not taken proper and necessary steps to recover the rent and that he was guilty of negligence. Due to agent's negligence, some of the rent due had become time-barred:

Held, that the landlord was entitled to recover from agent the rent which was not recovered owing to agent's negligence. A.I.R. 1939 Pat. 17=5 B.R. 328=180 Ind. Cas. 64.

——Negligence—Agent to keep proper check on accounts and cash balances—Agent putting implicit faith in subordinates—Fraud and defalcations by subordinates as result of agent's slackness—Liability of agent.

In an agreement between an agent and a company, it was provided "2. The agent shall keep proper books of account containing entries of all moneys received and paid and of all goods received or sold or delivered out by him on account of the company.... 3. The agent shall be responsible for all goods and moneys shall be received at the factory or factories of which he shall be in charge from time to time and in case of any deficiency which may be due directly or indirectly to his act, neglect, or default, shall forthwith pay to the company the selling prices of the goods and/or the amount of the moneys constituting the deficiency." The agent signed every month, the trial balances without checking them, as was his duty and certified them in the following words, "I have checked the balances on the trial balances as they appear in the ledger and have found them in accord. I have also checked and found correct the additions of the trial balances." These certificates were quite untrue. Similarly, he used to sign daily the cash book, without seeing that the amount in safe corresponded with amount shown as balance in the book; contrary to instructions, large sums were allowed to lie in the safe. There was no proper scrutiny, examination, check or precaution on the part of the agent who implicitly trusted his subordinates. The result was that the subordinates, taking advantage of the agent's slackness, committed gross frauds on him and the company. Had the agent been true to the instructions, he would certainly have detected the frauds and the defalcations:

Held, that the frauds and the defalcations being the result of the failure of the agent to perform his duties, he was liable for the negligence and breach of contract and frauds and defalcations resulting therefrom. A.I.R. 1937 P.C. 78=168 Ind. Cas. 494 (P.C.).

——Negligence — Agent for investment of moneys on securities—Omission to value security—Negligence—Principles of liability.

It is the duty of an agent who has been entrusted with the investment of moneys belonging to his principal to have a proper valuation made of the property upon the security of which the money is invested. If he chooses to rely mainly upon his own general knowledge of the value of lands in the locality, he does so at his own risk and if his judgment is shown to have been at fault, he will be liable for the loss which the principal might suffer as a result of the breach of duty. But before the agent is made liable for such breach of duty, it must be proved that the loss was the result of the agent's negligence.

Auction sales are no indication of the value of land and this must specially be applicable to a

forced sale under a mortgage decree.

If the security was adequate, the consideration that the agent was actuated more by a desire to meet the necessities of the mortgagor than by a regard for the interests of his principal is immaterial. A.I.R. 1932 P.C. 194=137 Ind. Cas. 531 =1932 Cr.C. 612 (P.C).

——**Negligence — Omission to comply with principal's instructions in taking out policy—Agent's liability to principal—Contract Act, S. 211.**

An agent who negligently omits to comply with the clear instructions of his principal must be regarded as guilty of gross negligence and whether he acts as gratuitous agent or not he is responsible to the principal for any loss caused by that negligence.

A joint Hindu family owned certain mills and in order to work the mills, entered into an arrangement with a Bank by which the Bank allowed them a cash credit up to Rs. 60,000 and took from them an equitable mortgage of the buildings and machinery of the said mills. By a clause in the agreement, the family undertook to insure the properties mortgaged for a sum of Rs. 40,000 and to assign and deposit the policy with the Bank if so required. Bank did not call upon the family to do so and the property was not insured for sometime. Subsequently, the manager of the family wrote to the Bank that he wanted to have his mills insured and the insurance was effected through the Bank. The total amount for which the policy was taken out was one lakh which included a charge on building, on machinery and on the stock of wheat and the policy was made so as to make the Bank the "assured" according to its terms. Subsequently, the mills were leased to a third person and the wheat and wheat products on the premises ceased to belong to the family. When the policy was again to expire, the manager of the family wrote to the Bank and the insurance company to renew the policy for one lac but as the wheat no longer belonged to him, he wanted the whole amount of one lakh to be made a charge on the building and machinery. The Bank replied that the company had been asked to renew the policy as instructed and the manager was later on informed that the policy was renewed and the policy was retained by the Bank. Subsequently, the mills caught fire and the building and the machinery was burnt. On investigation by the insurance company, it was found that the policy had been renewed on the old terms, i.e., the machinery and buildings were insured for Rs. 50,000 and the wheat and the wheat products for Rs. 50,000. The insurance company confined their payment to the loss incurred by the burning of the building and the machinery, and a sum of Rs. 46,985 was paid to the Bank which was the "assured." The manager of the family instituted a suit against the Bank claiming Rs. 52,000 on account of compensation for loss and damages due to the negligence of the Bank in connexion with the renewal of the policy:

Held, (i) that on the facts of the case the Bank acted in the matter as agent of the plaintiff and not as a mortgagee and was liable for the loss caused by its gross negligence in not carrying out the instructions of the principal irrespective of whether it was acting as a gratuitous agent or not;

(ii) had the plaintiff's instructions been duly carried out, the company would have paid, double the amount that was actually paid, and the Bank was, therefore, liable to pay the plaintiff to this extent. A.I.R. 1931 Lah. 302=134 Ind. Cas. 577.

——**Negligence — Neglect of duty by agent does not cease to be so by repetition.**

Neglect of duty does not cease by repetition to be neglect of duty and if there be any doctrine of lulling to sleep, it must depend upon and can only be another way of expressing estoppel or ratification. A.I.R. 1930 P.C. 278=128 Ind. Cas. 669 =60 M.L.J. 149 (P.C.).

——**Negligence.**

Principal appointing agent with knowledge of his qualifications—If agent acts like any other reasonable man of his qualifications he is not guilty of negligence. 94 Ind. Cas. 860=23 M. L.W. 476=A.I.R. 1926 Mad. 841.

——**Negligence — Servant is liable for negligent non-observance of instructions which led to loss.**

Where it can be shown that a loss sustained by the principal is directly traceable to disregard on the part of the agent of directions issued to him regarding the conduct of business, even though such disregard may have been due to nothing worse than negligence, or over-confidence in the honesty of others, such misconduct on the part of an agent is clearly actionable. 80 Ind. Cas. 241=46 All. 175=22 A.L.J. 26=5 L.R.A. Civ. 113=A.I.R. 1924 All. 467.

——**Negligence.**

An agent is not bound to seek the principal to pay the amount due to the principal as damages due from the agent on account of the agent's negligence. In this an agent differs from a debtor or from a purchaser. 76 Ind. Cas. 353=A.I.R. 1924 Sind 64.

——**Negligence of agent—Liability of agent—Liability for negligence.**

Where the plaintiffs alleged that they purchased goods and directed the defendant's to send them to a particular place and the goods were directed to other places on account of which they suffered loss and claimed damages from the defendants who placed that the goods were misdirected through the negligence of Railway officials.

Held, that the ownership of the goods rested in the plaintiffs from the date of purchase and the defendants became their agents from that date.

Held, further that the defendants in contracting with a Railway contracted as agents of the plaintiff irrespective of the fact whether they did or did not disclose the names of their principals and that they could only be held to be liable to pay damages if negligence was brought home to them. 7 A.L.J. 732=7 Ind. Cas. 287.

——**Negligence of—Agent — Damages.**

A defendant with special skill when employed for reward by the plaintiff is bound to exercise his skill in the execution of the duties entrusted to him and ought not to rely on the statement of others. (1908) 13 C.W.N. 59=1 Ind. Cas. 351.

——Neglect of agent—Suit for compensation—No duty of agent to seek out principal for payment. —Forum. **See** C. P. CODE S. 20. 27 M. 355.

9. Pakka Arhtia.

——Pucca Arhtia — Relationship between him and constituent—Main incidents—Suit for accounts by constituent against him—If lies.

The main incidents of the relationship between an up-country constituent and the Pucca Arhtia may be summarised as follows:—(1) A Pucca Arhtia is an agent employed for reward but he is an agent of a special type, the ordinary incidents of agency having, in their application to the Pucca Arhtia, been considerably modified by custom or usage of the market as hereinbelow stated; (2) An ordinary agent has to carry out the principal's mandate for purchase or sale by actually entering into contracts with third parties so as to bring about privity of contract between the principal and the third parties. A Pucca Arhtia, however, has no authority to pledge the credit of the constituent to third parties or to enter into contracts with third parties in the name of the constituent or to establish any pri ity between the constituent and the third parties but may carry out the mandate of the constituent by allocating the contract to himself as the principal. In other words, the Pucca Arhtia himself buys from the constituent or sells his own goods to the constituent, which an ordinary agent cannot ordinarily do; (3) When a Pucca Arhtia under instructions of the constituent puts through a contract, in such contract the constituent and the Pucca Arhtia with respect to contracting parties as principals and a new relationship as between principals arises between the constituent and the Pucca Arhtia with respect to the individual contracts so concluded, (4) A Pucca Arhtia may or may not cover himself by entering into contracts with third parties but if he does, he does so entirely on his own account and no privity is established between the constituent and the third parties and the constituent has no concern with such covering contracts with third parties and cannot call upon the Pucca Arhtia to account for those contracts. The profits or losses arising out of these covering contracts with third parties are entirely the concern of the Pucca Arhtia; (5) The Pucca Arhtia is under no obligation to substitute a fresh contract to meet the order of his constituent; (6) The Pucca Arhtia stands in a dual relationship with the constituent, namely; he is an agent for the purpose of quoting market prices and putting through contracts under instructions of his constituent, although he may allocate the contract to himself and he is also a principal with respect to the contract he as agent actually concludes with himself. The two distinct relationships subsist side by side; (7) An ordinary agent has to show to his principal how he has carried out the latter's instructions for purchase or sale by disclosing the names of the purchasers or sellers and the particulars of the rates, etc., at which the goods were purchased or sold and strictly to account for the profit, if any, made by the agent in course of the principal's business, but a Pucca Arhtia not being bound to enter into any contract with third parties is absolved from liability to account on the stringent footing like an ordinary agent and is indeed not liable to disclose his covering contracts or to account for the profits or loss made by him out of those covering contracts. The Pucca Arhtia nevertheless has all the ordinary duties of an agent in so far as they are not specially abrogated by custom or usage of the market. Thus he has to give correct quotations of the market rates, put through contracts under orders of the constituent although he may make the contract with himself as a principal, to inform the constituent as to whether he has carried out the instructions, submit accounts showing the results of the cross contracts, the amounts due by or to the Constituent the amounts received from or paid to the constituent and to remit the balance, if any, to the constituent. In short, although the Pucca Arhtia is absolved from the liability to account for the covering contracts and the profits or loss made thereout, there is no reason to hold that he is not liable to render ordinary accounts showing what contracts he as agent made with himself as principal, and at what rates, how the contracts so concluded have been performed or squared up by cross-contracts, the moneys received or paid to the constituent and the net amount due by or to the constituent. It follows therefore that a suit for accounts within the limitations indicated above will lie against the Pucca Arhtia at the instance of the constituent. Further, a suit for account is not necessarily confined between a principal and agent. Wherever it is necessary in order to ascertain the amount of money due to the plaintiff, he may ask the Court to pass a preliminary decree for accounts to be taken by or under the supervision of the Court. (See O. 21, R. 16, C. P. Code.) A.I.R. 1950 E.P. 92=52 P.L.R. 31 (F.B.).

——Pucca arhtia and constituent—Nature of relationship—Constituent's right to demand accounts.

Where an order has been given and accepted, the constituent and **pucca arhtia** stand to one another in another in the relation of principals, and there is no relationship of principal and agent such as would justify a demand by the constituent of an account. The only claim which can be made by a constituent against a **pucca arhtia** is for a liquidated sum. 49 P.L.R. 222=A.I.R. 1948 Lah. 14.

——Pucca Arhtia—Rights and liabilities—Right to recover loss.

The main characteristic of **pucca arhtia** is that he unlike a **kachha arhtia** acts as a principal in relation both to his constituent and to the opposite party with whom he deals on the instructions of his constituent. He is very like an ordinary 'del credere' agent. A **pucca arhtia** on receiving an order from a constituent can allocate that order to himself or enter into a contract of sale or purchase in his own name and on his credit with the opposite party. He has a right in exercise of his own discretion to keep the contract outstanding till due date or to cover it with a cross-contract. When a **pucca arhtia** receives a second order from the constituent to enter into a cross contract to cover his first order the **pucca arhtia** is not bound to carry out the second order, and what he is bound to do is to inform the contituent so that he may put through his order through some other **pucca arhtia**. The **pucca arhtia** is entitled to recover from his constituent the amount of loss suffered irrespective of whether he paid the same to the opposite party or not on account of the important position held by a **pucca arhtia** and as

his personal credit is involved in dealings, he has a certain amount of discretion left to him in carrying through the transactions and in acting in a manner so as to minimise the liability for loss. He cannot therefore be held liable for every variation with the orders of his constituent. I.L.R. (1948) Nag. 409=A. I. R. 1948 Nag. 173=1948 N.L.J. 164.

——Pucca arhtia—Incidents—Liabili.y to account.

The **Pucca arhtia** is a creation not of law but of custom in commercial world. The incident of a **pucca arhtia** is a question of fact and depends upon the proof of custom prevailing at a particular time and in a particular market. But such incidents based on custom would be subject to an express agreement between the pa.ties. The relationship of a constituent and a **pucca arhtia** is not purely of a buyer and a seller. It is not purely of a principal and agent. It is a mixtu·e of the two and the predominance of one or the other character depends on the pleadings and the evidence in a particular case. There is a difference between a **pucca arhtia** and an ordinary agent or a **kachha arhtia**. A **pucca arh.ia** does for certain purposes act as a principal in relation to his constituent and he also acts as a principal in carrying through the orders of his constituent. This does not however in every case absolve the **pucca arhtia** from the liability to account. This would depend upon the particular character in which he acted and on the terms of his employment. 1947 N.L.J. 533.

——Kachha arhtia—Position of—Nagpur.

Under the system in vogue in Nagpur, a **kachha arhtia** places himself in a position of an agent for an undisclosed principal in relation to the opposite party with whom forward deli.ery contracts are entered into for the constituent, and renders himself liable to the opposite party for payment of the amounts found due on those transactions. I.L.R. (1947) Nag. 45=228 Ind. Cas. 519=1947 N.L.J. 15=A.I.R. 1947 Nag. 157.

——Pakka arhatia—He is agent of his constituent only for purposes of ascertaining and quoting prices.

A **pucca adatia** is an agent of his constituent only up to a certain point. For the purposes of ascertaining and quoting the price, the **pucca adatia** is an agent of his constituent but after the price has been ascertained and a transaction takes pla·e, the **pucca adatia** ceases to be an agent and assumes towards his up-country constituent, the character of a principal and the transaction must be regarded as a contra·t between principal and principal. There is no privity between the constituent and the third party with whom the **pucca adatia** deals. Where, under the terms of the contract, the constituent cannot be brought into contractual relation with the third parties with whom the **pucca adatia** deals, both the constituent and the third parties look to the **pucca adatia** as a principal.

Held, that there being cross contracts between the parties, there was no dispute to refer to arbitration. A.I.R. 1942 Sind 115=I.L.R. (1942) Kar 38=201 Ind. Cas. 513.

——Pucca Arhatia — Duties of pacca arhatia—Contract between him and constituent — Nature of.

A **pacca arhatia** is an agent of his constituent only up to a certain point. It is the duty of the **pacca arhatia** to give a correct quotation of the price, and for the purposes of quoting the price, the **pacca arhatia** is an agent of his constituent. If, however, the rate quoted by the **pucca arhatia** is not incorrect and a transaction takes place between the **pacca arhatia** and the constituent, the transaction must be regarded as a contract between a principal and a principal. In the case of a **pacca arhatia** there is no privity between the constituent and the third party with whom a **pacca arhatia** deals. The **pacca arhatia** can make contracts with such parties or not as he pleases. If he makes contracts he can cancel them just as it suits him. The **pucca arhatia** can cover himself by contract with the third parties.; he can deal with the covering contract as he pleases and sell back the goods if it suits him. There is an absolutely distinct dividing line between the dealings as between the **arhatia** and his constituent on the one hand, and his covering dealings, if any, on the other. A.I.R. 1937 Lah. 389=39 P.L.R. 723=173 Ind. Cas. 444.

——Pucca Arhatia — Position of.

In the business of commission agency known as the **pakka arhat** system, the posit on of **pakka arhatia** is analogous to that of a **del credere** agent who incurs only a secondary liability towards the principal, and whose legal position is pa·tly that of an insurer and partly that of a surety for the parties with whom he deals to the extent of any default by reason of any insolvency or something equivalent.

In the case transactions entered into on the **pakka arhat** system, a custom or usage that entitles the commission agent to protect himself from loss in the event of the failure of the contracting party to insure him against the loss is neither unreasonable nor immoral. There is direct contractual relationship between the **pakka arhatia** and the purchaser and the seller and he as principal, is liable to both for the performance of the contract. The failure of a purchaser, who has entered into a forward contract for the purchase of some commodity through a **pakka arhatia**, to take delivery on due date does not exonerate the **arhatia** from the liability to take delivery from the seller in pursuance of the forward contract. It follows that a **pakka arhatia** is himself **vitally** interested in the performance of the contract that has been entered into through him and a custom that provides means to insure the **arhatia** against prospective loss cannot be characterized as unreasonable or immoral. On the contrary, such a custom is calculated to check reckless speculation and to promote fair dealing and the transaction of business on honest lines, and as such, is reasonable and salutary. A.I.R. 1935 All. 1004=1936 A.L.J. 475=1935 A.W.R. 1185 =150 Ind. Cas. 984.

——Pucca Arhatia — In pakki adat, loss of one is gain of another.

In **pakki adat** contracts, it must always inevitably be true that the transaction is one in which the loss of one party is the gain of the other. Every anna which the seller gains may be an anna lost by his principal, and every profit made by the principal must, in like manner, come out of the pocket of the agent. A.I.R. 1935 Sind 38=160 **Ind. Cas. 6.**

——Pucca Arhatia.

The words 'pakki adat' have no magical efficacy in themselves. They are no more than a compendious description of a body of local usage which vary from market to market. A.I.R. 1935 Sind 38=160 Ind. Cas. 6.

——Pucca arhatia—Teji-mandi transaction—Right of commission agent—Margin money.

A pakka adatia is entitled to demand margin money before he enters into any transaction, whether an independent transaction or a transaction by way of a covering transaction.

The right of a commission agent to demand margin money unless there is a specific agreement to the contrary depends in the ordinary course not only on the fluctuations in the rates of the commodity but also in the rates of the premium.

There are three courses open to a commission agent to secure the payment of the full amount of the premium. He can insist on payment of the whole premium in advance, or he can take security for payment on the due date, or he can demand margin against the fluctuations on the rates of premium. If he does not adopt either of the first two courses, he is entitled to call upon the constituent to pay sufficient margin so as to secure the payment of the whole of the moneys which may be due to him on the due date including the premium and in default of payment, to close the outstanding transaction. A.I.R. 1932 Bom. 328=34 Bom.L.R. 709=138 Ind. Cas. 244.

——Pacca artia, nature and incidents of—Agent's personal liability — Reasonableness and binding nature of such contracts—Transactions of sale in khatlis, nature of.

Transactions of sale and purchase in khatlis at Shamli are in the nature of forward contracts in grain which is stored in khatlis or pits and is ready for delivery between Jeth Badi 2 and Jeth Sudi 15 in each year.

The position of a pacca artia is not that of an ordinary agent who merely brings about a transaction between third parties. He becomes personally responsible and both the buyer as well as the seller look to him alone for the fulfilment of their contract. If the original seller fails to fulfil the contract, the pacca artia is bound to find the goods and give delivery or pay damages. If the buyer fails to take delivery, the pacca artia can claim damages from him.

The usage of pacca arat is not unreasonable and does not involve a conflict between the pacca artia's interest and duty.

Even if the usage does involve some conflict between the agent's duty and interest, that is no reason why parties who have entered into such contracts with full knowledge of the usage should not be held to be bound thereby. A.I.R. 1932 Lah. 633=33 P.L.R. 985=139 Ind. Cas. 637.

——Pucca arhatia—Liability as guarantor.

A pucca arhti undertakes to guarantee the performance of the contract. (1931) 134 Ind. Cas. 489=32 P.L.R. 380.

——Pakka Adatia—Calling for margin—Onus as to proof of circumstances.

In accordance with the ordinary practice in Bombay, the pakka adatias would be entitled to call for margin, if the rise or fall in the market justified a demand for margin. But the onus clearly lies on them to establish that circumstances arose which justified the exercise of their powers. Even where the contract purports to give an agent an absolute discretion as to calling for margin, it is yet incumbent on him to show that circumstances exist for the reasonable exercise of that discretion. A.I.R. 1925 P.C. 510, Foll. 100 Ind. Cas. 993=29 Bom.L.R. 147=A.I.R. 1927 Bom. 125.

——Pacca adatia—Liability of adatia.

The position of a pakka adatia is analogous to that of del credere agent, who incurs only a secondary liability towards the principal. His legal position is partly that of an insurer and partly that of a surety for the parties with whom he deals to the extent of any default by reason of any insolvency or something equivalent. His liability does not go to the extent of making him responsible to the principal where there can be no profit by reason of any stringency in the market. 105 Ind. Cas. 739=26 A.L.J. 81=A.I.R. 1927 All. 617.

——Pucca adatia—Relation.

Relationship between pakka adatias and their constituents is not one of principal and agent, but of principal and principal. 75 Ind. Cas. 906=A.I.R. 1923 Nag. 324.

——Pakka adatia—Duty of—Marwaris.

Among Marwaris doing forward business, the Pakka Adatia is not bound to find buyers and sellers. As between him and his client the business is finished when an order for purchase or sale is accepted. The sellig client cannot claim as of right the benefit of any covering contracts entered into by the Pakka Adatia on the same day as the sales, there being no privity between him and the opposite contracting parties. The legal relationship between the client and Adatia is that of vendor and purchaser. 15 Bom.L.R. 750=20 Ind. Cas. 882.

——Pucca Adatia—Pakhi adat—Up-country constituent—Rights of the Pakha adatia.

According to the custom of trade in Bombay the following incidents attach to the pakhi adat system:—(1) A pakhi adati can allocate an up-country constituent's order to himself without the knowledge, consent or permission of the constituent. This may be called the right of allocation in the first instance. (2) A pakha adatia receives an order to buy or sell. Accordingly he enters into a contract with a Bombay merchant. Subsequently, but before the due date, the pakha adatia enters into a cross-contract with the same merchant on his own account and either squares the original contract or keeps the two contracts open till due date. He is entitled to do that, and yet keep the order of the first constituent open till the due date so as to hold the said constituent bound on that date to deliver or take delivery as the case may be. (3) In the case put in above, (No. 2) instead of entering into the cross-contract on his own account the pakha adatia can enter into it on behalf of another constituent. The same result follows. When a pakha adatia receives a second order from his constituent to enter into a cross-contract and cover his first order against due date, the pakh adatia is not bound to carry out the second order in case owing to loss of credit he is unable to do so, and all that he is bound to do is to inform the constituent accordingly so as to enable the latter to put through his order through

some other pakka adatia. 7 Bom.L. R 57. [Affirmed on appeal 7 Bom.L.R. 611=30 Bom. 205.]

10. Place of accounting.

——Place of accounting.

Accounts by a commission agent are to be rendered either at the place where the agreement of agency was made, or at the place where the agency agreement was to be performed, or at the place where in performance of the agreement, payment has to be made.

In the absence of a specific agreement both the accounting and payment by a commission agent must be made in the place where the business of the agency was transacted. A.I.R. 1932 Bom. 42=33 Bom.L.R. 1364=135 Ind. Cas. 170.

——Place of accounting.

In absence of a contract to the contrary the accounting and payment of an agent must be necessarily done where all the business is transacted. A.I.R. 1924 All. 530, Foll. 94 Ind. Cas. 287= A.I.R. 1926 Sind 238.

——Place of accounting — Pakka Adhatia as an agent has to render account at the place where business is transacted and not at the place where principal resides.

Pakka adhatia probably corresponding to what is known in England as del credere agent, that is to say, an agent or factor, who being entrusted with the goods of nis principal to dispose of to the best advantage, is in lawful possession of them with a general power to deal with them without reference to his principal but guaranteeing the solvency of the sub-purchasers, and while entitled to charge against his principal his expenses and entitled also to an indemnity from his principal against all losses resulting from carrying out his duty, is under an obligation to pay to his principal the amount due after the accounts have been properly settled. Unless the contract clearly indicates the contrary, pakka adatia becomes a factor entrusted with goods of his principal with wide powers and has no doubt under the appropriate section of the Contract Act eventually to account to his principal, but the accounting must necessarily be done at the place where all the business is transacted. 8 A.L.J. 1160, Foll. 80 Ind. Cas. 661=46 All. 465=22 A.L.J. 591=6 L.R. A. (Civ.) 9=A.I.R. 1924 All. 530.

11. Powers and rights of agent.

——Powers and rights of agent—Agent's right of action—Conditions—Agent having interest in subject-matter and mere local agent—Distinction.

An agent who has some interest in the property —may be a qualified interest—can maintain an action to protect that interest. But a mere local agent who has no interest which is valid in law is not entitled to maintain an action on the contract in the place of the principal. A.I.R. 1950 Pat. 222=31 P.L.T. 100.

——Powers and rights of agent — Commission agent—Right to sue in own name—Agent engaged to ship cargo on boats and authorised to effect insurance — Agent insuring goods and taking out policy and paying premia, freight and incurring costs and expenses—Loss of goods—Right of agent to sue in own name for damages under policy.

Although an agent acting merely as such and taking out a policy of marine insurance in his own name would not be entitled to sue on the policy, since by no stretch of imagination can be said to have an insurable interest in the goods which he insures with the insurers, where, however a commission agent, employed to forward cargo by boat, is given authority by the principal to effect an insurance in his name, and agent not merely carries out the instructions of the principals to him but incurs further liabilities as commission agent or bailee in respect of the goods entrusted to him by the principal and incurs costs, charges and expenses, such as freight and insurance premia; in connection with the same, he would, by reason of the agents' lien or bailee's lien on these goods, be entitled to recover as against and from the goods and he cannot in such a case be said to have an insurble interest in the goods in respect of which he has effected the policy of insurance. If nothing more, he has an insurable interest in the goods to the extent of such expenses. He would, therefore, be entitled to sue for recovery, of the insurance amount in case of loss of goods at sea. 52 Bom.L.R. 703.

——Powers and rights of agent — Agent cannot ordinarily sue principal for accounts, though accounts are complicated — Necessity to investigate accounts does not alter nature of suit.

An agent is not ordinarily entitled to institute a suit for accounts against his principal. His suit must be for the recovery of the specific amount alleged to be due to him from the principal. The mere fact that the accounts are complicated would not entitle him to sue for rendition of accounts for which a principal is not legally liable, but it is open to the agent to serve interrogatories on the principal or to apply for discovery and inspection of his accounts. Similarly, the mere fact that in ascertaining the sum due to the agent it would be necessary to investigate accounts, does not in any way alter the nature of a suit brought by the agent against his principal. A.I.R. 1946 All. 489=1946 A.W.R. (H.C.) 619=224 Ind. Cas. 273.

——Powers and rights of agent—Agent's authority to negotiate and complete sale for specified price within particular time — Power of agent to conclude binding contract of sale. I.L.R. (1946) Mad. 465=1945 M.W.N. 632=58 M.L.W. 520 =A.I.R. 1946 Mad. 42=(1945) 2 M.L.J. 363.

——Powers and rights of agent—Life Assurance Company — Chief Agent — Agency terminated—Right of agent to commission on future premiums of assured introduced by him.

A life assurance company appointed **D** as its chief agent for Gujrat. **D** was allowed to work in name of **D** and **Co.**, with certain others as partners. On **D's** death, his sons the plaistiffs, were recognised as partners of **D** and **Co.** by the company. The chief agents had to appoint sub-agents and canvassers to supervise over them, and to see that they secured as much work as possible for the life assurance company; that renewal premiums were paid regularly and that the life policies once effected were duly kept alive. The company having terminated the chief agency by

notice,, the plaintiffs claimed that they were entitled, even after the termination of the agency, to commission on renewal premiums on all policies effected by them and reliance was placed on the terms of the contract, of agency the relevant portions of which were as follows: "the premiums of persons assured through my agency (plaintiffs') should be always subject to my commission so long as they remained within the province of Gujrat whether the premiums be remitted through my office or direct." Particular emphasis was laid on the word 'always." It was further contended that even if there was no definite agreement to pay commission after termination of agency, the plaintiffs were entitled to commission as an implied term of the agreement:

Held, (per **Stone, C.J.**) that in the absence of a definite agreement, the commission payable to the agent by his principal ceased on the termination of the agency especially so if the payment was for services, for when the services ceased, the commission ceased also. The terms relied upon did not constitute a definite agreement to pay commission after termination of agency.

(Per **Kania, J.**)—As it was necessary for the plaintiffs to do work in respect of the renewal premia, there could not be an implied agreement to pay commission on such renewal premia after the termination of the agency. Nor could the plaintiffs claim the commission on the renewal premiums on the basis of a definite agreement as no such agreement could be spelt out of the terms of the contract of agency relied upon by the plaintiffs. A.I.R. 1944 Bom. 166=46 Bom.L.R 279=I.L.R. (1944) Bom. 637=214 Ind. Cas. 305.

——Powers and rights of agent — Commission agent—Broker employed by seller introducing seller to prospective buyer — Contracts resulting from introduction — Remuneration of broker.

A broker who is employed by a seller to introduce him to prospective buyer is entitled to be paid whatever is in the circumstances the usual commission on all contracts resulting from that introduction. It may be a question whether a particular contract results from the introduction or not. Once the parties have, as a result of the introduction, been brought into business relationship by means of a contract then entered into, it may well be that a subsequent contract carries no commission for the broker because the subsequent contract is the fruit, not of the introduction, but of the satisfactory business relationship which the introduction established. [Second contract, held resulted from introduction.] A.I.R. 1943 P.C. 159=(1943) 2 M.L.J. 405=48 C.W.N. 1=10 B.R. 139=1943 A.L.J. 580=56 L.W. 766=46 Bom.L.R. 316=1943 A.W.R. 71=I.L.R. (1943) Kar. (P.C.) 109 Sup.=79 C.L.J. 49=209 Ind. Cas. 132 (P.C.).

——Powers and rights of agent — Commission auctioneer — Principle governing right to commission, stated.

Primarily, the right to commission arises under a contract between the auctioneer and the seller and the primary liability to pay this amount is on the seller and even if the auctioneer has a lien on the deposit with regard to his commission, the lien ordinarily is enforceable against a deposit when the deposit becomes the property of the seller. In certain circumstances, on equitable considerations, it may be possible to allow an auctioneer to recover his commission from the deposit even against the purchaser. But the right to claim commission may be lost by the auctioneer's negligence or misconduct:

Held, on facts that auctioneer was neither entitled to costs of the suit nor to commission. A.I.R. 1942 All. 90 (2)=1941 A.L.J. 756=1941 A.W.R. 365=199 Ind. Cas. 302.

——Powers and rights of agent.

Agent cannot enter into transaction in which his personal interest is in conflict with his duty towards his principal—**A** holding general power-of-attorney from **B** agreeing to sell to **C**, agent of **D** certain tons of sandalwood out of estates belonging to his principal—**C** paying Rs. 8,700 by way of advance to **A**—Rs. 5,000 in cash and balance of Rs. 3,700 that was due by **A** to **D** was taken into account towards advance—Suit by **D** for refund of advance:

Held, that **A,** in absence of specific authority; could not accept money which he owed to **D** by way of advance on behalf of **B**.

Held, further that **B** was liable for money actually paid by **C** to **A** as advance; that the question of **C's** authority to enter into contract had no relevancy on question of refund though it would be material on question of plaintiff's liability to pay damages for breach. A.I.R. 1942 Mad. 634=1942 M.W.N. 644=55 L.W. 446=I.L.R. (1942) Mad. 775=(1942) 2 M.L.J. 636=208 Ind. Cas. 198.

——Powers and rights of agent—Case of movable property — Authority to sell goods carries with it authority to receive price — Immovable property.

Cases of movable property must be decided on entirely different considerations. Section 27, Sale of Goods Act, only provides that a person cannot validly sell the goods belonging to another unless he had authority to do so (or where authority could not be disputed by the owner on account of his conduct) and does not separate the power of sale from the power of authority to receive the price. The authority to sell goods is assumed to carry with it the authority to receive the price.

The power-of attorney executed by the principal in favour of his agent ran as follows: "You shall cut the sandalwood trees in the under-mentioned two estates by employing coolies, sell them according to your like, pay the wages, etc. to the coolies, maintain ledger and day book accounts in respect of sale, deliver them to me with particulars. You shall yourself sign on my behalf in the forest Government order, permit, etc.; in the undermentioned two estates from this date".

Held; that the power to sell the wood in the circumstances contained in the power of attorney would include the authority to agree to sell the wood that was not ready for delivery and had to be cut, dried and cleaned later on.

Held, also that there was nothing in the power of attorney which might even suggest that the agent's powers were in any way limited as long as he was exercising the authority given to him under the power-of-attorney and that the authority

to sell the trees included the power to receive their price, large or small.

An agent having an authority to sell must not only be taken to have authority to do every lawful thing which is necessary to affect a sale but also what is usually done in the course of conducting a sale. And the receipt of the value or the price of the property sold by the agent must be regarded to be what is usually done in the course of conducting a sale. "Sale," as defined in T.P. Act, is a transfer of ownership in exchange for a price. The authority to sell immovable property and convey the same to the purchaser would, therefore, carry with it the power to receive the price. A.I.R. 1942 Mad. 634=55 L.W. 446=1942 M.W.N. 644=I.L.R. (1942) Mad. 775=(1942) 2 M.L.J. 636=208 Ind. Cas. 198.

——Powers and rights of agent—Agent let into possession on behalf of principal--If can challenge title of principal to receive money realised by him.

Where a person is let into possession as an agent on behalf of the landlord for realising moneys from the tenants, it is not open to him to challenge the title of the landlord to receive the moneys which were realised by him. A.I.R. 1942 Pat. 108=8 B.R. 67=196 Ind. Cas. 641.

——Powers and rights of agent — Contract by agent—Agent can enter into contract on the basis of his own liability.

An agent can enter into a contract on the basis that he is himself to be liable to perform it as well as his principal. Where a commission entered to an agreement on the express terms that it was to be liable for its fulfilment, its liability in the first instance would not be affected by the fact that the Commission is expressed to be acting "on its own behalf as well as on behalf of and with the approval of the Government." A.I.R. 1941 P.C. 114=8 B.R. 197=1941 A.W.R. 76=197 Ind. Cas. 186 (P.C.).

——Powers and rights of agent — Authority to adjust matters — Whether includes power to refer to arbitration.

Where a power-of-attorney authorises the agent to adjust a matter, the power does not include a power to refer the matter to arbitration on the principle underlying the maxim **delegata potestas non potest delegari**. A.I.R. 1940 Mad. 650=1940 M.W.N. 191=194 Ind. Cas. 826.

——Powers and rights of agent—Power-of-attorney — Construction — Power to assign decree passed in favour of principal.

A power-of-attorney executed by a company in favour of an agent authorized him "to ask, demand; sue for, recover and receive moneys debts goods, chattels, effects, interest, dividends or other sums to which the company was entitled." It further authorized him upon non-payment to institute legal proceedings or "to resort to any other procedure allowed by the law for recovering and enforcing the payment." It was contended that the words "to resort.....payment" authorized the agent to assign a decree passed in favour of the company:

Held, that the words did not constitute any such authority. They were to be read in conjunction with the power given to institute proceedings to recover moneys due to the company. A.I.R. 1939 Mad. 543=49 L.W. 375=1939 M.W.N. 290=188 Ind. Cas. 878.

——Powers and rights of agent — Commission agent, collecting old outstandings independently of any agreement.

The collection of the outstandings is certainly a part of the firm business and where salary chit fixes the remuneration of the agent and requires him to carry on the firm business according to the directions of the principal, the agent cannot refuse to collect them, if required. He is bound to collect them if required by the principal and independently of any agreement or custom, the agent is not entitled to some commission for collecting old outstandings. A.I.R. 1938 Mad. 725=1938 M.W.N. 576=(1938) 2 M.L.J. 79=48 L.W. 237=179 Ind. Cas. 225.

——Powers and rights of agent — Commission—'Samans' — Payment of share of profits as 'samans' is recognised.

It is customary among **Nattukottai Chetties** to pay 10 per cent. of the net profits to the foreign agents as **'samans'** and the custom has been recognised by the Madras High Court. A.I.R. 1938 Mad. 725=1938 M.W.N. 576=(1938) 2 M.L.J. 79=48 L.W. 237=179 Ind. Cas. 225.

——Powers and rights of agent—Delegation of power by agent—Limit of.

The maxim **delegatus non potest delegare** is clear and debars an agent from delegating his powers beyond the limit prescribed by the principal. A.I.R. 1938 Pesh. 63=177 Ind. Cas. 872.

——Powers and rights of agent—Remuneration.

An agent may get remuneration from his principal, though he cannot make profits as against his principal. A.I.R. 1938 Rang. 71=176 Ind. Cas. 909.

——Powers and rights of agent—Undisclosed principal — Agent's right — Whether can claim as trustee.

Where a broker conducts his brokerage business through the defendants and when his clients give him orders, he gives the necessary instructions to the defendants in his own name not disclosing the name of his clients the supposed agent's rights would be to recover the damage suffered by him on the footing that he had been principal. He has no claim against the other party in the capacity of trustee and such an agent cannot sue as trustee for his principals. What happens to the proceeds of a successul claim by such an agent is another matter. By virtue of his fiduciary relation to his principals, he may have to account to them for what he receives but this is not the concern of the other party. 169 Ind. Cas. 554=45 L.W. 65=1937 M.W.N. 1 (P.C.).

——Powers and rights of agent — Commission.

Where the remuneration of the agent was for the definite undertaking given by him that he would bring about a purchaser willing to purchase the property of the defendant, the mere fact that the transaction fell through—it is of no consequence even if it fell through on account of the default of the purchaser—would not disentitle the agent from claiming the remuneration when it is clear that the contract did not fall through in consequence of any act or default of the agent.

A.I.R. 1937 All. 46=1936 A.W.R. 1031=1936 A.L.J. 1163=166 Ind. Cas. 631.

——Powers and rights of agent—Remuneration—When becomes due.

Where a remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the transaction in respect of which the remuneration is claimed falls through provided that it does not fall through in consequence of any act or default of the agent. A.I.R. 1937 All. 46=1936 A.W.R. 1031=1936 A.L.J. 1163=166 Ind. Cas. 631.

——Powers and rights of agent—Agent carrying on export and import of goods—Power to borrow.

A power-of-attorney is to be construed strictly, that is to say, where a particular act is alleged to have been done under a power-of-attorney and that allegation is challenged and it is contended that the act was in excess of the authority given by the power-of-attorney, it is necessary to show that on a fair construction of the entire instrument, the authority in question has to be found within the four corners of the instrument either in express terms or by necessary implication.

Authority to purchase goods does not include power to receive money on deposit though it may include a power to borrow to pay for the goods. A.I.R. 1937 Mad. 27=44 L.W. 603=1936 M.W.N. 1196=(1937) 1 M.L.J. 23=165 Ind. Cas. 831.

——Powers and rights of agent.

Where a mukhtyarnama only authorises a person to prosecute the execution case on behalf of his principal, he cannot bind the principal by any agreement relinquishing the rights possessed by the principal. A.I.R. 1937 Oudh 270=1937 O.W.N. 127=166 Ind. Cas. 714.

——Powers and rights of agent—Insurance agent—Commission after agency ceases.

Even if the contract between an insurance agent and the company does not contain a clause to the effect that "the commission was allowed so long as the premiums were paid and the agent continued to represent the company," where the duties on the agent do not cease with the first introduction of the customer to the principal, commissions are not to be claimed on payments made by the customer after the agency ceases. A.I.R. 1936 Cal. 246=40 C.W.N. 694=162 Ind. Cas. 525.

——Powers and rights of agent — Power-of-attorney.

Power-of-attorney giving power to agent to do anything in matter of conduct of suit—Agent can appoint—Pleader for appeal. A.I.R. 1936 Lah. 583=165 Ind. Cas. 274.

——Powers and rights of agent—Agent for sale of goods—Power to receive payment.

In an action by the seller of goods against the buyer for the price of goods, it would be open to the buyer who had paid the seller's agent to show, and in the absence of any reasons to the contrary, he would be entitled to succeed on showing either that the agent had ostensible authority or that he had a customary authority to receive payments even though he may not have had actual authority,.

Where a person is a traveller for the sale of goods on behalf of a firm, he would have implied authority to receive payment in money for the goods sold by him. A.I.R. 1936 Mad. 379=43 L.W. 698=1936 M.W.N. 591=70 M.L.J. 570=163 Ind. Cas. 154.

——Powers and rights of agent.

Agent executing sarkat on behalf of principal in favour of adatiya can recover the loss under S. 222, Contract Act, from the principal. A.I.R. 1936 Nag. 37=31 N.L.R. 154 (Sup.)=161 Ind. Cas. 787.

——Powers and rights of agent—Power to purchase, whether implies power to borrow—Presumption.

An authority to purchase does not imply an authority to borrow for the purpose. On the other hand, there is a strong presumption that the principal did not intend to give his attorney power to borrow if he does not expressly state it. A.I.R. 1935 Mad. 599=1935 M.W.N. 511=42 L.W. 155=69 M.L.J. 179=158 Ind. Cas. 242.

——Uowers and rights of agent—Agent contracting personally—Goods purchased on behalf of principal—Agent, if has vendor's right of disposal of goods and stoppage in transit.

Where an agent, by contracting personally, has rendered himself personally liable for the price of goods brought on behalf of his principal, he has the same rights with regard to the disposal of the goods and with regard to stopping them in transit as he would have had if the relation between him and his principal had been that of seller and buyer. A.I.R. 1934 Lah. 191=15 L. 496=36 P.L.R. 348=150 Ind. Cas. 109.

——Powers and rights of agent—Implied authority of agent to contract—Nature of proof required—Contract Act (9 of 1872), S. 237.

Where a person alleged that he had an implied authority to settle a lease on behalf of a *shebait* and the lower Court found that he was acting as if he was acting if he were the real *shebait*:

Held, that the finding was insufficient to prove implied authority and to succeed in his contention, he must prove that he had been authorised to do some work of the class to which the present contract belonged and that in the absence of such proofs, the authority could not be held to be proved to bind the principal. A.I.R. 1933 Cal. 109=60 C. 111=36 C.W.N. 1108=142 Ind. Cas. 465.

——Powers and rights of agent.

Agent cannot settle transaction of sale and purchase before due date of settlement of accounts. A.I.R. 1932 Lah. 393=33 P.L.R. 745.

——Powers and rights of agent—Power to mortgage, whether includes power to make principal personally liable—Consent making principal liable—Validity.

Where an agent who was authorised by the power-of-attorney to sell mortgage or give away the principal's interest in certain properties and to conduct, settle or compromise suits and to do all necessary acts not expressly mentioned in the power, executed a mortgage bond containing a personal covenant for repayment of the mortgage-money and in a suit upon the mortgage consented to a final decree containing a personal decree for such amount as might remain outstanding after the sale of the properties:

Held; that the agent had no authority to make his principal personally liable for the payment of the money or to consent to a decree containing such a provision and the lower Court erred in passing a per-

sonal decree against the mortgagors. A.I.R. 1931 Rang. 223=134 Ind. Cas. 216.

——Powers and rights of agent—Authority of Agent—Instituting suit in principal capacity as guardian of minor.

A suit was instituted by the general attorney of a minor principal's guardian, without the guardian's knowledge and permission both on his own behalf and for the minor's guardian, professedly as the guardian's authorized agent:

Held, that the minor not being fully represented, the judgment cannot be conclusive as against him. 128 Ind. Cas. 763=A.I.R. 1930 All. 875.

——Powers and rights of agent.

When commission agent purchases and himself pays for goods and does not deliver them to his principal until he makes payment to him, the property in goods does not pass to the principal until payment is made. A suit by commission agent for price of goods is incompetent. 129 Ind. Cas. 287=A.I.R. 1930 Lah. 974.

——Powers and rights of agent.

Amounts paid by an agent for purchasing permits to export the goods of the principal can be recovered by the agent from the principal, and the maxim *ex dolo malo non oritur actio* does not apply to such a case. 123 Ind. Cas. 299=A.I.R. 1930 Sind 175.

——Powers and rights of agent—Commission agent personally liable for price—Property vests in agent—He has right to resale or to stop in transit.

Where a commission agent, by contracting personally, renders himself personally liable for the price of goods bought on behalf of his principal, the property in the goods, as between the principal and agent, vests in the agent, and does not pass to the principal until he pays for the goods, or the agent intends that it shall pass and the agent has the same rights with regard to the disposal of goods (resale), and with regard to stopping them in transit as he would have had if the relation between him and his principal had been that of seller and buyer. 120 Ind. Cas. 337=31 Bom. L.R. 508=A.I.R. 1929 Bom. 260.

——Powers and rights of agent.

In the case of *badni* transactions the commission agents can recover from their principals only if they have made actual payments on their behalf to third party, or have incurred enforceable liability. 115 Ind. Cas. 424=10 L.L.J. 522=A.I.R. 1929 Lah. 375.

——Powers and rights of agent—Commission agent must show that the transaction was brought about by his intervention to entitle him to commission.

Where a person is employed as an agent to bring about a transaction on behalf of his principal, he is entitled to have his remuneration only if the transaction in question is the direct consequence of his agency. It need not necessarily be the immediate cause of the transaction, but it must be shown that the transaction was brought about as the direct result of his intervention. It is not sufficient for him to show that it would not have been entered into but for his services, if it resulted therefrom only as a casual or remote consequence. 8 C.W. N. 831, Foll. 111 Ind. Cas. 99=A.I.R. 1928 Lah. 605.

——Powers and rights of agent.

An agent is not ordinarily entitled to institute a suit for accounts against his principal. His suit must be for the recovery of the specific amount alleged to be due to him from the principal. 60 P.R. 1899, Rel. on. 104 Ind. Cas. 339=A.I.R. 1927 Lah. 701.

——Powers and rights of agent.

In a suit by principal against agent for accounts, although balance is found due to the agent, a decree for the amount found to be due to the defendant from the plaintiff cannot be granted in favour of the defendant and consequently he cannot object to the withdrawal of the suit by plaintiff, for accounts. 104 Ind. Cas. 339=A.I.R. 1927 Lah. 701.

——Powers and rights of agent—Agent's authority to act for principal.

In order to decide whether a right conferred by an Act is to be exercised personally and not by an agent, the real test is to see whether there is anything in the statute which leads to the conclusion that the ordinary right of every person to do through the agent what he could himself is expressly or by necessary implication restricted by the statute. 105 Ind. Cas. 534=5 Rang. 483=A.I.R. 1927 Rang. 306.

——Powers and rights of agent—Court must look at the exigencies of business life—Agent making mistake is entitled to rectify it.

The law of principal and agent cannot be considered to be confined by the exact section of the Indian Contract Act and, in considering the liabilities and rights of an agent the Courts must look at the exigencies of business life and the situations that occasionally arise. An agent who makes a mistake must undoubtedly pay the penalty for it, but at the same time he should be permitted to rectify his own error. Where the principal says to his agent "Do not sell my shares below 83" and by a misunderstanding he sells them at 69 he certainly cannot hold his principal bound to accept the sale at 69. But as soon as he discovers his error, he can repurchase exactly similar shares in the same concern and hold them for his principal. By so doing he causes no real change in the situation. Undoubtedly if in order to obtain the new shares he had to pay more than the price at which he had sold the old, he would have to bear the loss himself, but an agent would not be debarred from taking such a course of action provided he put his principal in exactly the same position that the principal was in before the mistake was made. 97 Ind. Cas. 888=2 Luck. 198=3 O.W. N. (Sup.) 166=A.I.R. 1926 Oudh 576.

——Powers and rights of agent—Suit by Calcutta broker as agent on his own account and not as agent must fail.

The plaintiff entered into the contracts on behalf of his principals who were undisclosed and he did so in the character of broker or agent:

Held, his suit was liable to be dismissed as untenable:

Held, further even if the plaintiff was entitled to enforce the contracts upon the footing of *Gubbay* v. *Avetoom*, 17 Cal. 449, his suit was liable to dismissal under S. 236 of the Indian Contract Act as

he was not acting as agent but on his own account. A broker who enters into a contract for and on behalf of his principal is not entitled to sue upon the contract even though the principal be undisclosed where the broker expressly contracted as a broker. There is no custom in the stock and share market in Calcutta that a broker should be treated as principal both by buyer and seller to whom he would be and whom he could hold liable under the contracts. 81 Ind. Cas. 721=51 Cal. 588=A.I.R. 1924 Cal. 733.

——Powers and rights of agent—Commission Agent—Dispute as to payment is to be settled on the actual terms of the contract.

It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent that a plaintiff cannot recover unless he shows that the conditions of the written bargain have been fulfilled. If he proves fulfilment he recovers, if not, he fails. There appears to be no half-way house, and it matters not that the plaintiff proves expenditure of time, money and skill. (1923) 1 K.B. 110, Foll.

Where the letter of authority stated in specific terms that the remuneration was to be paid after the registration of the lease:

Held, that no commission was due until the lease was actually registered and no implied contract could be presumed to *quantum meruit* for his services. 79 Ind. Cas. 287=50 Cal. 878=27 C.W.N. 1007=A.I.R. 1924 Cal. 517.

——Powers and rights of agent—Broker commissioned to find purchaser must procure a willing and able purchaser.

A broker is entitled to a percentage on the money which he succeeds in realising for principal but, where the transaction cannot be completed because the money is not forthcoming and consequently the principal realises nothing, the broker is not entitled to his brokerage. If, however, the vendors take the negotiations out of the broker's hands, and those subsequently fall through, the full brokerage is nevertheless payable. 79 Ind. Cas. 750=2 Rang. 45=A.I.R. 1924 Rang. 232.

——Powers and rights of agent—Agent employed to procure a buyer has no authority to enter into open contract for sale.

Where an owner of a land handed to a broker the following letter: "I authorise you to procure a buyer of my divided portion of the above premises for Rs. 45,000 and on your sending same, I shall pay you as remuneration at 1 per cent. on the purchase-money."

Held: that the words meant that the offer was to be placed before the vendor for his consideration. It was in no sense an authority to the brokers to sell the plaintiff's property nor did it amount to an offer on the part of the vendor to sell the premises to whoever might be brought into touch with the vendor by the broker. It is a settled law that if an owner of land instructs a broker or an estate agent to place it on his books and to find a purchaser for him, that does not authorise the agent to enter into an open contract for sale of the land or indeed to make any firm contract for sale binding the principal. 69 Ind. Cas. 978=49 Cal. 389=A.I.R. 1922 Cal. 397.

——Powers and rights of agent—Principal also a banker agent having deposit in that Bank—Suit by principal for sale-proceeds in agent's hands—Agent can set off amounts deposited.

A, a Company, was a sugar manufacturer and *B* its selling agent who also used to collect and hold the purchase-money from the purchasers. *B* had deposited certain sums in a Bank *AA* as security. The Bank *AA* and the Sugar Company *A* though separate legal entity were virtually one as the capital of one came from the other and both were under one control. In a suit by *A* against *B* for balance of sale proceeds *B* pleaded to set-off the amount of deposit which was held by *AA* and which was more than the claim of *A*:

Held, that the claim of *A* was not maintainable. If the Company *A* could bring actions for sums due from *B* in respect of sales of sugar, they could bring them only as principals in this sense that they take the benefit of these sums subject to every equity which affects these sums in the hands of *AA*. 76 Ind. Cas. 944=15 M.L.W. 201=24 C.W.N. 1004=A.I.R. 1921 P.C. 103 (P.C.).

——Powers and rights of agent—Power of attorney to sell immovable property—Construction—No authority to receive purchase money—Obiter.

A mere general authority to sell immoveable property does not carry with it an implied authority to receive the purchase money. (1910) 20 M.L.J. 479=8 M.L.T. 7=1910 M.W.N. 407=7 Ind. Cas. 189.

——Powers and rights of agent—Lien of agent—Equities—Receiver's appointment.

The possessory lien of an agent is subject to all the rights and equities available against the principal at the time such lien attaches. The appointment of a receiver does not take effect or date back by relation to a period prior to his appointment. The appointment of a receiver is complete on the entry of an order of appointment, although he may not be able to take actual possession of the property until the security is approved. 13 C.W.N. 654=9 C.L.J. 563=1 Ind. Cas. 356=36 Cal. 713.

——Powers and rights of agent.

Wagering contract of agreement to pay differences—Payment by agent to third parties—Claim of reimbursement. *See* CONTRACT ACT, S. 30. 14 M.L.J. 326.

——Powers and rights of agent.

Government and its officers—Private and public agents, distinction between—Scope of authority. *See*. 12 M.L.J. 453=26 M. 268.

——Powers and rights of agent—Broker—Fraud—Sale—Payment of price to agent—Apparent authority of agent—Rights and duties of third party.

In a question between a principal and a third party who has dealt *bona fide* with the agent of the principal, the true limit of the agent's power to bind the principal is the apparent authority with which, the agent is invested. In the absence of express authority a party who is employed to find purchaser for a property is not authorised to receive the price, much less to take in exchange another property. If the purchaser pays the price to the person so employed by the seller, and that person embezzles the money, the seller can recover the price from the purchaser. (1904) 1 A.L.J. 124.

——Powers and rights of agent—Commission to agent—Sale or lease of house through agent—What entitles agent to commission—Express stipulation—Direct intervention.

In the absence of any special stipulation, an agent, in order to found a claim for his *bonus* or commission in selling or letting a house, must shew that such sale or lease was the direct result of his intervention and was obtained by means of his agency or some sub-agent of his: it is not sufficient for him to show that lease or sale was obtained indirectly as a remote and casual consequence of his efforts. 4 F.F. 291; 24 Law Times 706; 58 L.T. 96, foll. (1904) 8 C.W.N. 831.

——Powers and rights of agent—Public officer—Agent of Government—Authority to bind Government.

A Government officer such has no as express or implied authority to pledge the credit of Government for all matters necessary to the performance of the duties imposed on him by Government. (1902) 4 Bom.L.R. 706=26 B. 801.

——Powers and rights of agent—Broker engaged to negotiate loan on mortgage—Implied guarantee by principal—Failure of principal to satisfy intending lender as to title—Broker's claim to remuneration.

Defendant engaged plaintiff as broker to negotiate a loan of Rs. 18,000 on the first mortgage of certain properties, and agreed to pay plaintiff brokerage at 4 per cent. Plaintiff procured a person who was prepared to lend the amount, and who actually placed the sum in the hands of the common attorney of himself and defendant. The attorney was not satisfied that the mortgage was to be the first mortgage of the property, and advised the intending lender to withdraw; and the transaction fell through. It wos conceded for defendant that the circumstances were such as to justify the attorney in advising the lender's withdrawal. On plaintiff suing his principal for commission.

Held, that plaintiff had duly performed his part of the contract and was therefore entitled to his remuneration under it, the failure of the negotiations being due to defendant's inability to satisfy the intending lender on a point in respect of which there was a guarantee by him in the contract *viz.*, that the mortgage was to be a first mortgage. 33 L.T. 584, foll. (1902) 7 C.W.N. 297=30 Cal. 202.

12. Principal's liability.

——Principal's liability—Knowledge of agent—If knowledge of principal—Rule.

In law a principal is only bound by the knowledge of his agent provided that that knowledge is on a material point and the knowledge is such that the Court would draw the inference that the agent was bound to communicate the knowledge acquired by him his principal. 51 Bom.L.R. 529=A. I. R. 1950 Bom. 76.

——Principal's liability.

Agent cutting trees for principal and using same for latter—Agent is not liable for price of trees to their owner. A.I.R. 1944 Pesh. 34=46 P.L.R. 266=219 Ind. Cas. 81.

——Principal's liability—Ostensible agent.

Where an ostensible authority exists, a person dealing with the agent will not be affected with notice of a private limitation of the ostensible authority as between the principal and the agent themeselves. A.I.R. 1942 All. 170=1942 A.L.J. 131=1942 A.W.R. 99=I. L. R. (1942) All. 289=200 Ind. Cas. 225.

——Principal's liability—Agent of firm advancing firm's money and obtaining mortgage in his favour—Firm's initials used—Transaction, if by firm.

Where the money advanced was the firm's money but the mortgage was in favour of the firm's agent, the mere fact that he used the firm's initials would not show that the transaction was entered into by the firm. A.I.R. 1941 Rang. 122=195 Ind. Cas. 221.

——Principal's liability—Consent decree to which agent was party—Decree, held binding on principal.

The sons of a deceased Hindu were adjudicated insolvents and the entire assets of the deceased in British India vested in the Official Assignee. In order to get at the Ceylon assets of the deceased, the Official Assignee applied through his agents to the Ceylon Court for the grant of letters of administration with a copy of the wills annexed. The Ceylon Court intended that the letters should be to the Official Assignee in British India though they were actually issued to the agents who thereafter functioned as administrators and got themselves substituted as defendants in the action by a creditor of the deceased in the Ceylon Court in which a compromise decree was passed against them:

Held, that the consent decree passed against the agents must be taken to have been passed against them as the agents of the Official Assignee and it was not open to the Official Assignee to say that he was not a party to the consent decree at all. A.I.R. 1940 Mad. 837=52 L.W. 89=(1940) 2 M.L.J. 621=1940 M.W.N. 1205.

——Principal's liability—Promissory note executed by agent.

Where an agent who was managing a mill for and on behalf of the principal has executed a promissory note on behalf of the principal, the principal is not liable under the note in the absence of evidence to show that the agent had authority to incur debts on behalf of the principal. A.I.R. 1940 Rang. 97=188 Ind. Cas. 120.

——Principal's liability—Admission by Eastern Bengal Railway is on behalf of Government.

Admissions by the Eastern Bengal Railway are admissions by the agents of the Government and are, therefore, binding on the latter. A. I. R. 1939 Cal. 758=70 C. L. J. 126=185 Ind. Cas. 454.

——Principal's liability—Person obtaining judgment against agent in previous suit—Subsequent suit against principal whether barred.

Quaere.—Whether, after judgment had been obtained against the agent in an earlier suit, a subsequent suit against the principal would be barred by the doctrine of election. A. I. R. 1939 Mad. 520=1939 M.W.N. 209=49 L.W. 343=(1939) 1 M L.J. 509=I.L.R. (1939) Mad. 282=184 Ind. Cas. 153.

——Principal's liability—Contract within scope of agent's authority—Principal, if can repudiate it.

It cannot be said that in the absence of express authority, a principal can repudiate contract within the scope of the agent's general authority if the contract is one *prima facie* for the benefit of the agent. A.I.R. 1938 Cal. 573=42 C. W. N. 718=177 Ind. Cas. 715.

——Principal's liability—By unauthorised borrowing by agent, money of third person applied for benefit of principal.

Where, by any wrongful or unauthorized act of an agent, the money or property of a third person comes to the hands of the principal or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or the value of such money or property. If the agent had already misappropriated the principal's moneys and thus created a necessity for the borrowing the lender cannot suffer for the dishonesty of the agent and the borrowing would have been at a time when there were, in fact, no funds of the principal available. If on the other hand, the agent borrowed even when the principal's moneys were available the borrowed money, if paid into the principal's account or applied for his benefit will clearly be money, which the principal was not entitled to retain, and the fact or possibility of a subsequent misappropriation by the agent cannot affect the lender's remedies.

The equitable rule regarding the creditor's right against the principal is recognized and followed in this country. There is no justification for the contention that equitable claims are excluded by the Contract Act. If necessary, the creditor's claim in a case of this kind may be rested on S. 64 or S. 70, Contract Act. A. I. R. 1938 Mad. 966=1938 M.W.N. 1023=48 L.W. 666=(1938) 2 M.L.J. 688=182 Ind. Cas. 929.

——Principal's liability—Act of agent belonging to authorised class—Borrowing by partner—Creditor, if should look to its application.

Where a firm is a trading firm, so that one partner can borrow money for the purpose of the business on the credit of the firm, no duty is cast on the person advancing the money to make any further inquiries. If the act belongs to an authorized class, it is not material whether the agent intends the principal's benefit or not, nor whether the principal in fact derives any benefit. A. I. R. 1937 Bom. 262=39 Bom.L.R. 343=170 Ind. Cas. 147.

——Principal's liability—Instigation or abetment—Necessity of.

The maxium of *qui facit per alium facit per se* or the law of agency is not a doctrine of criminal law but of civil law. The principal can be made responsible for and found guilty of the acts of his agents under the Criminal Code only where it is proved that he has instigated or otherwise abetted the acts of the person who actually committed the crime. The law of abetment was enacted to deal with such cases. A.I.R. 1937 Rang. 117=38 Cr. L. J. 764=1937 Rang. L. R. 246=169 Ind. Cas. 293.

——Principal's liability—Order received from person in name of a firm—Firm executing the order, if can hold former firm liable in the absence of holding out or authority.

It cannot be said that if a firm receives an order in the name of a firm from any person who chooses to write to them, they are entitled to carry out that order without any inquiry and thereafter, they can hold the firm, in whose name they execute the order, even if the writer had no actual authority to give the order, liable. When there is no holding out or authority proved, there can be no liability. A.I.R. 1937 Sind 151=169 Ind. Cas. 423.

——Principal's liability—Ratification—Essentials of.

In order that there may be a valid ratification, there must be not only a knowledge of the fact to be ratified, but also an intention to ratify, and that the principal must do something more than merely stand by and let his agent act in the way he chooses. Non-intervention by itself is not ratification. A.I.R. 1936 Bom. 114=37 Bom.L. R. 1033=161 Ind. Cas. 769.

——Principal's liability—Company with unlimited power to borrow—Director borrowing without authority—Money used by company—Implied promise to repay.

Per *Kania, J.*—When an agent borrows money for a principal without the authority of the principal, but if the principal takes the benefit of the money so borrowed or when the money so borrowed has gone into the coffers of the principal, the law implies a promise to repay. The lender has not advanced the money as a gift but has given it as a loan, and the principal having received the benefit of the money, the law implies a promise to repay.

There appears to be nothing in law which makes this principle inapplicable to the case of a joint stock company when the borrowing power of the company itself is unlimited. The position would be that the principal (the company) through its agents (the directors or the managing agents) had borrowed money which the principal had not authorised the agents to borrow. However the money having been borrowed and used for the benefit of the principal, either in paying its debts or for its legitimate business, the company cannot repudiate its liability to repay on the ground that the agents had no authority from the company to borrow. A.I.R. 1936 Bom. 62=60 B. 326=37 Bom.L.R. 978=161 Ind. Cas. 126.

——Principal's liability—Undisclosed principal—Effect of.

The only effect of S. 233, Contract Act, is to give a person dealing with an agent of an undisclosed principal three alternatives. He may hold either the agent liable or the principal, or both of them. He may sue either the agent, or the principal, or both of them together. But whichever alternative he chooses, once the suit has been decreed, his remedies are exhausted. There is only one cause of action, not several and the liability of principal and agent is not several, nor joint and several. (1936) 163 Ind. Cas. 331=39 C.W. N. 461=62 C. 612.

——Principal's liability—Ratification after expiry of limitation.

Where the ratification of the act of an agent, by the principal is made after the expiry of the period of limitation, the ratification is of no effect. A.I. R. 1936 Lah. 321=37 P. L. R. 446=161 Ind. Cas. 957.

——Principal's liability

Plaintiff depositing money in Bank in name of

Military Officer in view of contract—Contract finished—Plaintiff applying for return of deposit —Payment from Bank directed—Bank going in liquidation—Full amount not paid.

Held, balance should be recovered from Military Authorities. A. I. R. 1936 Pesh. 148=163 Ind. Cas. 448.

—Principal's liability—Ratification, meaning of.

Ratification is used to express the conduct of a principal who endorses the action of his agent which had at first taken place without the principal's authority. A.I.R. 1935 Pat. 376=1 B. R. 584=16 P.L.T. 897=156 Ind. Cas. 200.

——Principal's liability—Tort.

Principal is liable for the torts of his agent committed within the scope of agency. 1933 M.W.N. 1246.

——Principal's liability—Suit against both—Remedy only against one—Equitable principles —Applicability.

Where an undisclosed principal is made a defendant in a suit, he will be liable, but when both principal and agent are made party defendants, only one of them is liable. A.I.R. 1933 Pat. 196=12 Pat. 216=14 P. L. T. 149=146 Ind. Cas. 56.

——Principal's liability—Fraud of agent.

A principal may be liable for the fraud or other illegal act committed by his agent within the general scope of the authority given to him and even the fact that the act of the agent is criminal does not necessarily take it out of the scope of his authority. A.I.R. 1933 Sind 176=27 S.L.R. 41 =144 Ind. Cas. 452.

——Principal's liability—Unauthorised acts.

A principal would not be bound by an unauthorised act done by his agent, even though he derived benefit therefrom, and when the agent did not disclose the name of his principal, there can be no claim against the principal. A.I.R. 1932 Nag. 27=27 N. L.R. 324=135 Ind. Cas. 401.

——Principal's liability—Agent signing negotiable instrument.

Where a promissory note was signed by a person who alleged to be the agent of a firm but he signed it in his own name, and there was no promise in it of the firm to repay the loan:

Held, that the firm was not liable on the promissory note. A.I.R. 1932 Rang. 97=10 Rang. 257 =139 Ind. Cas. 460.

——Principal's liability for agent's acts.

Where a pleader of a bank receives money and certifies payment under a decree on behalf of the bank, he does so as an authorized agent of the bank; and the bank cannot go back upon his action on the assertion that the amount has been withheld by pleader and not paid to the bank. 1930 A.L.J. 945=129 Ind. Cas. 382=A.I.R. 1930 All. 659.

——Principal's liability—Money borrowed by agent on behalf of principal—Lender believing that he was authorized—Money borrowed devoted in paying legal debts of principal—Principal is liable to lender.

Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent had authority, though it turns out that his act was not authorized, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal. 122 Ind. Cas. 444=12 N.L.J. 175=A.I.R. 1930 Nag. 42.

——Principal's liability—Bank acting through officers—Knowledge on part of officers—Whether amounts to sufficient notice to bank.

Where the Chairman and manager of a Bank have arranged between themselves without actual knowledge on the part of other officers of the Bank the assignment of a decree by the Chairman to the Bank, the Bank cannot claim the benefit of that assignment without accepting liability for knowledge on the part of the Chairman and manager of a subsequent attachment of the decree which had been assigned. In such a case the officers of the Bank who carry on its business and represent it in its transactions are more than mere agents and any information which they receive relating to transactions carried out by them on behalf of the Bank must be regarded as information received by the Bank. 125 Ind. Cas. 365=8 Rang. 223=A.I.R. 1930 Rang. 265.

——Principal's liability.

An agent's acquiescence cannot be pleaded when the other party knows that he has not authority to acquiesce. 115 Ind. Cas. 628=A.I.R. 1929 All. 386.

——Principal's liability—Contract of agency subsisting—Agents short comings in discharge of his duties under agreement—Principal is liable to pay commission under agreement.

So long as the agency subsits, the principal remains under his contractual obligation to pay the commission in terms of the agreement which creates mutual rights and obligations of a continuing nature, in spite of all the shortcomings of the agent in the discharge of his duties under the agreement. A certain company, *S*, was appointed managing agents of another company, *P*, for a certain number of years, and the agreement was duly executed. The company *S* was thereunder entitled to a certain commission as remuneration for their services as managing agents. Such services were not, however, categorically enumerated in the agreement. The agreement was to have immmediate effect and the directors of *P* company were to enforce it. *P* paid certain amounts to *S* as commission for their services for certain periods. But the services rendered by the company *S* were not of a substantial nature and it was found that their services were not profitable to *P* company. So the contract of agency was put an end to. The company *S* therefore sued for their commission up to the date of their dismissal as managing agents:

Held, that in spite of all the shortcomings of the *S* company in the discharge of their duties there was acquiescence in the continuance of the managing agency up to the date of dismissal. The responsibility for the company *P* not having had full value for the amount of commission to which they continued to be liable lay with their directors who allowed things to drift too long. The desire of the company *P* not to pay the commission is like that of a master who allows his servant to remain idle for the whole month and objects at the end of the month to paying his salary on the ground that he did little or no work during the whole month. *P*

was therefore liable to pay the commission. 119 Ind. Cas. 837=26 A.L.J. 1119=A.I.R. 1929 All. 87.

——Principal's liability—Notice to agent of facts arising out of agency is notice to principal —But parties to contract can stipulate against this presumption.

Notice of facts to an agent is contructive notice thereof to the principal himself where it arises from or is at the time connected with the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal and if he has not, still, the principal having entrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal; otherwise the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party. But it is quite open to the parties to a contract to stipulate that this presumption which arises upon general principles of public policy should not arise in any particular case, and that the notice instead of being served on an agent would have to be served on the principal himself. This stipulation viewed in proper light would mean that express notice is given of the limitation of the agent's authority, and if with such knowledge a party chooses to deal with the agent and not with the principal he does so at his own peril. 116 Ind. Cas. 148=A.I.R. 1928 Cal. 371.

——Principal's liability—General agency implying delegation to do all acts connected with a particular trade—Principal cannot set up secret and private instructions to the agents.

In the case of a general agency which implies a delegation to do all acts connected with a particular trade, business or employment, the principles to be borne in mind are: "If a person is held out to third parties or to the public at large, by the principal, as having a general authority to act for and to bind him in a particular business or employment, it would be the height of injustice and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agent, limiting his authority; and thus to defeat his acts and transactions under the agency when the party dealing with him had, and could have, no notice of such instructions. In such cases good faith requires that the principal should be held bound by the acts of the agent, within the scope of his general authority. The maxim of natural justice here applies with its full force, that he, who without intentional fraud has enabled any person to do an act, which must be injurious to another innocent party, shall himself suffer the injury rather than the innocent party, who has confidence in him. 116 Ind. Cas. 148=A.I.R. 1928 Cal. 371.

——Principal's liability—Agent to purchase on behalf of principal—Principal is not bound if agent sells his own goods to him unless principal has assented to that mode—Effect of assent—Relationship of vendor and purchaser.

If an agent employed to effect a purchase on behalf of his principal from a third person upon certain terms either sells his own goods to his principal or as agent buys from a third person upon other terms, the principal thereby is not bound, and in either event is at liberty to repudiate the act of his agent in effecting the contract. But if the agent sells his own goods, and the principal assents to the mode in which the agent has carried out his mandate after the purchase has been effected the relationship of the parties quoad the contract of sale ceases to be that of principal and agent, and ripens into that of vendor and purchaser, though it may be necessary to refer to some other agreement, for instance, the agreemnt of agency, in order to ascertain the terms and conditions of the contract of sale. 104 Ind. Cas. 268=54 Cal. 549=A.I.R. 1927 Cal. 668.

——Principal's liability for agent's acts.

The fraud of an agent, when such agent is acting within the scope of his employment on behalf of his principal, is considered technically in law to be the fraud of the principal. 99 Ind. Cas. 727=4 Rang. 381=A.I.R. 1927 Rang. 49.

——Principal's liability—Agent saying that his master has suspended payment is not a "notice".

The mere fact that certain creditors went to the debtor's office, and were told by the agent that his master had stopped payment, would not be a notice of suspension by the debtor, since, in the ordinary course, an agent does not have an authority within the general scope of his agency to commit an act of insolvency on behalf of his principal. 98 Ind. Cas. 431=28 Bom. L.R. 680=A.I.R. 1926 Bom. 383.

——Principal's liability.

The master is not criminally responsible for the acts of his servant unless he expressly commands or personally co-operates in them or criminal responsibility is expressly imposed by statute or contract. 87 Ind. Cas. 918=26 Cr. L.J. 1030=A.I.R. 1926 Nag. 73.

——Principal's liability—Principal not bound by the fraud of agent when person relying on agent's fraud is a party to that fraud.

A principal is bound only by acts done by his agent on his behalf in good faith and not by his fraudulent actions when a third person who relies upon such actions is himself a party to the fraud. If no money is actually paid by the judgment-debtor to the agent of the decree-holder and if the said agent fraudulently and collusively on having been bribed by the judgment-debtor admits in Court the receipt of the decretal amount, his action cannot be binding upon his principal, the decree-holder. 92 Ind. Cas. 612=13 O.L.J. 132=A.I.R. 1926 Oudh 337.

——Principal's liability.

Goods purchaser by agent in pursuance of order by principal become property of principal the moment they are purchased and appropriated by agent. 94 Ind. Cas. 287=A.I.R. 1926 Sind 238.

——Principal's liability—Agent's purchase of goods—Property passes to principal.

Where goods purchased by an agent on his principal's behalf are destroyed by fire the principal and not the agent must bear the loss. The reason for this is that once the parties constitute themselves by any means, principal and agent, property in goods bought under a contract for purchase of goods made by the agent on behalf of the principal does not pass to the agents as against the principal. 82 Ind. Cas. 683=29 C.W.N. 121=A.I.R. 1925 Cal. 284.

—Principal's liability.

There can be no criminal liability for the act of an agent. 87 Ind. Cas. 962=26 Cri. L.J. 1042=A.I.R. 1925 Oudh 676.

——Principal's liability—Misappropriation by agent—Principal is not liable.

The defendant's firm doing business as share-brokers had employed one *G* in the course of their business as a sub-broker. There was a transaction on August 10, 1922, between him and the plaintiff, and the result was that the plaintiff had to pay him Rs. 15,000. *G* owed the plaintiff Rs. 1,000 and the plaintiff gave him a crossed bearer cheque of Rs. 14,000 in favour of the defendants. *G* paid this cheque into his own account with a bank, and on the same day drew two cheques in favour of the defendants for sums amounting in all to Rs. 10,645-10-0 which they duly received. Subsequently *G* absconded without having taken any steps to carry out the plaintiff's contract:

Held, that the money misappropriated by *G* could not be said to have been received by defendants and held by them for plaintiff's use and therefore defendants were not liable. 77 Ind. Cas. 266=48 Bom. 20=25 Bom. L.R. 1014=A.I.R. 1924 Bom. 232.

——Principal's liability—Mere receipt of money by agent of insurance company does not imply acceptance of proposal for acceptance—Premium must be fixed.

An agent employed by an insurance company merely to introduce business to the insurers is not in any real sense of the word their agent. His business is merely to obtain proposals and transmit them to the insurer. He can neither accept any proposal nor issue a cover note and, in so far as he fills up the proposal form for the proposer, he is to be regarded as the agent of the proposer, and not the agent of the company. The granting to him of a bundle of proposal forms does not in any way imply the grant of any particular authority to him. The grant of a book of a receipt form, not specially worded, does not give rise to any implied authority. The signing of receipt that is given to the assured by an agent in his own name, with the addition of the company's name underneath his own, gives rise to no implied authority. These facts only indicate that he may by trusted to submit the proposals and any money deposited to the Company. The mere acceptance of the premium does not amount to an acceptance. What facts will constitute an acceptance on the part of the insurers will depend on the circumstances of a particular case. It is, however, essential that the premium should be fixed, as, until it is fixed, there is no complete contract. The acceptance of the premium by the agent cannot bind the company. 83 Ind. Cas. 569=2 Rang. 158=3 Bur. L.J. 40=A.I.R. 1924 Rang. 269.

——Principal's liability—Station Master accepting bailment—Railway Company is liable for safe custody of goods.

Where the conduct of the Station Master showed that he accepted the bailment of the goods on behalf of the Railway Company, S. 72 of the Railways Act came into operation and the Railway Company was responsible for their safe custody. 82 Ind. Cas. 772=A.I.R. 1923 All. 71.

——Principal's liability.

There is no warrant for the proposition that if the agent broke the rule of law the principal is guilty. 82 Ind. Cas. 63=25 Cr. L.J. 1199=A.I.R. 1923 Lah. 603.

——Principal's liability.

The question whether an agent has contracted on behalf of the principal or personally, depends on the intention of the parties to be deduced from the surrounding circumstances. Where the agent is given power to execute deeds in his own name, a deed so drawn up by the agent without describing himself as agent is nevertheless binding on the principal. Where a principal entrusts his agent with securities and instructs him to raise a certain sum of money thereon and the latter raises a larger sum fraudulently and misappropriates the difference the lender acting *bona fide*, the principal cannot redeem the securities without paying the lender all that he has lent although the lender did not know that the agent had authority to borrow at all, and made no enquiry. 59 Ind. Cas. 596=23 O. C. 353=7 O.L. J. 705.

——Principal's liability—Fraud of agent—Liability of former—Cheque presented at the Government treasury cashed and amount misappropriated by employees at the treasury—Liability of Government.

The true rule of law with regard to the liability of the master for the misconduct of the servant is that his master is liable for the fraud of his servant in the course of his service and for the master's benefit and that a master is not liable for the misconduct of the servant committed for the servant's own private benefit and that it is not necessary that the benefit should accure to the master. Where plaintiff who had got a cheque for work done for the District Board presented it for encashment at the District Treasury, but the head poddar and the Mohurir employed there misappropriated the amount of the cheque and it was found that the latter did so for their one benefit:

Held, that in these circumstances the Secretary of State for India in Council was not liable for the fraud committed by his employees. (1909) 13 C.W.N. 619=36 C. 647=1 Ind. Cas. 735.

——Principal's liability—Fraud of agent—Witholding of information—Principal not liable for the sudden dishonesty of a qualified agent who has served him for years.

If a principal employs an agent to keep him informed, and that agent is thoroughly competent and might have kept him informed, but in fraud of his principal and in violation of his duty keeps back information which he has, the principal is not affected with it. Where a principal has employed qualified agents who have for years served him well and given him no cause at all for suspicion, the sudden dishonesty of one of them ought not be imputable because it could not have been foreseen by the principal. (1909) 11 Bom. L.R. 926=4 Ind. Cas. 652.

——Principal's liability—Notice to agent when notice to Principal—Constructive notice.

The knowledge of an agent, not acquired in the matter for which he was agent, cannot be imputed to the principal, nor can it be used to upset a transaction of a date before the agency commenced. (1907) 11 C.W.N. 1109=4 A.L.J. 750=17 M.L.J. 465=9 Bom. L.R. 1062=6 C.L.J. 674=2 M.L.T. 394=34 I.A. 179=31 Bom. 566.

——Principal's liability—Agent, act of, beyond authority—Suit for money advanced to agent for benefit of principal—Implied ratification.

Where *A* does an act as agent for *B*, without any

communication with *C*, *C* cannot by afterwards adopting that act make *A* his agent and thereby incur any liability or take any benefit under the act of *A*. If the implied authority of an agent to raise a loan is not established, but it is proved that of the sum borrowed a portion has been applied for the benefit of the principal with his knowledge the creditor is entitled to reimbursed by the principal to the extent he has been benefited, on the principal of implied ratification. (1907) 6 C.L.J. 639.

——Principal's liability—Suit against principal for purchase-money due to a stranger—Cause of action.

Where the agent did not pledge his own personal credit and there was no allegation even that the pleading of the agent's credit was within the scope of agency, the agent has no cause of action to sue the principal for the purchase-money due to a stranger in respect of things supplied, at any before the agent was compelled to pay the same out of his pocket. (1905) 32 C. 1145.

——Principal's liability—Liability in tort of principal for acts of agents.

Where the Secretary of a Municipal Board acting under orders from the Chairman of the Board, procured the issue of a warrant of distraint for a sum exceeding what was due from the person against whom the warrant was obtained and proceeded to seize and sell the goods of such person, it was *held*, that the Municipal Board was liable for the acts of its Secretary whether or not there had been any resolution of the Board directing the Secretary to obtain a warrant of distraint for the particular sum for which the warrant was issued. 1 A.L.J. 195=1904 A.W.N. 95=26 A. 482.

——Principal's liability—Principal non-existent on the date of the contract—Liability.

No person can as agent bind by contract a principal who does not exist at the date of the contract. L.R. 2 C.P. 174, Foll. (1904) 6 Bom. L.R. 1106.

——Principal's liability.

Principal resident abroad—Contract by—Agent's —Liability. *See* CONTRACT ACT, S. 230. 27 M. 315.

——Principal's liability.

Government as principal and its officers as agents —Liability for tortious acts of agents. 6 Bom. L.R. 65=28 B. 314.

——Principal's liability—Notice to agent—Notice to principal—Indian Contract Act, S. 229 —Transfer of Property Act, S. 3.

The principle that notice to an agent is notice to the principal is a rule of general law and applies even where S. 229 of the Indian Contract Act or S. 3 of the Transfer of Property Act, does not apply. (1902) 6 C.W.N. 849=4 Bom. L.R. 832=25 A. 1 =29 I.A. 203 (P.C.).

——Principal's liability—Government officer, acts of—Presumption that he is acting on behalf of Government—Duty of person dealing with Government officer to inquire as to his authority to pledge Government credit.

Persons dealing with Government officers are bound to inquire whether such officers are entitled to pledge the credit of the Government. There is no presumption that the acts of a Government officer are on behalf of the Government to which he is subordinate. (1902) 4 Bom. L.R. 706=26 B. 801.

——Principal's liability—Government officer contracting on behalf of Government—Personal liability of.

An agent contracting on behalf of Government is not personally bound by such a contract, but it must be shown he was acting within the scope of his agency. (1902) 4 Bom. L.R. 706=26 B. 801.

——Liability of principal—Agent's unauthorised acts consequent on agent being placed in a particular position by principal—Principal how far bound—Customs official paying rent for loved land—How far Government bound by such payment.

Where an agent's unauthorised act is due to the principal engaging to do a certain business and to do a certain class of acts, the principal is bound by the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him. So where customs officials working under Government paid rent to a private party in respect of land which the Government claimed at it own:

Held, that the Government was bound by the legal consequences of such payment of rent. (1901) 4 Bom. L.R. 28=26 B. 410.

——Principal's liability—Principal and agent—Holding out as agent.

The mere fact that the principal ratifies an act of the agent which the agent is not authorised to do will not amount to holding out by the principal that tthe agent has authority to enter into similar transactions. Where a firm inadvertently guaranteed an advance by another firm to one of the former firm's customers and that was brought about by its assistant having no authority to do so it was held not to amount to a holding out by the firm that the said assistant had authority to bring about similar advances by the latter firm on the guarantee of the latter firm so as to bind the latter firm to pay any loss accruing therefrom. (1901) 6 C.W.N. 429.

——Principal's liability—Fraud of agent—Not for the principal—Liability of the principal—Contract Act. S. 238

Where an agent acts fraudulently in the course of business, not for the principal but on his own account, the principal is not liable for any loss caused thereby. (1901) 6 C.W.N. 429.

——Liability of principal for acts of agents—Omission anl commission. *See* PENAL CODE, S. 154.

13. Proof of agency.

——Proof of agency—Person acting as Manager of company for long time and accepting and endorsing bills of exchange—Whether establishes that he had authority of partners to act as such and land company.

When a person has been acting as the manager of a Company for a long period and has been transacting all the business of the Company as such manager, including the acceptance and endorsing of the bills of exchange of the value of several lacs of rupees, this fact alone is sufficient to establish that he had proper authority of the partners to act as the manager of the Company and to bind it as such. A.I.R. 1939 Lah. 225=187 Ind. Cas. 650.

——Proof of agency—Person proving in insolvency against X without prejudice to rights of parties—Whether can plead in subsequent suit that Y was principal of X.

Where a person proves in insolvency against *X* and if this action of the person in the Insolvency Court is without prejudice to the rghts of the parties, then it is open to person in subsequent suit to advance a plea that *Y* was principal of *X*, even if, proof in insolvency amounted to a judgment against *X* for the purposes of the doctrine of election. A. I.R. 1939 Mad. 520=1939 M.W.N. 209=49 L. W. 343=(1939) 1 M.L.J. 509=I. L. R. (1939) Mad. 282=184 Ind. Cas. 153.

——Proof of agency—Authority to act as agent must be shown.

It is not possible for the Court to accept the bare *ipse dixit* of a witness that he is acting as the agent of certain persons in absence of any data as to when and by whom he had been so authorized to act, whether the alleged authority was in writing or verbal, general or restricted and whether it empowered him to act alone or was to hold good in favour of his successor-in-office also. 120 Ind. Cas. 615=A. I.R. 1930 Lah. 364.

——Proof of agency.

The question of agency is a mixed question of fact and law and very largely depending on the evidence in the particular case. 1930 M.W.N. 729.

——Proof of agency.

Mere allegation of agency is not sufficient—Specific scope of agent's powers must be proved. 92 Ind. Cas. 984=53 Cal. 297=30 C.W.N. 160=A.I. R. 1926 Cal. 542.

——Proof of agency.

In the absence of proof as to where any express contract of agency was made it must be deemed to have been made where the agent receives orders from his principal and accepts the orders thus indicating his consent to act. 12 S.L.R. 93, Rel. on. 94 Ind. Cas. 287=A.I.R. 1926 Sind 238.

——Proof of agency—Agent's signature on behalf of firm—Oral evidence.

The question whether an agent signed for himself or on behalf of the (principal) firm is one of fact to be determined with reference to the evidence in the case. Th reception of parol evidence in regard to such matter is subject to much the same rules as govern contracts generally. (1905) 15 M.L.J. 384=28 M. 544.

14. Ratification.

——Ratification. *See also* (1)CONTRACT ACT SS. 196 TO 200.

(2) PRINCIPAL AND AGENT—PRINCIPAL'S LIABILITY.

——Ratification—Essentials—No ratification when agent did not purport to act for principal. 20 M.L.J. 371=35 Mad. 177.

——Ratification in part of agents' acts. 14 M.L. J. 443.

——Ratification—Government officer acting on behalf of Government—Unauthorised acts—Who can ratify.

Ratification of the acts of a Government officer done beyond the scope of his authority cannot be made by an unauthorized agent; it can only be made by Government itself or with its full knowledge. (1902) 4 Bom. L.R. 706=26 B. 801.

——Unauthorised acts of agent—Ratification by principal of part. *See* CONTRACT ACT, S. 199. 4 Bom. L.R. 28=26 B. 410.

15. Relationship.

——Relationship—Master and servant—Relationship—Distinction between—Tests—Wrongful termination—Damages—Right to.

There is a difference between the relationship of master and servant and that of principal and agent. A principal has the right to direct what work the agent has to do, but a master has the further right to direct how the work is to be done. An agent would be entitled to damages in the event of the agency being wrongly terminated only if he had been successful in his agency. I.L.R. (1947) Mad. 170 =59 L.W. 385=1946 M.W.N. 502=A.I.R. 1946 Mad. 530=(1946) 2 M.L.J. 67.

——Relationship—Contract of agency—If to be in writing.

Agency may be inferred from circumstances of the case and the conduct of parties. 1947 M.L.R. 21 (Civ.).

——Relationship—Word "emanation" should not be applied to agent—Meaning of word explained.

The word "emanation" is hardly applicable to a person or a body having a corporate capacity. Its primary meaning is "that which issues or proceeds from some source" and it is commonly used to describe the physical properties of substance (*e.g.*, radium) which give out emanations of recognisable character. To avoid the obscurity in future, in preference to the inappropriate and undefined word "emanation", it would be better if words "agent" or "servant" were used. A.I.R. 1941 P.C. 114 =8 B.R. 197=1941 A.W.R. 76=197 Ind. Cas. 186 (P.C.).

——Relationship — Forward contract upon foreign exchange—Principle of account—Sale cases, if can be applied.

The principle of the account sale cases has never been extended to the case of forward contracts entered into by the agent on behalf of the principal upon a foreign exchange. Hence, the acceptance by the principal of the accounts sent by the agent's foreign broker as evidence of the contracts upon the foreign exchange cannot be taken to be an implied term of the dealings between the principal and the agent. A.I.R. 1941 Bom. 108=43 Bom. L.R. 53=I.L.R. (1941) Bom. 273=196 Ind. Cas. 732.

——Relationship—Dealer and broker.

The relation of a dealer and a broker is that of a principal and agent and not of a seller and a buyer. A.I.R. 1939 Bom. 435=I.L.R. (1939) Bom. 454=41 Bom.L.R. 609=186 Ind. Cas. 8.

——Relationship—Benamidar and beneficiary.

The relationship between these two is not that of a principal and agent. No question of ratification arises. A.I.R. 1939 Mad. 858=50 L.W. 357=1939 M.W.N. 834=(1939) 2 M.L.J. 501=188 Ind. Cas. 48.

——Relationship—Burmese Buddhist husband, if agent of his wife.

Per *Mackey, J.*—A Burmese Buddhist husband

is not necessarily the agent of his wife. A.I.R. 1939 Rang. 287=184 Ind. Cas. 622.

——Relationship—Contract between plaintiff, agent of match factory and defendant, for sale of matches—Defendant required to pay for goods before he was allowed to sell them—Profits of sale going to defendant—Defendant, if agent of plaintiff.

Plaintiff, an agent of a match factory, made a contract with the defendant for the sale of the matches. Under the contract, the defendant was required to pay for the cases of matches before he was allowed to sell them. The profits from sale were apparently to go into his own pocket but the agreement was silent on this point:

Held, that the agreement with the defendant was intended to confer upon the latter only the position of a favoured buyer and the defendant was not an agent of the plaintiff. The main test to decide whether a person selling goods supplied by other is his agent, is whether such person is supposed to be selling his own goods when the time for sale comes or whether he is supposed to be selling the goods of his principal, for the liability of an agent to render accounts is based on the assumption that he is dealing with money or goods entrusted to him. A.I.R. 1938 Lah. 814=180 Ind. Cas. 333.

——Relationship — Firm — Partner, relations inter se—Liabilities of proprietors—Successor of firm—Liabilities of.

The firm is an entity and if, in the absence of any notice to those with whom it had dealings, the various partners and proprietors assume the liabilities as well as the rights of the current firm, the existing proprietor of the firm must be regarded as the agent of those with whom the firm had dealings in the same way as his predecessors. A firm *X* ordered certain machinery from firm *Y* according to specifications and estimates submitted by firm *Y*. The firm, *Y*, according to the invoices, was to supply certain machinery from their own stock with the prices fixed but the prices of the rest of the machinery were made subject to fluctuations in them and the firm *Y* was to charge five per cent. as their commission upon actual prices. Firm *Y* acted as agents of firm *X* for certain purpose such as for insuring, shipping and clearing goods. During the transaction, the firm *X* sold all the machinery to company *G* and informed the firm *Y* to credit all the advances made by firm *X* to the names of the company *G* who also confirmed this by a latter and asked the firm *Y* to correspond and to draw upon them in future. There were also changes in the firm *Y*. *S*, who was the sole proprietor of the firm when the order was placed, took some other people into partnership but these partners gradually retired. *S* also subsequently retired and *W* became the sole proprietor. Company *G* instituted a suit against the firm *Y* for rendering accounts on the ground that the firm *Y* as their agents had charged far in excess of the actual price paid to the suppliers. Firm *Y* pleaded that it was acting as principal and not as an agent and even if it acted as an agent, existing sole proprietor *W* was not liable to render accounts and at any rate the firm *Y* was not an agent of company *G* as the relationship of principal and agent existed between the firm *X* and *S* the then proprietor;

Held, that the firm *Y* acted as an agent with regard to the machinery, the prices of which were made subject to the fluctuations and acted as principal with respect to the machinery, the prices of which were fixed:

Held, also that the change in the firm *Y* did not affect this relationship in the absence of notice to those dealing with it as the firm as an entity. The existing proprietor was, therefore, liable to render accounts:

Held, further that the firm *Y* was also an agent of the company *G* as the firm *X* had not only transferred the machinery purchased from the firm *Y* to company *G* but also the entire rights under the contract. The firm *Y* was, therefore, liable to render accounts to firm *G* for the items for which they acted as agents. A.I.R. 1938 Lah. 277=182 Ind. Cas. 438.

——Relationship—Authority—Mention in deed of contract—Liability.

Where a person signs a contract in his own name without any qualification, he is *prima facie* to be deemed to be contracting personally; and in order to prevent the liability from attaching to himself, it must appear from the document that he did not intend to bind himself as principal. Contract by brother to mortgage property of sister under authority from her—Contract signed by brother in his own name—Body of contract describing him as "authorised agent and elder brother":

Held, that the brother was not personally liable under contract. A.I.R. 1938 Mad. 146=46 L.W. 851=(1938) 1 M.L.J. 63=1937 M.W.N. 1118=174 Ind. Cas. 799.

——Relationship—Commission agent.

Commission agents are agents within S. 182, Contract Act, but are not agents pure and simple. Commission agents are, of course, agents up to a point, and to that extent, they stand in a position of active confidence towards their principals, but beyond that they are not agents in the real sense of the term and the relationship between the parties from then on is one of debtor and creditor. A.I.R. 1938 Nag. 254=176 Ind. Cas. 675.

——Relationship — Formality for creating agency.

No particular formality is required with the constitution of agency, and if one person allows or causes, another man to do a certain act relating to his property with his consent or knowledge, then the man who does the act must be taken to be acting as the other man's agent. A.I.R. 1938 Rang. 145=177 Ind. Cas. 601.

——Relationship—Canvasser.

The position of a canvasser is that of an agent who, so long as he is acting for his employers, is daily or weekly soliciting advertisements or renewals. A.I.R. 1936 Cal. 246=40 C.W.N. 694=162 Ind. Cas. 525.

——Relationship—Liability, if joint or alternative.

Quaere.—Whether in India the liability of principal and agent is joint or alternative, that is to say, whether in a suit against both principal and agent, the plaintiff may have judgment against both of them jointly. (1936) 163 Ind. Cas. 331=62 Cal. 612=39 C.W.N. 461.

——Relationship—Lambardar and co-sharer.

The jural relation between a *lambardar* and the co-sharer is that of agent and principal and conse-

quently, he must account for the share of profits which he holds as the agent. A.I.R. 1936 Nag. 71=31 N.L.R. 202 (Sup.)=163 Ind. Cas. 179.

——Relationship—President of Municipal Committee, whether agent of Committee.

Agency is the creation of contract, and there is no contractual relationship between a Municipal Committee and its President, and hence the President is not an agent of the Committee. A.I.R. 1936 Rang. 310=164 Ind. Cas. 410.

——Relationship—"Carrying on business through agent," meaning of—'Commission agent,' whether included in expression.

Whether a firm is carrying on business at a particular place or not is a question of fact. If the firm has only an office where business for the firm is done by an agent, the question whether it is carrying on business at the place where it has its office depends upon the powers and authority of the agent. If the agent has authority merely to take orders and to transmit them to his firm or show samples, that is not carrying on business. It would, however, be different if the agent has power to conclude binding contracts on his own initiative on behalf of the firm. The expression "carrying on business through an agent" means carrying on business through an agent properly and strictly so-called under his effective control and this expression does not apply to an agent who is a mere post office for bringing about contracts or who acts as a general agent for divers firms or is a mere broker:

Held, that the words "manager of a European firm" in a submission clause meant manager of a European firm carrying on business and consequently, the appointment of the commission agent of a European firm as an arbitrator of the dispute was not proper. A.I.R. 1936 Sind 121=29 S.L.R. 292 =164 Ind. Cas. 1015.

——Relationship—Agent happening to be legal practitioner and obtaining vakalatnama from principal—Agent, if ceases to be agent.

An agent, who happens to be a legal practitioner, cannot, by merely obtaining a *vakalatnama* from the principal and on the strength of it, suing for the realisation of the amount due to his principal, cease to be an agent. A.I.R. 1935 Lah. 49=157 Ind. Cas. 815.

——Relationship.

The doctrine of agency cannot be applied to deprive the claim of the mortgagee to be subrogated. A.I.R. 1935 Oudh 399=1935 O. W. N. 622=11 Luck. 224=155 Ind. Cas. 905.

——Relationship—Partnership and agency—Tests—Pleadings—Receipt of share of profits—One party not bound to disclose name of the other—Relationship between parties.

Although a right to participation in profits is a strong test of partnership and there may be cases where, upon a simple participation in profits, there is a presumption, not of law, but of fact that there is partnership, yet whether the relation of partnership does or does not exist must depend upon the whole contract between the parties, and that circumstance is not conclusive. An agreement to share all profit and all loss is an agreement of partnership even though the words 'partner' or 'partnership' do not occur in the agreement while even though some losses are to be shared in by the parties, the agreement may show that a partnership was not intended. The actual relationship between the parties to a transaction is to be determined upon the real character of the transaction between them, whatever the words used in the pleadings be.

Where *A* was to take certain work under a contract from a company, make over the work for management to *B* who would get a certain share in the profits, *A* getting the balance and *A* was not bound to disclose *B's* name to the company and the work was to stand in *A's* name as far as the company was concerned:

Held, that *A* and *B* were not partners but the relationship between them was that of principal and agent, inasmuch as the common business was to be carried on by *B* on behalf of *A* so that *A* could be regarded as principal. A.I.R. 1933 Cal. 204=56 C.L.J. 172=141 Ind. Cas. 225.

——Relationship—Private instructions to agent, effect of, on third party.

Private instructions issued by a principal to his agent are not binding on a third party unless the latter has notice. A.I.R. 1932 All. 540=1932 A. L.J. 526=54 All. 557=138 Ind. Cas. 439.

——Relationship.

Contract between *A* and *B*—Deposit of security by *A* in *B's* name—Bank becoming insolvent—Bank, held accredited agent of *B* and *B*, as the principal, was bound to repay the entire amount of the deposit to *A*. A.I.R. 1932 Lah. 34=32 P.L.R. 819 =133 Ind. Cas. 881.

——Relationship of Principal and Agent—Clerk in bank acting within scope of authority is agent.

The clerk in a bank in charge of savings bank accounts, through whom alone money could be withdrawn, and who alone could report to the official concerned what a particular depositor desirous of withdrawing money has to his credit money in excess of what he desires to withdraw, so far as he acts within the scope of his authority is an agent of the bank. 124 Ind. Cas. 180=A.I.R. 1930 All. 573.

——Relationship.

Three younger brothers appointed the eldest brother as their attorney to collect rents and manage the property.

Held, that an attorney is, after all, an agent and the appointment of an agent could not derogate from the proprietary rights of the three brothers. 101 Ind. Cas. 625=6 Bur.L.J. 45=A.I.R. 1927 Rang. 157.

——Relationship—Commission agent cannot be vendor and agent at the same time—He becomes vendor when contract, for making which he was agent, has been carried into effect.

Circumstances may arise in which a person who enters into a contract of sale as agent, for example, as agent for an undisclosed principal, may be deemed to be either a principal or an agent *vis-a-vis* the other party to the contract of sale; but in the eye of the law he cannot be regarded as filling at the same time both capacities. In effecting the contract of sale, he must needs have acted either as a principal, or as an agent. The agreement between a commission agent and the party for whom he is acting may, at the outset, be that between a principal and his agent, and so long as the contract remains executory the relationship of principal and agent may subsist between the parties. Such a broker may possess a right in certain circumstances to stop the goods in transit But after the

contract of purchase has been effected the relationship of the parties quoad the contract of sale ceases to be that of the principal and agent, and ripens into that of vendor and purchaser, though it may be necessary to refer to some other agreement for example to ascertain the terms and conditions of the contract of sale, it may be difficult to ascertain whether in any particular case the relationship between the parties is that of principal and agent or of vendor and vendee; but inevitably, it must be either the one or the other. Case-law referred to. 87 Ind. Cas. 218=A.I.R. 1926 Cal. 189.

——Relationship—In modern business, a so-called agent may really be a buyer if he is so treated.

Modern business has given extension to the terms "agent" and "agency". In many trades—particularly, for instance, in the motor car trade—the so-called agent is merely a favoured and favouring buyer, one who under an overriding contract undertakes to do his best to find a market for the manufacturer's stock, who is given some special advantages, such as a special discount or preference in complying with his orders; but who in each particular contract acts as a buyer from the manufacturer and sells at whatever price he can get, unless—as is sometimes the case—he is, by a special provision in the overriding contract, forbidden to sell too cheaply or required not to spoil the market by asking too much. 88 Ind. Cas. 307=49 Mad. 1=30 C.W.N. 794=6 L.R.P.C. 129=A.I.R. 1925 P. C. 161 (P.C.).

——Relationship.

Relationship between *pacca adatias* and their constituents is not one of principal and agent but of principal and principal. 75 Ind. Cas. 906=A.I.R. 1923 Nag. 324.

——Relationship.

Where in an English mortgage, the mortgagor had as a condition of the mortgage to appoint the mortgagee's nominee as manager of the property,

Held, that the mortgagee had a perfect right before lending its money to insist upon the mortgagor appointing manager in whom he had confidence, and he could not be held, merely because his nominee had to be appointed as manager, to be in possession of the property. 61 Ind. Cas. 486 =28 M.L.T. 351=1920 M.W.N. 631=25 C.W.N. 265=A.I.R. 1921 P.C. 118 (P.C.).

——Relationship—Agent laying out money on insufficient security—Solicitor.

A person does not become an agent on behalf of another merely because he gives him advice in matters of business. Agency is founded upon a contract either expressed or implied by which one of the parties confides to the other the management of some business to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it. The essence of the matter is that the principal authorises the agent to represent or act for him in bringing or to aid in bringing the principal into contractual relation with a third person. The mere fact that plaintiff employed the defendant in laying out or investing a sum of money and that the defendant undertook and promised to perform and fulfil that duty, and that injury resulted by reason of the insufficient security is not sufficient to make the defendant liable. 4 B. and C. 345, Rel. on. A solicitor who has been employed as such in a transaction for investment of money may be liable for negligence in lending money on sufficient security.

The liability of a solicitor varies with the extent of the part he is employed to take in the transaction. A solicitor in a mortgage transaction may be employed either (1) to invest in a particular mortgage or (2) to find securities to be approved by the client and then invest the money, or (3) to find securities and invest, the client taking little or no part in the business. No relation of trustee and *cestui que trust* exists between the parties in the first two events and the liability is quite different in the third case from that in the other two. In the third case, the defendant is not liable if the plaintiff is shown to have known and approved of the investment. 39 Ch. D. 178, Rel. on. (1907) 6 C.L.J. 580=12 C.W.N. 28.

——Relationship — Indentor — Manufacturer sending goods through agent—Relation between agent and indentor.

Although the transaction between a commission merchant in Europe and an indentor in Bombay may be a contract of sale passing the property from one to the other there may be superadded the duty of an agent to his principal, *e.g.*, to buy the goods at the lowest price possible. (1903) 5 Bom. L.R. 519.

16. Remuneration and commission.

See PRINCIPAL AND AGENT—POWERS AND RIGHTS OF AGENT.

17. Revocation.

——Revocation—Common manager.

Where an agent has been appointed by several persons, it cannot be said that under all the circumstances, one of the joint proprietors would be entitled to revoke the authority of the agent. A.I.R. 1936 Pat. 456=2 B.R. 721=17 P.L.T. 865=164 Ind. Cas. 220.

——Revocation—Agency coupled with an interest—Revocability.

A power of attorney authorizing the agent to exercise the rights of the Shrotriemdars under Madras Act 8 of 1865, when it is an authority coupled with an interest, is irrevocable. 28 Mad. 301= (1904) 16 M.L.J. 143.

18. Sub-agents.

See CONTRACT ACT, SS. 190 TO 195.

19. Suit for accounts.

See also C. P. CODE, O. 20, R. 16.

——Suit for accounts.

Principal and Agent—Account, suit for—Agent —Limitation. *See* LIMITATION ACT, ARTS. 89, 90.

——Suit for accounts—Several principals appointing one common agent—Right of one principal to sue for account on his own behalf without joinder of others.

Generally, where there are joint principals having one agent there can only be one account which is a joint account. But where the principals are joint and several, as in the case of co-sharer zamindars of a mahal, owning different shares therein,

having one *Naib* or agent, there can be no objection to joint and several accounting and it is competent for one co-sharer or principal to sue for an account of his own exclusive share without reference to the others and without making the others parties. A. I.R. 1949 Cal. 656.

——Suit for accounts—Commission—Claim to set off raised in suit by principal—Withdrawal—Subsequent claim for commission—Starting point of account.

Where an agent in a suit by his principal counter-claimed for arrears of commission due to him and allowed a compromise decree to be passed declaring his set off to be withdrawn, in respect of commission for the subsequent period the starting point of the account will be the date of the written statement claiming a set-off in the prior suit and not the date of the compromise decree declaring the claim withdrawn. I. L. R. (1947) Mad. 18=226 Ind. Cas. 386=59 L.W. 205=1946 M.W.N. 235=A. I.R. 1946 Mad. 470=(1946) 1 M.L.J. 264.

——Suit for accounts—Agent cannot ordinarily sue principal for accounts, though accounts are complicated—Necessity to investigate accounts does not alter nature of suit.

An agent is not ordinarily entitled to institute a suit for accounts against his principal. His suit must be for the recovery of the specific amount alleged to be due to him from the principal. The mere fact that the accounts are complicated would not entitle him to sue for rendition of accounts for which a principal is not legally liable, but it is open to the agent to serve interrogatories on the principal or to apply for discovery and inspection of his accounts. Similarly, the mere fact that in ascertaining the sum due to the agent it would be necessary to investigate accounts, does not in any way alter the nature of a suit brought by the agent against his principal. A.I. R. 1946 All. 489=1946 All. W.R. (H.C.) 619=224 Ind. Cas. 273.

——Suit for accounts.

Preliminary decree—If on taking accounts, amount is found due to agent from principal, Court should pass final decree to that effect and not dismiss suit. A.I.R. 1942 Lah. 81=44 P.L.R. 41 =I. L. R. (1943) Lah. 151=199 Ind. Cas. 695 (D.B.).

[Overrules A. I. R. 1934 Lah. 708=152 Ind. Cas. 133; A.I.R. 1932 Lah. 619=140 Ind. Cas. 15 and A.I.R. 1927 Lah. 701=104 Ind. Cas. 339].

——Suit for accounts—Forum.

The general rule is that a suit for accounts against a commission agent must be filed at the place where the commission agent works. A. I. R. 1940 Lah. 171=42 P.L.R. 203=188 Ind. Cas. 299.

——Suit for accounts—Agent's claim for credit for transferred items, when can be allowed.

In a suit for accounts between the principal and agent, it cannot be said that the agent is entitled in equity to credit for all the items due to himself, though a suit by him for the recovery of any such item might be barred, unless the right to account as between the parties was one that was subsisting on the date of the suit. A.I.R. 1940 Mad. 299= 1939 M.W.N. 1046 (2)=188 Ind. Cas. 626.

——Suit for accounts—Liability of representative of deceased agent to render account—Extent of—Accounts and papers already submitted to principal—Duty of principal in such case—Preliminary decree, if can be passed on these bases.

The representatives of a deceased agent are not liable to render an account in the sense in which the agent, had he lived, might have been called upon to do so. The liability to render accounts is a personal one attaching to the agent and cannot be enforced against his heirs. But if the principal can prove that he has suffered loss owing to breach of duty of the agent, his heirs are liable to the extent of the assets of the deceased agent in their hands. The burden of proof, however, in such a case rests on the plaintiff. It is clear that the plaintiff can only succeed in enforcing liability against the defendant, in respect of his father's failure to account to the extent that the plaintiff can prove that through this failure loss has been caused to the plaintiff.

The mere fact that books of accounts have been submitted is not by itself sufficient to absolve an agent from liability to explain the accounts if called upon. But the principal is not entitled to a preliminary decree merely because the defendant has not explained the papers. When all the papers have been submitted it is for the plaintiff next to call upon the defendant to explain the accounts: then on refusal to do so, an account might be ordered by the Court. Where all the papers have been submitted, it is the plaintiff's duty to produce the accounts in Court with a statement of the matters objected to and of what balance the plaintiff claims to be in his favour. A.I.R. 1940 Pat. 114=6 B.R. 49=21 P.L.T. 129=184 Ind. Cas. 495.

——Suit for accounts—Obligation of either party—Accounts taken and adjusted—Specific sum found due from principal to agent—Agent has right to sue—Cause of action.

Where a relation between the parties is that of a principal and agent, the accounts between them are mutual running and current accounts. The essentials of a mutual, open and current account are the reciprocity of dealing and the right to mutual demand; where these are the relations between the parties, an account, to be a settled account need not be signed provided that it is submitted to the party sought to be made liable on it and he has, by words or by his conduct, acquiesced in its correctness. Until an account is stated between the parties, the right of either of them is to bring a suit for account and to have accounts taken. But once account has been stated, the party in whose favour there is a credit balance has the right to sue for the balance due to him. As between a principal and agent, the obligation of either party is not confined to the rendering of accounts but includes also the payment of any balance which might be found due on taking accounts and where accounts are taken and adjusted and a specific sum found due from the principal to the agent, the agent then has a right to sue forthwith for recovery of the money. In such a case, a cause of action arises to the plaintiff from the fact of adjustment of account and time begins to run from the date of the adjustment. A.I.R. 1940 Pat. 71=21 P.L.T. 41=6 B. R. 82=184 Ind. Cas. 830.

——Suit for accounts—Sub-agent.

Principal cannot sue his sub-agent for accounts unless he establishes fraud or wrong doing on the

part of the sub-agent. A.I.R. 1938 Cal. 12=I.L.R. (1937) 2 Cal. 124=173 Ind. Cas. 530.

——Suit for accounts—Sums not realized due to laches of principal—Credit for such amount.

Where, on the date of the agent's leaving the business, particular outstanding arising out of credit transactions during the period of agency were really realisable assets, the mere fact that by reason of subsequent events, *i.e.*, either on account of change in the situation of the debtors or because of laches or negligence on the part of the principal or his agents in making the collections, some of these outstandings have not been realised, should not be insisted on to the prejudice of the agent even in calculating profits in taking accounts between principal and agent. A.I.R. 1938 Mad. 38=183 Ind. Cas. 82.

——Suit for accounts—Agent entitled to share of profits—Interest on principal.

The ordinary rule of law is that as between partners or between the principal and an agent who is paid for his services by a share of the profits of the business interest on capital is not to be charged in taking accounts unless there is some agreement to that effect. An agreement between the principal and agent provided that 'interest expenditure' was to be allowed before profit was ascertained:

Held, that the parties meant to exclude only the payments actually made by way of interest to strangers and not that the interest on capital invested by the principal was to be allowed before ascertainment of profit. A.I.R. 1938 Mad. 38=183 Ind. Cas. 82.

——Suit for accounts—Such right only arises if parties are in fiduciary relationship.

A suit for accounts is founded on the right of the plaintiff to receive an account from the other party. But such a right can only arise if the parties are in a fiduciary relationship to each other. A.I.R. 1938 Nag. 254=176 Ind. Cas. 675.

——Suit for accounts—Principal in possession of account-books—Duty of.

An agent merely by handing over to his principal a set of account-books is not absolved from the liability to explain them; but where the principal who is in possession of all the account-books sues his agent for accounts, he is expected to disclose such particulars as will establish a *prima facie* liability of the agent to account. It is not open to any principal, who has got all the accounts of his agent in his possession, to employ the machinery of the Court for examining his accounts on the off-chance of making his agent liable for any sum which, on such examination, may be found due from him. A.I.R. 1938 Pat. 392=4 B.R. 797=177 Ind. Cas. 133.

——Suit for accounts—When maintainable.

There cannot be, in law, a suit for accounts unless the defendant in the suit is under an obligation to render accounts to the plaintiff. The principal owes no obligation to render accounts to the agent. Hence, an agent cannot maintain a suit for accounts against the principal as defendant. The mere fact that in ascertaining the sum due to the plaintiff, it would be necessary to investigate accounts, does not, in any way, alter the nature of the suit. A.I.R. 1937 Cal. 359=41 C.W.N. 703=I.L.R. (1937) 2 Cal. 259=169 Ind. Cas. 930.

——Suit for accounts.

Principal cannot select single transaction and claim on it without adjusting rights and liabilities in respect of other transactions between them. A.I.R. 1937 Nag. 172=I.L.R. (1937) Nag. 85=168 Ind. Cas. 190.

——Suit for accounts—Joint and several principals—Death of one—Suit by survivor against agent for rendition of accounts—Time, when begins to run—Limitation Act (IX of 1908), Sch. I, Art. 89—Contract Act (1872), S. 201.

Where there are two or more principals who are "joint and several" and one of them dies, the agency terminates only as regards the deceased principal's representatives. It continues as regards the surviving principal. Consequently, period of limitation for a suit against the agent for rendition of accounts does not begin to run from the death of the deceased principal as against the surviving principal. The surviving principal may file such suit within three years of the termination of the agency as against him. A.I.R. 1936 Cal. 650=41 C.W.N. 27=64 C.L.J. 587=166 Ind. Cas. 608.

——Suit for account—Suit, if should be one for an account—Principal objecting only to certain items of agent's account—Suit in respect of those items, if sufficient.

The agent is the accounting party, and the ordinary form of suit between a principal and an agent should be a suit calling upon the agent to account generally, but if the principal is in the main satisfied with the agent's accounts, and only takes objection to certain items therein which he is prepared to specify, then the result of bringing a suit in regard to these particular items only is to relieve the agent of considerable burden. Hence, the suit need not be for an account. A.I.R. 1935 Rang. 209=157 Ind. Cas. 166.

——Suit for accounts—Agency admitted—Documents withheld—Liability.

Where, in a suit for the rendition of accounts on the allegation that the defendants were the agents of a joint Hindu family of which the father of the plaintiff was the *karta* up to 1923, and thereafter the plaintiff No. 1 became the *karta*, originally the defendant No. 1 half-heartedly denied that he had anything to do with the collection of rent, but was subsequently forced to admit, being confronted with certain documents, that he was entrusted with the duty of collecting rent, and that defendant No. 2 was associated with him in that work:

Held, that in such a case the Court would be justified in pasing a preliminary decree directing the defendants to render an account of what they received in course of their employment as agents on behalf of the plaintiff's family and that since the liability of the defendants to render account arose from the facts admitted in the pleadings, a preliminary decree should be passed directing that an account be taken from the defendants. The fact that the plainiff is in possession of certain documents and is withholding them cannot have the effect of relieving the defendants of their liability to render account if they are otherwise liable:

Held, also that there could not be said to have been two successive contracts of agency. After the death of the father, they continued the services of the defendants who were not the agents of the plaintiff personally but of the family of which the plaintiff became the *karta* on the death of his father. A.I.R. 1934 All. 553=1934 A.L.J. 453=3 A.W.R. 617=150 Ind. Cas. 151.

——Suit for accounts—Agent's right to sue for accounts—Special circumstances — Insurance agent's right to sue—Contract Act (9 of 1872), S. 23.

It cannot be laid down as a hard and fast rule that under no circumstances can an agent call on his principal to render accounts. On the other hand, where the accounts between a principal and agent are of so complicated a nature that they cannot be satisfactorily disposed of in an action at law, an agent has a right to have an account taken.

Where the plaintiffs were to be remunerated by a commission calculated on the premia paid on all policies effected or introduced through the plaintiffs:

He'd, that they were entitled to call upon the defendant company to rendition of accounts. A.I.R. 1938 Lah. 483=144 Ind. Cas. 505.

——Suit for accounts—Limitation—Duty of agent to satisfy principal of reasonable diligence —Agency, termination of—Cause of action for suit—Limitation, when begins to run—Hyderabad Limitation Act (2 of 1322-F), S. 76.

D, a commission agent was paid Rs. 5,500 for buying cotton and cotton seeds and for selling them at a profit in Bombay. Out of this amount, certain bales of cotton and certain quantity of cotton seeds were consigned to Bombay with the knowledge of the plaintiff. *D* had paid only Rs. 1,000 in respect of the goods. On being asked to settle the accounts of the balance, *D* evaded and finally refused. Plaintiff alleged that *D* had kept the cotton for a period without any reason during which time the price of cotton rose from Rs. 400 to Rs. 500 several times, and filed a suit for Rs. 8,000, the amount due from *D*:

Held, (*i*) that *D* as agent was legally bound to satisfy the principal, the plaintiff, that he acted with reasonable diligence and skill and in the interests of the principal.

(*ii*) that *D* would be deemed to have ceased to be an agent of the plaintiff from the day when the plaintiff stopped *D* from selling goods or when they were sold and the price was received by *D*;

(*iii*) that the suit being one for accounts, limitation would begin to run from the date on which *D* ceased to be the agent of the plaintiff or at the most when he received the price of the goods sold and that the suit was governed by Art. 76 of the Hyderabad Limitation Act. (1933) 142 Ind. Cas. 428.

——Suit for accounts—Sub-contract—Relationship of agency not constituted—Suit for rendition of account—Maintainability.

A sub-contract was entered into by a contractor undertaking some building work of a railway company with another contractor on certain percentage basis. The sub-contractor sued the railway contractor for rendition of accounts:

Held, that under the circumstances a suit for rendition of accounts could not lie, as there was no relationship of principal and agent between the two contractors for realizing money from the railway company, nor was there any privity of contract between the sub-contractor and the railway company and that a suit for a specific sum due to him should have been brought. 32 P.L.R. 137=130 Ind. Cas. 54=A.I.R. 1930 Lah. 1062.

——Suit for accounts.

A principal can sue an agent for a sum of money had and received on his behalf and may also bring a suit for accounts. 109 Ind. Cas. 867=A.I.R. 1929 Lah. 94.

——Suit for accounts—Principal suing agent for accounts of money borrowed by agent on principal's credit—Concession given by creditors to principals will not reduce agent's liabilities.

Where principal was suing to make the agent account for all the money the agent had raised by borrowing on the principal's credit:

Held (Per *Krishnan, J.*).—The agent was bound to account for all these moneys. The fact that some creditors at the request of the principal gave him concessions or that others did not enforce their debts against him in time has nothing to do with the liabilities and rights as between the principal and agent. There is no reason why the defaulting agent should get the benefit of any advantages gained by the principal by his own exertions. 102 Ind. Cas. 561 =1927 M.W.N. 118=38 M.L.T. 256=38 M.L.T. 56=A.I.R. 1927 Mad. 478 (F.B.).

——Suit for accounts—Suit for accounts and suit to re-open settled account—Distinction.

A suit by a principal for accounts on the allegation that the defendant, his agent, has not rendered any account, has manifestly an entirely different scope from that of a suit in which a principal alleges that the defendant, his agent, has rendered accounts and prays to have them re-opened or to have liberty to surcharge and falsify them, on the ground of fraud or material error. It is only in the case of settled accounts that liberty has to be obtained by a plaintiff to surcharge and falsify. 13 C.L.J. 165, Foll. 90 Ind. Cas. 944=52 Cal. 765=A.I.R. 1925 Cal. 1069.

——Suit for accounts.

Where it was found that the accounts had not been explained by the agent without finding whether any item required explanation or had been wrongly or falsely entered, and a decree was passed in favour of the principal:

Held, that the decree passed under such circumstances could not be justified. 90 Ind. Cas. 944 =52 Cal. 766=A.I.R. 1925 Cal. 1069.

——Suit for accounts—Two principals—Right to demand account.

Where an agent has to account to more principals than one they must all sue and he is not liable to render separate accounts in separate suits to each of its principals to whom jointly he is accountable. 62 Ind. Cas. 766 (Cal.).

——Suit for accounts—By agent.

An agent cannot maintain a suit against his principal for rendition of accounts except where he makes out a special case such as that the account between him and the principal is of a complicated nature. Plaintiff must satisfy the Court in order to entitle him to an order for account from the defendant, that the defendant is an accounting party. 78 Ind. Cas. 846=A.I.R. 1925 Sind 173.

——Suit for accounts—Demand—Principal suing for share of profits—No demand and refusal of accounts—Agent liable to account for all profits received.

In a suit by the principal against agent for rents and profits of the suit property, if there was no demand and refusal of accounts, the agent is liable to account for all the amounts received on behalf of the plaintiff. It is immaterial in such a case whether Art. 89 applies on the ground of agency, or Art. 120 applies on the ground of absence of specific contract

of agency. 114 Ind. Cas. 364=A.I.R. 1928 Mad. 1236.

——Suit for accounts—Demand necessary.

If all the papers are submitted, the principal is bound to call upon the agent to explain the accounts and if the agent expresses his willingness to explain the accounts, if called upon to do so, and avers that he had never been so called upon the suit can be dismissed as being one without a cause of action. 90 Ind. Cas. 944=52 Cal. 766=A.I.R. 1925 Cal. 1069.

——Suit for accounts—Limitation.

Where there was no specific contract of agency between the parties Art. 120 should be applied and not Art. 89. A.I.R. 1922 Mad. 150 (F.B.), Foll. 114 Ind. Cas. 364=A.I.R. 1928 Mad. 1236.

——Suit for accounts—Nature and scope—Plaintiff must produce and prove the accounts and erroneous entries and the Court is to decide upon such particulars treating each separate item.

In a suit for accounts it lies upon the plaintiffs to point out the entries in the accounts which they allege to be erroneous, or in respect of transactions not shown in the accounts, to state what monies have been received and not credited and the Judge will have to deal with questions thus raised between the parties, treating each item separately. In such a case it is the plaintiff's duty to produce the accounts in Court together with a succinct statement of what they contain, and what the balance is, whether in his favour or against him. 90 Ind. Cas. 944=52 Cal. 766=A.I.R. 1925 Cal. 1069.

——Suit for accounts.

A suit for account is not maintainable by the owner of an estate against a Tahsildar appointed by a Receiver to his estate. Such a suit is really on the same basis as a bill of discovery and it can be sustained only on proof of fiduciary relation between the parties; but the Receiver is not a representative of the owner, he is an officer of the Court. 62 Ind. Cas. 768=26 C.W.N. 992=A.I.R. 1921 Cal. 516.

——Suit for accounts—No suit for accounts by an agent.

Obiter dictum.—There can be no suit by an agent against the principal for accounts, there being no liability of a principal to render accounts. The agent can only sue for balance on account. 12 N. L.R. 174=37 Ind. Cas. 510.

——Suit for accounts by principal—No set off pleaded by agent—Involves an undertaking to pay whatever is found due to agent—No claim for set off necessary—C. P. Code Act (15 of 1882), Ss. 215-A. 216—Decree in account cases.

A suit for account by a principal against an agent, where the agency is not denied, necessarily involves an undertaking by the plaintiff to pay to the defendant any sum that may be found due to the defendant by him on the taking of accounts, and it is necessary that the defendant should plead a set-off or counter claim. Hence, where a suit was brought against an agent for rendition of accounts, and the agent expressed himself as ready and willing to render the accounts but alleged that, on such accounts being taken money would be found due to him without specifically praying, for a decree, and the Court granted a decree to the agent upon the finding that money was really due to him:

Held, that the decree was justified with reference to the proisions of Ss. 215-A and 216 of the Code of Civil Procedure, 1882. (1910) 7 A.L.J. 543=6 Ind. Cas. 162=32 A. 525.

——Suit for accounts.

The law does not impose any duty upon a plaintiff, who calls on his agent to account first to satisfy the Court that there is or ought reasonably to have been some surplus in the hands of agent. The fact of agency being established it is the duty of the Court to fix a date for the furnishing of the accounts. The plaintiff has only to show that the defendant is an accounting party and then it is for the defendant to prove the amount of his receipts. 1 A.L.J. 347=1905 A.W.N. 1.

20. Suits.

——Suits.

Held on facts that the suit by agent against principal was for indemnity and not for accounts. A.I.R. 1940 Mad. 504=I.L.R. (1940) Mad. 296=51 L.W. 171=(1940) 1 M.L.J. 173=1940 M.W.N. 597=191 Ind. Cas. 598.

——Suits.

It is not every suit by principal against agent and *vice versa* that is excluded from the cognizance of Small Cause Court. A.I.R. 1938 Mad. 789=(1938) 2 M.L.J. 76=47 L.W. 793=1938 M.W.N. 707=176 Ind. Cas. 806.

——Suits.

Suit by agent against principal for specific sum alleged to be due to him in regard to certain dealings is not one for accounts and is triable by Small Cause Court. A.I.R. 1938 Mad. 707=47 L.W. 654=1938 M.W.N. 613=(1938) 2 M.L.J. 112=177 Ind. Cas. 631.

——Suits.

Suit by agent on behalf of undisclosed principal—Death of agent—Agent's representatives not brought on record—No right to principal to continue the suit. *See* C. P. CODE, O. 22, R. 1. 17 M. L.J. 116.

——Suits—Falsely contracting as agent—Undisclosed principal—Suit on contract.

Plaintiffs sued to recover Rs. 25,000 in respect of breach of three contracts for the purchase and sale of jute. The Court found as a fact that in the transaction in suit the plaintiff purported to act as a broker to the defendant but really acted as principal and that this was without the knowledge and consent of the defendant:

Held, that S. 236 of the Contract Act was a bar to plaintiff's action. (1907) 11 C.W.N. 609=34 C. 628.

21. Termination of agency.

——Termination of agency—Insurance agency—Termination—Notice.

[Construction and requisities of a valid notice considered.] A.I.R. 1946 P.C. 6=(1945) 2 M.L.J. 496=1946 M.W.N. 59=12 B. R. 350=223 Ind. Cas 15=50 C.W.N. 73=72 I.A. 315 (P.C.).

——Termination of agency—Power-of-attorney executed by minor's certificated guardian—Termination of agency—Authority, if ceases merely on minor's attaining majority.

Where a certificated guardian of a minor has executed a power-of attorney in favour of a certain person to act for the minor, the agency of such a person can terminate only in accordance with the provisions of S. 201 and other relevant sections of the Contract Act. The authority of such a person to act for the minor cannot be deemed to have ceased merely on the attainment of majority by the minor. A.I.R. 1946 All. 1=1945 A.L.J. 361=I.L.R. (1945) All. 882=1945 O.W. N. (H.C.) 302=1945 A.W.R. (H.C.) 308 (2)=222 Ind. Cas. 375.

——Termination of agency—Reasonableness of notice is question of fact.

The question as to what is the reasonable period of a notice for the termination of an agency by the principal is a question of fact and the Appellate Court will not interfere with the trial Court's finding on that question in the absence of anything to show that the trial Court took into account any fact or circumstances which it ought not to have considered or that it omitted to consider any admissible circumstance. A.I.R. 1944 Bom. 166=46 Bom. L.R. 279=I. L. R. (1944) Bom. 637=214 Ind. Cas. 305.

——Termination of agency.

In determining the reasonableness of the notice, a very important element to be taken into consideration is the nature of the employment. Firm appointed Chief Agents of an insurance company:

Held, that taking everything into consideration, the case was of exceptional character and, therefore, two years' notice was reasonable. A.I.R. 1944 Bom. 166=46 Bom. L.R. 279=I.L.R. (1944) Bom. 637=214 Ind. Cas. 305.

——Termination of agency—Life Assurance.

Company appointing *D* as Chief Agent for Gujrat —*D* allowed to secure business for company in name of *D* and Co. with certain others as partners—Company recognizing and holding *D* alone responsible for all cash transactions—Employment of agent being personal contract of agency, held to be revocable. A.I.R. 1944 Bom. 166=46 Bom. L.R. 279 =I.L.R. (1944) Bom. 637=214 Ind. Cas. 305.

——Termination of agency—Managing agents—Question whether termination of employment on ground of misconduct was justified—Test—Principles applicable in case of master and servant, if apply.

Where the question is whether the termination of the employment of a certain firm as managing agents of a certain company on the ground of misconduct, was justified, it is not correct to say that the same principle does not apply to such agents as in the case of master and servant. In each case, the question must be whether the misconduct proved, or reasonably apprehended, has such a direct bearing on the employer's business, or on the discharge by the employee of that part of the employer's business in which he is employed as to seriously affect to threaten to seriously affect the employer's business or the employee's efficient discharge of his duty to his employer. The nature of the particular business, and the nature of the duties of the employee, will require to be considered in each case in order to arrive at a just conclusion on the question, but the principle remains the same. A.I.R. 1944 P. C. 17=57 L.W. 98=48 C.W.N. 181=1944 A.L.J. 93=10 B.R. 462=(1944) 1 M.L.J. 227=46 Bom. L.R. 324=1944 M.W.N. 337=78 C.L.J. 113=1944 A.W.R. 28=I.L.R. (1944) Kar. (P.C.) 57 (Sup.)=211 Ind. Cas. 434 (P.C.).

——Termination of agency—Agency, unless it is for fixed term, continues and is terminated at principal's pleasure—Agency is personal.

An agency, unless it is for a fixed term, obviously continues and may be terminated at the pleasure of the principal. By its very nature, it is personal, neither transferable nor assignable and depends entirely on the agreement made with the principal. A.I.R. 1943 Sind 197=I.L.R. (1943) Kar. 49=211 Ind. Cas. 162.

(22) Third parties.

See CONTRACT ACT, SS. 226 TO 238.

(23) Undisclosed agent.

See CONTRACT ACT, S. 231.

(24) Miscellaneous.

——Agent losing office during suit—Suit can be decreed in principal's favour.

If a party has two agents both fully accredited either can bring a suit on behalf of the principal without the concurrence of the other. And if in the course of a suit brought by an agent his powers are taken away, there is nothing to prevent a decree being passed in favour of his principal. So also if one of two Lambardars of a mahal brings a suit for ejectment on behalf of the proprietary body without the concurrence of the other Lambardar, a decree can be passed even after the plaintiff Lambardar has been relieved of his office. 78 Ind. Cas. 722=A.I.R. 1925 Nag. 32.

——Commission on sale ordinarily means on a completed sale.

Where one of the terms of a contract between a vendor and purchaser, which provided that the commission payable to a commission agent should be paid by the purchaser and not by the vendor was that the whole contract was subject to the title being approved by a vakil:

Held, that the contract to pay commission by the purchaser was also subject to the approval of the title by the vakil.

Where the plaintiff says, "the defendant enagaged me for the purpose of purchasing a house. The terms of the engagement were that I should negotiate for the purchaser at a commission of 2 per cent. on the purchase price."

Held, in the absence of words to the contrary, "purchasing a house" means the completion of the purchase of that house. It does not mean a conditional contract, or even an unconditional contract, for the purchase and sale of it. In the same way "the purchase price" means the price paid and not the price agreed to be paid conditionally or unconditionally. 4 T.L.R. 541, Foll. 76 Ind. Cas. 756=18 M.L.W. 560=33 M.L.T. 3=1923 M.W.N. 675=A.I.R. 1924 Mad. 212=45 M.L.W. 409.

——Contract Act, S. 231, Para. 2—"Discloses himself".

The words "discloses himself" in para. 2 of S. 231 of the Contract Act should be construed strictly. There is no right of repudiation if the principal is disclosed by any other means than by the principal

himself. The second clause should be read as governed by the preceding clause which is restricted to cases where "an agent makes a contract with a person who neither knows nor has reason to suspect, that he is an agent." (1904) 6 Bom. L.R. 731=32 B. 356.

PRINCIPAL AND SURETY.

See (1) CONTRACT ACT, SS. 124-147.
(2) SURETY.

PRINTER.

See (1) CONTEMPT OF COURTS ACT.
(2) PENAL CODE, SS. 499 AND 500.
(3) PRESS AND REGISTRATION OF BOOKS ACT, 1867.
(4) PRESS (EMERGENCY POWERS) ACT, 1931, S. 18 (1).
(5) TORT—DEFAMATION.

PRINTING PRESSES AND NEWSPAPERS ACT (25 OF 1867)—Declaration by printer—Presumption.

A statutory declaration of printership raises a presumption of his liability as printer and publisher. (1909) 32 M. 338=9 Cr. L.J. 506=5 M.L.T. 415 =2 Ind. Cas. 193.

——Penal Code, Ss. 124-A and 7—Printer's liability.

The declared printer of a newspaper is responsible for seditious articles published therein unless he can establish that in fact he had nothing to do with them. And he is technically guilty of an offence under S. 124-A, Penal Code. 38 Cal. 227=12 Cr. L.J. 354 =10 Ind. Cas. 954.

——Ss. 1 and 3—'Book,' meaning of—If includes a part of a book or a pamphlet.

The word 'book' as defined in S. 1 of the Act includes also part of a book or pamphlet so that the printer of a pamphlet must print his name and place of printing as otherwise he commits a breach of the provisions of the Act. 14 Bom. L.R. 40=13 Cr. L.J. 139=13 Ind. Cas. 827.

——Ss. 3 and 12—Presses.

The two sections do not deal with intention, and if the Rule in S. 3 is not complied with, an offence is committed and is punishable under S. 12. The section means that the name of the printer as such and the name of the publisher as such must be printed and the object is that the paper should clearly intimate who is liable as printer and who is liable as publisher. A note that a printer printed a newspaper in a certain press, for a certain man does not mean an intimation as to the publisher according to the section. A publisher cannot be described as 'Manager' instead of as 'Publisher' merely because the manager and publisher of many papers are identical, the terms of the Act must be strictly complied with. 5 P.R. 1909 Cr.=15 P. W.R. 1909 Cr.=10 Cr. L.J. 195=142 P.L.R. 1909=9 Ind. Cas. 978.

——S. 6—Declaration—Refusal of District Magistrate to authenticate—Revision.

The proceedings of a Magistrate in refusing to authenticate a declaration under S. 6 of the Act is a purely ministerial act in which the High Court could not interfere. 19 Cr. L.J. 621=27 P.W.R. 1918 Cr.=21 P.R. 1918 Cr.=137 P.L.R. 1918 =45 Ind. Cas. 525.

——S. 7—Declaration by printer—Liability of printer.

The person who subscribes to the declaration under the Printing Presses and Newspapers Act must be presumed under S. 7 to be cognizant of all that he was printing and publishing and, in the absence of any evidence to the contrary, his liability in the matter cannot be gainsaid. (1907) 7 C.L.J. 49= 35 C. 141.

——S. 7—Liability of Printer—Absence of good faith—Onus.

S. 7 applies both to civil and criminal proceedings. It makes the printer responsible whoever may be the writer of the seditious articles in the paper. The onus is on the printer to prove absence in good faith. Absence with a view of merely shirking the liability and with knowledge that seditious articles will be written is not absence is good faith. (1908) 35 C. 945.

——S. 7—Presumption of liability.

A declaration by a person as printer of a newspaper raises a presumption that he is liable as printer and publisher of the seditious articles therein and his guilt is established if the presumption is not rebutted. 32 Mad. 338=5 M.L.T. 415=9 Cr. L.J. 506=2 Ind. Cas. 193.

PRIOR AND PUISNE MORTGAGE.

See T. P. ACT, SS. 74 AND 75.

PRIORITY.

See (1) C. P. CODE, S. 73.
(2) CROWN DEBTS.
(3) MORTGAGE.
(4) REGISTRATION ACT, S. 50.
(5) T. P. ACT, SS. 76 AN D 101.

PRISONS ACT (9 OF 1898), S. 3—Borstal Institution, held to be a prison.

Per *Dunkley, J.—Obiter.*—The Borstal Institution and Training School at Thayetmyo are prisons within the meaning of the definition in S. 3, Prisons Act of 1894. A. I. R. 1936 Rang. 485=38 Cr. L.J. 33=14 R. 625=165 Ind. Cas. 575 (F. B.).

——S. 3 (2)—"Criminal prisoner"—Approver, if comes under.

An approver is not a convicted person, but when his detention is ordered by a Court of Law under S. 337 (3), Cr. P. Code, he comes within the category of 'Criminal Prisoner,' as defined by S. 3 (2) of the Prisons Act. A.I.R. 1931 Lah. 476=32 P.L. R. 493=12 L. 635=32 Cr.L.J. 913=132 Ind. Cas. 519.

——S. 3 (2)—Approver if a "Criminal prisoner."

An approver detained in custody under S. 337, Cr. P. Code, comes within the definition of a 'criminal prisoner' in S. 3 (2) of the Prisons Act. A.I. R. 1931 Lah. 353=32 Cr.L.J. 785=32 P.L.R. 423 =12 L. 604=131 Ind. Cas. 625.

——S. 3—Under-trial prisoner—If a "criminal prisoner"—Under-trial prisoner is a prisoner—Judicial lock-up is a prison.

An under-trial prisoner is a prisoner. A person committed to custody in pursuance of a warrant or an order of a Court exercising criminal jurisdiction, though not convicted, is a criminal prisoner within sub-S. (2) of S. 3.

A judicial lock-up is a prison within the meaning of that expression used in the Prisons Act. 76 Ind.

Cas. 29=4 Lah. 448=25 Cr.L.J. 93=A.I.R. 1924 Lah. 257.

——S. 4—S. 4, Prisons Act, imposes upon the Local Government the duty of providing for prisoners' accommodation in prisons as ordained by that Act. A. I.R. 1931 Lah. 476=32 P.L.R. 493=12 L. 635=32 Cr.L.J. 913=132 Ind. Cas. 519.

——S. 31—Where the Police refused to allow the legal advisers of the accused to interview him and refused to allow the relatives of the accused to supply him food and clothing during Police investigation:

Held, that a person who is merely arrested on suspicion during the course of a Police investigation cannot be placed on a worse footing than an unconvicted criminal prisoner to whom such amenities are allowed under Ss. 31 to 33 of the Prisons Act and the conduct of the Police was unjustifiable. A.I.R. 1932 Lah. 13=12 L. 211=32 Cr.L.J. 1022=32 P. L.R. 935=133 Ind. Cas. 288.

——S. 33—Default of decree-holder.

When a civil prisoner was released by the Jail authorities for non-supply of the clothing to be supplied to him under S. 33 but it was discovered that the requisition on the arresting creditor was wrongly addressed and did not reach him till four days after the petitioner was released.

Held, that *A* was released for a mistake of the Jail authorities and not for any default of the decree-holder under S. 33. 5 Bur.L.T. 159=6 L.B.R. 61 =17 Ind. Cas. 911.

——S. 40—Under trial prisoner detained in jail asking permission of Jail Superintendent to interview certain person—Permission refused—Prisoner moving Court ordering his detention—Application rejected by Court.

Held, that neither the High Court nor the trial Court had any jurisdiction to go into the question whether the Superintendent had or had not disregarded or observed the provisions of the Prisons Act in this respect; and that presuming the order of the Superintendent was improper that prisoner's redress lay to the superior executive authority. Apart from enforcement of writ in such cases, Court has no power of supervision over the administration of a prison. A.I.R. 1932 Lah. 390=33 Cr.L.J. 531= 33 P.L.R. 722=14 L. 182=137 Ind. Cas. 851.

——S. 42—Communication with prisoners—Prisoner reading it commits abetment of offence.

The first accused was a prisoner at the Penitentiary and the second accused an uncle of the first. The second accused received a wire from a relation at Coimbatore which contained matters pertaining to the first accused. He wrote a message on the back of the telegram intending that that writing should be read by the first accused, and handed the telegram to a Jail Warder who was employed to, and did, carry the telegram to the first accused in the jail. The latter, thereupon, read the telegram as well as the communication written on the back of it and wrote a reply on the back of the same telegram and handed it to the warder for being carried to the second accused.

Held, that the 1st accused was rightly convicted of an offence under S. 42 of the Prisons Act read with S. 107, I. P. Code. A prisoner can abet the communication to himself. 72 Ind. Cas. 609=24 Cr.L.J. 449=18 M.L.W. 80=1923 M.W.N. 274 =A.I.R. 1923 Mad. 596=44 M.L.J. 585.

——S. 42—Newspapers—Carrying a bundle of newspapers from a prisoner, is an offence.

Carrying a bundle of newspapers from a prisoner inside the jail, to one, outside the jail premises, is an offence under S. 42 read with Art. 485 of the Bombay Jail Manual, 1911. 83 Ind. Cas. 342=26 Bom. L.R. 267=25 Cr.L.J. 1382=A.I.R. 1924 Bom. 385.

——S. 46 (12)—Torture of convicts—Extent of.

Whipping for insubordination may be legally administered in jails under proper precautions and in accordance with the rules given in the Jail Manual. In prisons where habitual and other long term convicts are confined, such a whipping for the purpose of enforcing discipline may, at times, be a regrettable necessity, but it is not arguable that an illegal and unauthorized beating or torture can afford a defence in the case of alleged insubordination. A.I.R. 1940 Lah. 210=41 Cr.L.J. 639=I.L.R. (1940) Lah. 521=188 Ind. Cas. 440.

——S. 52—Conviction under—Sustainability—Prisoner going on hunger strike—First breach of prisoners' discipline—No evidence that Superintendent considered it not adequately punishable by him.

Where the conduct of the prisoner in going on a hunger strike constituted his first breach of prisoner's discipline and there is no evidence to show that his offence was considered by the Superintendent as not to be adequately punishable by the infliction of any punishment which he himself had power to award under the Prisons Act, the conviction of the prisoner under S. 52 of that Act cannot be sustained. 2 D.R. 105.

——S. 52—"District Magistrate" or "Magistrate of the First Class".

"District Magistrate," and "Magistrate of the First Class," as used in S. 52 of the Prisons Act, do not include a Presidency Magistrate. A Presidency Magistrate, therefore, has no jurisdiction to try prisoners for offences under S. 52. 32 Mad. 303=10 Cr.L.J. 393=3 Ind. Cas. 885.

——S. 54—Penal Code (45 of 1860), S. 186—Refusal by Subordinate Medical Officer to submit to search—Order of Jailor—Offence.

Where a medical officer suspected by the Jailor to be conveying a letter to a prisoner refused to submit himself for search, the offence is one under S. 186, I. P. Code and not under S. 54 of the Prisons Act. 7 S.L.R. 49=14 Cr.L.J. 619=21 Ind. Cas. 667.

PRISONERS ACT (3 OF 1900), Ss. 2, 11.

See CORONER'S ACT, S. 24.

——S. 3—Applicability — Accused sentenced by Sessions Judge, Karnal before partition and detained in Lahore Jail—Karnal not forming part of Pakistan after partition—Warrant for detention issued by Sessions Judge, Karnal—If lapses on partition. *See* HIGH COURTS (PUNJAB) ORDER, 1947, ART. 13. Pak. L.R. (1948) Lah. 19.

——Ss. 3, 4—Prisoners Act (9 of 1894), S. 40—Under-trial prisoner—Jurisdiction of Court to issue orders to Jail Authorities to permit interview—Non-compliance with provisions of Prisons Act—Remedy of prisoner.

Where an under-trial prisoner detained in a jail under the warrant of the Court applied to the Superintendent of the jail for permission to interview certain persons and this permission was refused and he then moved the Court which had issued the warrant

for his detention, for an order directing the Superintendent to grant his request and his application was also rejected by the Court:

Held, that neither the High Court nor the trial Court had any jurisdiction to go into the question whether the Superintendent had or had not disregarded or observed the provisions of the Prisons Act in this respect and that, presuming the order of the Superintendent was improper, the prisoner's redress lay to the superior executive authority. Apart from the enforcement of the writ in such cases, the Court has no power of supervision over the administration of a prison. A.I.R. 1932 Lah. 390=14 L. 182=33 Cr.L.J. 531=33 P.L.R. 722=137 Ind. Cas. 851.

——S. 3—Punjab Jail Manual, para. 813—'Under-trial' prisoner—Detention — Interference by Court.

Where a person is detained in prison, he is subject to the provisions of the Prisons Act and the rules thereunder, and if it is found that the action taken by the jail authorities is in conformity with the law, the Court will have no power to interfere. But if it is found that the action is not warranted by the Prisons Act or the rules thereunder, the Court has power to give directions regarding the detention.

Where an under-trial prisoner was kept in what amounted to 'solitary confinement' under the Prisons Act, apparently for an indefinite period, though he had committed no prison offence:

Held, that the Court had power to enquire into the matter and to give such directions to the jail authorities as may be necessary in the interests of justice. A.I.R. 1931 Lah. 562=32 P.L.R. 586=32 Cr.L.J. 988=133 Ind. Cas. 59.

——S. 9—Prisoner convicted and sentenced by High Court in the exercise of its jurisdiction on reference under S. 307, C. P. Code—Committing to a jail other than Presidency Jail—Legality of.

S. 9 does not apply to a prisoner convicted and sentenced by the High Court in the exercise of its powers on a reference under S. 307 of the C. P. Code, and such a prisoner can be committed to any jail within its revisional jurisdiction. **(1901) 6 C. W. N. 254=29 Cal. 286.**

——Ss. 29, 31, 32 (as amended in 1903)—Person sentenced to transportation—Where to be confined.

In India, a prisoner sentenced to transportation may be sent to the Andamans or may be kept in one of the jails in India appointed for transportation prisoners where he will be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment. I.L.R. (1945) Lah. 325=72 I.A. 1=I.L.R. (1945) Kar. (P.C.) 120 Sup.=49 C.W.N. 339=1945 M.W.N. 188=58 L.W. 251=(1945) 1 M.L.J. 399=11 B.R. 445=1945 A.L.J. 265=46 Cr.L.J. 626=47 Bom.L.R. 625=219 Ind. Cas. 350=1945 Pesh. L. J. 64=A.I.R. 1945 P.C. 64 (P.C.).

——S. 35—Prisoners not confined by order of Court but under R. 26, Defence of India Rules—Court, if can regulate his movements.

The Prisoners Act is intended to apply only to those persons who are confined under an order of the Court.

It could not possibly have been intended that when a person is detained or confined, not by a judicial authority but by an executive authority (*e.g.*, R. 26, Defence of India Rules), his movements should be regulated by a Court of law. It is only when the confinement is the result of a judicial order that the movements of the prisoner or the person confined can be regulated by a Court of law under the provisions of the Prisoners Act. A.I.R. 1943 Bom. 226=45 Bom.L.R. 422=209 Ind. Cas. 422.

——S. 40—'Local Government'—Letter by the High Court to the Local Government to procure attendance of a prisoner in the Kolhapur State to answer to a charge in British Territory.

The Kolhapur Durbar is not a 'Local Government' within the meaning of the section. The High Court of Bombay refused to address a letter to the Government of Bombay under S. 40 requesting them to ask the Kolhapur Durbar to permit a prisoner who was in prison in that State to come out of jail to answer charges in a criminal proceeding pending against him in the British Territory. (1905) 7 Bom. L.R. 566=2 Cr.L.J. 504.

PRIVACY. *See* (1) EASEMENT—RIGHT OF PRIVACY.
(2) EASEMENTS ACT.

PRIVATE AWARD. *See* C. P. CODE, SCH. II, PARAS. 20 AND 21.

PRIVATE DEFENCE. *See* PENAL CODE, SS. 96 TO 106, 299 AND 300 AND 304.

PRIVATE INTERNATIONAL LAW. *See* INTERNATIONAL LAW.

PRIVATE PROSECUTOR. *See* CR. P. CODE, 1898, SS. 423 AND 439.

PRIVIES. *See* (1) C. P. CODE, SS. 11 AND 47.
(2) EVIDENCE ACT, SS. 18 TO 21, 115 AND 116.

PRIVILEGE. *See* (1) PENAL CODE, SS. 499 AND 500.
(2) TORT—DEFAMATION.

PRIVILEGED COMMUNICATION. *See* EVIDENCE ACT, SS. 122 TO 129.

PRIVILEGED DOCUMENTS. *See* EVIDENCE ACT, SS. 122 TO 129.

PRIVITY. *See* (1) CONTRACT.
(2) LANDLORD AND TENANT.

PRIVITY OF CONTRACT. *See* (1) CONTRACT ACT, SS. 2 (*d*), 19-A AND 37.
(2) SPECIFIC RELIEF ACT, S. 23.

PRIVY COUNCIL. *See also* (1) C. P. CODE SS. 109 TO 112 AND O. 45.
(2) INCOME-TAX ACT, S. 66-A.
(3) GOVERNMENT OF INDIA ACT, S. 208.
(4) JUDICIAL COMMITTEE RULES.
(5) OUDH COURTS ACT S. 12.

Synopsis.

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17. **Question and finding of fact.**
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See C. P. CODE, O. 45, R. 7.
21. **Special Knowledge of Indian Courts.**
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(2) PRIVY COUNCIL—EVIDENCE.
22. **Special leave to appeal.**
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23. **Value of decisions.**
See also PRECEDENTS—(1) OBITER DICTA.
(2) PRIVY COUNCIL.
24. **Miscellaneous.**

1. Additional evidence.

——Additional evidence.

There is no restriction on the powers of the Board to admit evidence for the non-production of which at the initial stage sufficient ground has been made out. 74 Ind. Cas. 747=21 A.L.J. 554=4 Pat.L.T. 447 =1 Pat.L.R. 345=2 Pat. 676=50 I.A. 183=25 Bom.L.R. 1259=28 C.W.N. 277=33 M.L.T. 233 =18 M.L.W. 728=4 L.R.P.C. 123=5 L.R.P.C. 8=39 C.L.J. 318=3 P.L.R. 1924=A.I.R. 1923 P.C. 128=45 M.L.J. 578 (P.C.).

——Additional evidence—Affidavit.

When the case was before the Privy Council, the respondent's daughter who was a party to the suit and the date of whose birth was relevent to the enquiry in suit, put in an affidavit to the effect that she had come of age on a particular date.

Held, it was very doubtful whether the affidavit was admissible at all for the purposes of hearing the appeal, but even if admitted was of little weight not having been tested by cross-examination. 23 C.W. N. 961=(1919) M.W.N. 544=10 L.W. 599=27 M.L.T. 106=A.I.R. 1919 P.C. 181 (P.C.).

2. Compromise.

——Compromise—Minor parties — Certificate under O. 32, R. 7 of the C. P. Code.

Where the Judges of the High Court had on a petition for compromise of an appeal pending before the Privy Council, to which certain minors were parties had certified under O. 32, R. 7 of the C. P. Code that the compromise in their opinion was a proper one and beneficial to the minors, the Privy Council allowed the appeal to be withdrawn on the terms agreed. 47 I.A. 90 (Foot-note).

——Compromise—Minor parties—Leave to withdraw.

Applications to allow an appeal to be withdrawn on terms when there are parties concerned who are not *sui juris* are not granted without grave consideration. The Judicial Committee being assured by the counsel at their bar that the terms on which the appeal was proposed to be withdrawn were beneficial to a minor party thereto, and having before them the opinion of counsel who appeared in the High Court, to the same effect granted leave to withdraw the appeal on the proposed terms. 38 M.L.J. 431= 11 L.W. 486=(1920) M.W.N. 311=22 Bom.L.R. 552=18 A.L.J. 499=55 Ind. Cas. 943 (P.C.).

3. Concurrent findings.

——Concurrent judgment of two Courts on a pure question of fact—Review of evidence for a third time—If and when justified.

In the case of the concurrent judgment of two Courts on a pure question of fact, the practice of the Privy Council is to decline to review the evidence for a third time, unless there are some special circumstances which would justify a departure from the practice. Though there can be no doubt that the later decisions of the Board have somewhat modified the earlier form of the practice on a review of them the following propositions may be derived as the present practice of the Board and the nature of the special circumstances which will justify a departure from the practice. (1) That the practice applies in the case of all various judicature whose final tribunal is the Board. (2) That it applies to the concurrent findings of fact of two Courts and not to concurrent findings of the Judges who compose such Courts. Therefore, a dissent by a member of the Appellate Court does not obviate the practice. (3) That a difference in the reasons which bring the Judges to the same finding of fact will not obviate the practice. (4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that propositions be corrected the finding cannot stand; or if may be the neglect of some principle of law of procedure, whose application will have the same effect The question whether there is evidence on which the Courts could arrive at their finding is such a question of law. (5) That the question of admissibility of evidence is a proposition of law but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice. (6) That the practice is not a cast iron one, and the foregoing statement as to reasons which will justify departure is illustrative only and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice. (7) That the Board will always be reluctant to depart from the practice in cases which involve questions of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the Courts of that country. (8) That the practice relates to the findings of the Courts below, which are generally stated in the order of the Court, but may be stated as findings on the issue before the Court in the judgments provided that they are directly related to the final decision of the Court. 73 I.A. 246=51 C.W.N. 98=1946 A.W.R. (P.C.) 182=1947 M.W.N. 7=1946 O.A. (P.C.) 182=49 Bom.L.R. 246=A.I.R. 1947 P.C. 19=I.L.R. (1947) Kar. (P.C.) 85=227 Ind. Cas. 177=1946 A.L.J. 441=13 B.R. 68=(1946) 2 M.L.J. 442 (P.C.).

——Concurrent findings of fact—Interference.

Concurrent findings of fact by Courts in India are a fatal obstacle to the success of an appeal to Privy Council. A.I.R. 1947 P.C. 172.

——Concurrent findings—Wagering transactions.

Question whether the transactions between the parties were wagering transactions, or in other words, were bets, is one of fact and where there are concurrent findings on the question by both Courts in favour of plaintiffs, the Privy Council, in accordance with its practice, will not interfere on that ground alone. A.I.R. 1942 P.C. 19=1942 A.L.J. 258=8 B.R. 640=1942 A.W.R. 43=55 L.W. 332=199 Ind. Cas. 574 (P.C.).

——Concurrent findings.

No doubt the rule as to concurrent findings is not so rigid that it might not be departed from if such a state of things existed as facts appearing from some undisputed document which are completely destructive of the findings of fact by the Judge, but where nothing of that kind appears, it is impossible for their Lordships to interfere with those concurrent findings of fact. A.I.R. 1941 P.C. 55=7 B.R. 985=1941 O.W.N. 1070=1941 A.L.J. 499=1941 A.W.R. 85 =195 Ind. Cas. 658 (P.C.).

——Concurrent findings.

Where it is a case in which both the Courts in India have reached the same conclusion upon questions of fact, and a case in which no reason has been, or could be, suggested for a departure by their Lordships from the course which they normally pursue in such circumstances, their Lordships would not interfere with the concurrent findings on the question of fact. (1941) 195 Ind. Cas. 624=7 B.R. 978=I. L.R. (1941) Kar. P. C. 123 Sup.=1942 A.W.R. 12 (P.C.).

——Concurrent findings—Question of person's conversion.

Where, before arriving at a finding that the *Raja* had not been converted to Islam and had not married the plaintiff's mother, both Courts in India subjected to a painstaking and a minute and accurate scrutiny the voluminous and contradictory evidence bearing upon the personal history of the *Raja*.

Held, that taking into consideration the fact that much must depend on the view taken as to such a man's conversion to Islam, openly avowed and followed by marriage to a Muslim lady, being a matter of intense public interest, considerable importance and wide notoriety; the opinion of the Judges of the province upon such a matter not being lightly to be disregarded—all the less so when two of them were Muslims, there was strong reason in the case why their Lordships should be slow to depart from the rule of practice which, though not a rule of law nor a rigid rule, plays an important part in the exercise of the prerogative—that concurrent findings of fact would not be disturbed. A.I.R. 1939 P.C. 249=6 B.R. 1=44 C.W.N. 66=I.L.R. (1940) Kar. P. C. 1 Sup.=183 Ind. Cas. 662 (P.C.).

——Concurrent findings.

Their Lordships refused to depart from the rule of accepting the concurrent findings of fact, on the ground of alleged inadmissibility of certain documents taken into consideration by the lower Courts, when their findings could not, on any reasonable review of the case, be regarded as based upon these documents or dependent upon them. A.I.R. 1939 P.C. 249=6 B.R. 1=I.L.R. (1943) Kar. P.C. 1 Sup.=44 C. W.N. 66=183 Ind. Cas. 662 (P.C.).

——Concurrent findings.

Where it is not satisfactorily shown that the concurrent findings of fact have been arrived at by reason of any error of method or mistake or through neglect of any aspect of the evidence, their Lordships would not depart from the important, though not inflexible, rule of practice that concurrent findings of fact should not be disturbed. A.I.R. 1939 P.C. 152=5 B.R. 631=43 C.W.N. 842=1939 O.W.N. 562=41 Bom.L.R. 1061=70 C.L.J. 377=I.L.R. (1939) Kar. P.C. 258 Sup.=181 Ind. Cas. 311 (P.C.).

——Concurrent findings.

Where the case is clear, the Privy Council will not disturb concurrent judgments of the Courts below on pure questions of fact. (1939) 183 Ind. Cas. 194. (P.C.).

——Concurrent findings—Duty of appellant.

In face of concurrent findings of fact in the Courts below, it is incumbent upon the appellant to satisfy their Lordships of the Privy Council without any shadow of doubt that such findings were erroneous. (1939) 182 Ind. Cas. 416 (P.C.).

——Concurrent findings.

In a case of concurrent findings of fact, where the whole question is one of fact it is not the practice of the Privy Council to go behind those findings. It may be that in exceptional cases, where it is clear that some serious injustice has or may be involved, the rule may be departed from, but that is so only in the most unusual circumstances. The rule is one which obviously is of the utmost importance to maintain, because the Board of the Privy Council does not sit for the purpose of re-opening findings of fact in which the Courts below have concurred. A. I. R. 1938 P.C. 183=1938 A.L.J. 547=1938 A. W. R. 129=4 B.R. 665=1938 M.W.N. 666=1938 O.W. N. 619=40 P.L.R. 779=40 Bom.L.R. 1063=32 S. L.R. 545=174 Ind. Cas. 867 (P.C).

——Concurrent findings—Question as to navigability of river based on documentary and historical writings.

The rule that the Privy Council would not interfere to disturb the concurrent findings of fact, except under special circumstances, certainly has a *prima facie* application notwithstanding the considerable difference of opinion among the Judges. If the question were that of the construction of deeds or other documents, it would be one of law. But where the question is as to the effect to be given as evidence to certain historical writings as referring to the state and the use of a river in the past—matters which have to be considered in relation to the facts proved as to the present state of the river and other circumstances, the ordinary rule of non-interference with findings of fact will apply.

Consequently, their Lordships will not interfere with concurrent findings of fact of lower Courts on the question of navigability of a certain river, based on documentary or historical writings. A.I.R. 1937 P.C. 157=168 Ind. Cas. 610 (P.C.).

——Concurrent findings—Amount due to party on termination of partnership.

The Board will not entertain an appeal from two concurrent findings on a question of amount due to a party on a termination of partnership which is a pure question of fact. (1937) 168 Ind. Cas. 737 (P. C.).

——Concurrent findings.

As a general rule, the Privy Council will not interfere with concurrent findings of fact especially where

there is ample evidence to support them. (1935) 156 Ind. Cas. 843 (P.C.).

——Concurrent findings.

Privy Council will not interfere with the concurrent findings of facts of Courts in India. (1934) 66 M.L.J. 147 (P.C.).

——Concurrent findings.

On an issue of fact, concurrent findings should be conclusive, unless indeed where the enforcement of the rule would work obvious injustice, or the violation of some principle of law or procedure. A.I.R. 1932 P.C. 231=9 O.W.N. 817=36 L.W. 450=63 M.L.J. 408=34 Bom. L. R. 1609=1933 A.L.J. 321=17 R.D. 392=138 Ind. Cas. 774 (P.C.).

——Concurrent findings.

Concurrent findings will not be disturbed unless it is shown that there has been a miscarriage of justice, or the violation of some principle of law or procedure. This does not necessarily imply that their Lordships make the findings their own, for, almost *ex hyphothesi,* they have not considered them in detail: but only that where matters of fact have been fairly tried by two local Courts, which are often in a better position to conclude upon them than the Board and the same conclusion has been reached by both, it is not in the public interest that the facts should again be examined in the ultimate Court of Appeal. A.I.R. 1932 P.C. 89=9 O.W.N. 196=38 C.W.N. 461=62 M.L.J. 451=1932 A.L.J. 297=1932 M.W.N. 502=35 L.W. 667=55 C.L.J. 255=34 Bom. L. R. 771=59 I.A. 147=7 Luck. 64=136 Ind. Cas. 108 (P.C.).

——Concurrent findings.

Usually their Lordships of the Privy Council do not disturb the concurrent findings of the Courts below. A.I.R. 1932 P.C. 25=9 O.W.N. 25=35 L.W. 106=38 C.W.N. 305=55 C.L.J. 145=34 Bom. L.R. 475=62 M.L.J. 405=1932 A.L.J. 344=59 I.A. 21=54 A. 46=135 Ind. Cas. 762 (P.C.).

——Concurrent findings.

It is not the practice of the Privy Council to reopen concurrent findings of fact of the Courts below. A.I.R. 1932 P.C. 13=8 O.W.N. 1378=36 C.W.N. 137=62 M.L.J. 320=6 Luck. 556=1932 A. L. J. 663=35 L.W. 118=62 C.L.J. 326=59 I.A. 1=136 Ind. Cas. 385 (P.C.).

——Concurrent findings.

The usual practice with the Privy Council is not to disturb concurrent findings of fact of the Courts below. A.I.R. 1931 P.C. 317=54 C.L.J. 425=61 M.L.J. 898=136 Ind. Cas. 393 (P.C.).

——Concurrent findings.

The Privy Council will not differ from what is practically a concurrent finding on a question of separation of a joint family. A.I.R. 1931 P.C. 48=35 C.W.N. 438=60 M.L.J. 386=33 L.W. 439=53 C.L.J. 313=14 N.L.J. 56=33 Bom.L.R. 442=27 N.L.R. 131=58 I.A. 106=130 Ind. Cas. 673 (P.C.).

——Concurrent findings—Rule.

Though the conclusion as to fact may be based on inferences in law so as to prevent the rigid application of the rule as to concurrent findings on what is really a question of fact, the Privy Council will be slow to disturb a finding which depends upon an appreciation of local circumstances and is arrived at by two Courts without any dissentient opinion. 32 M.L.W. 577=128 Ind. Cas. 660=A.I.R. 1930 P.C. 261 (P.C.).

——Concurrent findings—Finding of Trial Court upheld by Appellate Court will not ordinarily be upset.

It is contrary to the ordinary practice of the Board to upset a finding of the trial Court based upon definite fact established by the experience of some of the witnesses and agreed to by the Court of appeal. There are occasions when rigid reliance on such a rule might be capable of working injustice, and in all such cases their Lordships are always prepared to relax its strength but in a case where reliance upon it is only one means of defeating a claim, which would be defeated by one if not by more, of the other defences that have been raised in the action, the rule would not be relaxed. 121 Ind. Cas. 238=6 O.W.N. 876=A.I.R. 1929 P.C. 238 (P.C.).

——Concurrent findings.

The rule as to concurrent findings is such that unless some exceptional circumstances exist to warrant a departure from it any discussion of the merits of those findings is inadmissible. 115 Ind. Cas. 722=31 Bom.L.R. 700=33 C.W.N. 675=29 M.L.W. 445=A.I.R. 1929 P.C. 63 (P.C.).

——Concurrent findings—Grounds for interference.

The question whether certain lands do form part of an estate depends upon the proper inferences to be drawn from the revenue records consisting of registers, thaks or maps, and thak statements recorded when the thaks were made, and Judges of the Calcutta High Court, from their familiarity with the revenue system of Bengal, are in a better position to draw the proper inferences from these records, and the Privy Council would not interfere with their finding affirming the finding of the lower Court, unless it is clearly made out that it is vitiated by some error of law. 113 Ind. Cas. 465=56 Cal. 813=56 I.A. 74=33 C.W.N. 289=49 C.L.J. 112=A.I.R. 1929 P.C. 50 (P.C.).

——Concurrent findings.

If it can be shown that the findings of one of the Courts is based on an erroneous proposition of law so that if that proposition be corrected the finding disappears, then in that case it is no finding at all. 116 Ind. Cas. 593=A.I.R. 1929 P.C. 38 (P.C.).

——Concurrent findings—What would be misdirection if jury were directed, would also render finding of fact erroneous.

While it is in a patent case for the Judge to construe a specification, it is for the jury (where law allows jury) to contrast the specifications so construed with the facts of the case as found so as to arrive at a conclusion either as to anticipation or as to novelty and subject-matter, but there must be no misdirection as to the facts found or as to how they may be handled. If, therefore, it can be shown that in the view a Judge without jury has taken there is something which, if addressed to a jury, would be misdirection, there is no finding of pure fact in the judgment 116 Ind. Cas. 593=A.I.R. 1929 P.C. 38 (P.C.).

——Concurrent findings.

The ordinary rule of Privy Council is to refuse to interfere except in very special cases with decisions turning on concurrent findings of fact. 114 Ind. Cas. 17=52 Mad. 175=31 Bom.L.R. 299=56 I.A. 21=1929 A.L.J. 41=1929 M.W.N. 47=29 M.L.W. 118=49 C.L.J. 148=33 C.W.N. 261=A.I.R. 1929 P.C. 24=56 M.L.J. 218 (P.C.).

——Concurrent findings.

Concurrent findings of the Courts of India on questions of fact cannot be disturbed by the Privy

Council. 106 Ind. Cas. 646=30 Bom.L.R. 115=32 C.W.N. 481=5 O.W.N. 93=47 C.L.J. 134=27 M.L.W. 802=54 M.L.J. 6 (P.C.).

——Concurrent findings—Rule as to concurrent findings applies to all judicatures subordinate to Privy Council.

The rule as to concurrent findings is not a rule based on any statutory provision. It is rather a rule of conduct which the Privy Council has laid down for itself. As such it has gradually developed. The judicature which has given greatest occasion for its development has undoubtedly been the judicature of India, but the principle is not in any way limited in its application to Indian Legislature or Indian Law. The rule is a rule of conduct for the Empire, and will be applied to all the various judicatures whose final tribunal is the Privy Council. 101 Ind. Cas. 903=4 O.W.N. 463=A.I.R. 1927 P.C. 66 (P.C.).

——Concurrent findings.

The Privy Council as Court of second appeal will not interfere with concurrent judgments of the Courts below on matters of fact unless very definite and explicit grounds for the interference are assigned, such as miscarriage of justice or the violation of ossiy principle of law or procedure.

This expression means such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all.

There is also another way of preventing the application of the rule. If it can be shown that the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected the finding disappears, then in that case it is no finding at all.

The rule (as to concurrent findings) is none the less applicable because the two Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence. 101 Ind. Cas. 903=4 O.W.N. 463=A.I.R. 1927 P.C. 66 (P.C.).

——Concurrent findings.

Where there is considerable evidence both ways, their Lordships would not displace a conclusion of fact upon which both Courts in India have concurred. 100 Ind. Cas. 77=31 C.W.N. 245=25 M.L.W. 400=1927 M.W.N. 190=38 M.L.T. 57=45 C.L.J. 308=29 Bom.L.R. 786=A.I.R. 1927 P.C. 27=52 M.L.J. 492 (P.C.).

——Concurrent findings—Grounds for interference—Lower Courts coming to same findings on different grounds no ground for interference.

Privy Council will not interfere with concurrent findings of fact unless very definite and explicit grounds for that interference are assigned.

The mere fact that the Subordinate Judge went principally on oral evidence, while the High Court went on the effect of certain letters in arriving at the finding is no ground for interference. 30 I.A. 41. Appl. 98 Ind. Cas. 901=48 All. 763=53 I.A. 268=31 C.W.N. 154=38 M.L.T. 15=24 M.L.W. 908=1926 M.W.N. 942=3 O.W.N. 907=A.I.R. 1926 P.C. 125 (P.C.).

——Concurrent findings.

The rule of the Privy Council is that concurrent findings of fact are not to be disturbed. 99 Ind. Cas. 581=54 Cal. 84=53 I.A. 230=38 M.L.T. 9=1926 M.W.N. 882=31 C.W.N. 317=26 M.L.W. 1=A.I.R. 1926 P.C. 121 (P.C.).

——Concurrent findings.

When there are concurrent findings of fact it is only in very exceptional cases that the Privy Council think it their duty to allow the matter to be re-opened. 99 Ind. Cas. 427=31 C.W.N. 152 (P.C.).

——Concurrent findings.

It is not the practice of their Lordships of the Privy Council to re-open a concurrent finding of fact by the Courts below. 97 Ind. Cas. 287=30 C.W.N. 464 (P.C.).

——Concurrent findings.

It is a settled principle that the Privy Council does not interfere with concurrent findings of fact in the Courts below. 88 Ind. Cas. 196=A.I.R. 1925 P.C. 174 (P.C.).

——Concurrent findings—No underlying question of law or misdirection—Findings cannot be disturbed.

If it appears that underlying findings of fact there are questions of law on which the findings proceeded or that there is a case that the Judges misdirected themselves, then the rule as to concurrent findings not being the subject of appeal does not apply to the exclusion of such grounds of law as are alluded to.

The question involved in the appeal related to the extent or area of a certain mahal settled with the defendants. What had been scruplously in view of the Judges of the High Court according to their statement was a correct appreciation of the limits and functions of a Court in construing a document of title submitted for its consideration. The Judges of the High Court, said that it was not the duty of the Court, and would have been contrary to their duty, to admit any antecedent documents for the purpose of contradicting the terms of the settlement made and that any antecedent documents and maps could be used solely for the purpose of identifying the thing demised.

Held, that the view of the High Court was quite correct.

Held, further that applying these principles the High Court had arrived at the right conclusions of fact. 88 Ind. Cas. 103=26 P.L.R. 257=2 O.W.N. 403=41 C.L.J. 386=3 Pat.L.R. Civ. 114=6 P.L.T. 349=6 L.R.P.C. 109=27 B.L.R. 899=1925 M.W.N. 403=A.I.R. 1923 P.C. 122=48 M.L.J. 611 (P.C.).

——Concurrent findings—Rule.

It is a well-established rule of the Board that issues of fact which had been the subject of definite and concurrent finding of the Courts below in India are excluded from review by the Board. 81 Ind. Cas. 1056=1924 M.W.N. 429=11 O.L.J. 433=20 M.L.W. 710=A.I.R. 1924 P.C. 232 (P.C.).

——Concurrent findings.

Where the point to be decided is a pure question of fact, concurrent finding of both the lower Courts would in an ordinary case be enough to dismiss the appeal. 71 Ind. Cas. 769=2 Pat. 230=4 P.L.T. 217=50 I.A. 58=37 C.L.J. 369=25 Bom.L.R. 560=1923 M.W.N. 377=32 M.L.T. 121=27 C.W.N. 901=18 M.L.W. 597=A.I.R. 1923 P.C. 21=44 M.L.J. 476 (P.C.).

——Concurrent findings—Fraud.

Both Courts below having negatived fraud, it would require an exceptionally strong case to induce the Board to take a contrary view. 69 Ind. Cas. 71=49 I.A. 342=31 M.L.T. 200=1 Pat. 741=27 C.W.N. 269=3 P.L.T. 749=21 A.L.J. 18=16 M.L.W. 956=37 C.L.J. 356=25 Bom.L.R. 634=4

L.R.P.C. 17=A.I.R. 1922 P.C. 356=44 M.L.J. 751 (P.C.).

——Concurrent findings.

Where there are concurrent findings of fact by the Courts below, the Board will not interfere. 74 Ind. Cas. 561=28 C.W.N. 722=A.I.R. 1922 P.C. 184 (P.C.).

——Concurrent findings—Finding about marriage.

Where the Judges of the Appellate Court affirm the finding that the marriage was disproved, the finding being a concurrent finding of fact binds their Lordships of Privy Council. For concurrent findings to be binding on the Board, the fact or facts found must be such as are necessary for the foundation of the proposition in law to be subsequently applied to them. 60 Ind. Cas. 837=26 C.W.N. 81=48 I.A. 114=48 Cal. 856=19 A.L.J. 414=23 Bom.L.R. 636 =33 C.L.J. 479=14 M.L.W. 175=1921 M.W.N. 366=A.I.R. 1922 P.C. 159=40 M.L.J. 510 (P.C.).

——Concurrent findings.

Concurrent findings of facts will not be interfered with by the Privy Council. 59 Ind. Cas. 1=24 C. W.N. 494=23 M.L.T. 135=12 M.L.W. 497=32 C.L.J. 447=1920 M.W.N. 324=A.I.R. 1920 P.C. 87 (P.C.).

——Concurrent findings—Burden of proof.

On the question whether a wakfnama was obtained by fraud and undue influence and the executant, a pardanashin lady, understood the document, the onus of proof having been properly placed, there were concurrent findings on issues of fact which it was impossible for the appellants to displace. 32 C.L.J. 447=24 C.W.N. 494=(1920) M.W.N. 324=28 M. L.T. 135=12 L.W. 497=59 Ind. Cas 1 (P.C.).

——Concurrent findings—Adverse possession—Inference from documents—Findings of Court below not binding.

Concurrent opinions of the Courts in India that the possession of properties by a Hindu widow was for her life, merely in lieu of maintenance, and not adverse to the reversioners, was reversed by the Privy Council on the ground that the question being one of inference from documents and not one of fact, a wrong conclusion had been arrived at by the Courts below. The Privy Council held in reversal of the judgments of the Courts below that a widow in possession of properties of the family had acquired an absolutely estate by prescription. 42 All. 152=46 I.A. 197=38 M.L.J. 259=18 A.L.J. 235=11 L. W. 384=(1920) M.W.N. 3=27 M.L.T. 200=24 C.W.N. 394=22 Bom.L.R. 451=55 Ind. Cas. 486 (P.C.).

——Concurrent findings—Ryoti land.

The concurrent findings of the Courts below as regards the lands being *ryoti* must be accepted in second appeal. 42 Mad. 400=46 I.A. 44=17 A. L.J. 233=36 M.L.J. 257=23 C.W.N. 626=21 Bom.L.R. 627=26 M.L.T. 1=30 C.L.J. 77=(1919) M.W.N. 541=10 L.W. 400=49 Ind. Cas. 708 (P.C.).

(Affirming on appeal. 39 Mad. 341=27 Ind. Cas. 77).

——Concurrent findings—Custom—Mixed law and fact.

The rule as to the concurrent findings being binding on the Judicial Committee, does not apply to findings as to the existence of a custom, since that is a matter of mixed law and fact. 40 Mad. 709=44 I.A. 147=21 C.W.N. 729=15 A.L.J. 485=1 Pat.L.W. 697=33 M.L.J. 1=19 Bom.L.R. 567= 22 M.L.T. 1=(1917) M.W.N. 507=26 C.L.J. 153=6 L.W. 222=39 Ind. Cas. 722 (P.C.).

——Concurrent findings—Practice.

Where there are concurrent findings on an issue of fact, it is an established rule of the Privy Council that it is not for Their Lordships to consider what conclusion they would have arrived at if the matter had for the first time come before them but that it is for the appellant to establish that the judgments of the Courts below are clearly wrong. 12 A.C. 101, Foll. 18 C.W.N. 1281=16 M.L.T. 290=27 M. L.J. 365=1 L.W. 807=(1914) M.W.N. 757=16 Bom.L.R. 925=20 C.L.J. 563=25 Ind. Cas. 309 (P.C.).

——Concurrent findings—Principle of—Applicability—Question of Law.

The principle of concurrent findings of fact does not apply to a case where there is no evidence to support the finding and it is possible for the Judicial Committee to hold from the conduct of the parties in not examining themselves as witnesses that the transaction was intended as a fraud on the registration law by the inclusion of a fictitous item so as to give jurisdiction to a particular Registration Officer. 41 Cal. 972=41 I.A. 910=1 L.W. 1050=27 M.L.J. 80 =(1914) M.W.N. 462=16 M.L.T. 6=18 C.W.N. 817=19 C.L.J. 484=16 Bom.L.R. 400=12 A.L.J. 774=23 Ind. Cas. 637 (P.C.).

——Concurrent findings—No interference.

Unless it appears that the Courts below have not drawn the proper conclusions from the documentary evidence, the Privy Council will not interfere in cases where there are concurrent findings of fact. 15 M. L.T. 66=(1914) M.W.N. 42=12 A.L.J. 79=19 C.L.J. 129=18 C.W.N. 428=16 Bom.L.R. 101= 26 M.L.J. 248=22 Ind. Cas. 51 (P.C.).

——Concurrent findings—Impartibility of estate.

The Privy Council accepted the concurrent findings of the Courts below on the impartibility of an estate, especially as it was justified by the evidence. 41 I. A. 51=17 C.W.N. 122=14 M.L.T. 259=25 M. L.J. 386=18 C.L.J. 393=(1913) M.W.N. 791= 15 Bom.L.R. 1010=21 Ind. Cas. 339 (P.C.).

——Concurrent findings—Custom of adoption at variance with Hindu Law.

The Privy Council upheld the concurrent findings of the Courts below as to the proof of a custom of adoption at variance with the Hindu Law but held that having regard to the limited evidence adduced, the case was not to be taken as a precedent in future litigation among other parties. 40 Cal. 879=40 I.A. 157=17 C.W.N. 885=126 P.W.R. 1913=187 P. L.R. 1913=18 C.L.J. 70=14 M.L.T. 83=102 P. R. (1913)=(1913) M.W.N. 509=15 Bom.L.R. 646=19 Ind. Cas. 669 (P.C.).

——Concurrent findings.

The Board will not disturb the concurrent finding of fact by the Lower Courts. 18 Ind. Cas. 91 (P. C.).

——Concurrent findings—Conclusive.

The concurrent findings of two Courts on the question of the genuineness of a document which is a question of fact, are conclusive. 13 M.L.T. 185=(1913) M.W.N. 157=17 C.W.N. 389=17 C.L.J. 277= 15 Bom.L.R. 445=25 M.L.J. 95=18 Ind. Cas. 17 (P.C.).

——**Concurrent findings.**

Concurrent findings of fact by the Lower Courts cannot be questioned in an appeal to the Privy Council. 13 M.L.T. 198=(1913) M.W.N. 191=15 Bom.L.R. 463=17 C.L.J. 295=18 Ind. Cas. 13 (P.C.).

——**Concurrent findings—Question of fact.**

The Privy Council is not sitting as a Court of first instance and cannot take into account even well-founded criticism and disturb the concurrent findings in effect of two Lower Courts purely on a question of fact unless it is satisfied that they are clearly erroneous. 17 Ind. Cas. 733 (P.C.).

——**Concurrent findings — No interference — Validity of finding—No reference to evidence at length.**

The Judicial Committee refused to disturb the concurrent findings of the Courts in India to the effect that the plaintiff had not discharged the onus which lay on him of proving that a deed of gift executed by a *pardanashin* lady was explained to and understood by her. It would be to misconstrue entirely the provisions as to concurrent findings of fact if the Judges of India were to have impliedly the duty laid on them of making their narrative of the circumstances minutely and completely exhaustive, under the penalty that, if they failed to do so the absence from their mind of elementary considerations might be presumed. 34 All. 455=39 I. A. 156=16 C.W.N. 889=23 M.L.J. 210=10 A.L.J. 364=16 C.L.J. 613=14 Bom.L.R. 1055=12 M.L.T. 361=(1912) M.W.N. 976=15 O.C. 271=16 Ind. Cas. 197 (P.C.).

——**Concurrent findings.**

The Privy Council accepted as conclusive concurrent findings of the Court below as to the necessity and the passing of consideration for an alienation of ancestral property by the father. 40 Cal. 288=13 M.L.T. 5=11 A.L.J. 1=9 P.W.R. 1913=17 C.L.J. 137=15 Bom.L.R. 79=17 C.W.N. 302=28 P.L.R. 1913=24 M.L.J. 318=(1913) M.W.N. 58 =26 P.R. 1913=17 Ind. Cas. 666 (P.C.) [Affirming 2 P.L.R. 1909=48 P.W.R. 1909=4 Ind. Cas. 632].

——**Concurrent findings—Custom.**

The existence of a family custom of inheritance is a question of fact on which the Privy Council will follow the usual practice of accepting concurrent findings of fact. 31 All. 557=36 I.A. 210=10 C.L.J. 297=11 Bom.L.R. 1210=14 C.W.N. 59=19 M.L.J. 697=13 O.C. 183=4 Ind. Cas. 457 (P.C.).

——**Concurrent findings—Weight due to.**

On a conclusion of fact, a concurrent finding of two Courts, although not absolutely binding on the Judicial Committee, is entitled to the greatest weight. 31 All. 457=36 I.A. 125=10 C.L.J. 216=13 C.W.N. 1073=6 A.L.J. 767=11 Bom.L.R. 890=12 O.C. 304=19 M.L.J. 605=4 Ind. Cas. 25 (P.C.).

——**Concurrent findings — Question whether lands are part of permanently settled estate.**

The question whether certain *Jhum* lands lay within or without the limits of a permanently settled estate is not a pure question of fact, to be settled by concurrent findings of the Courts below. Every point in the process of reasoning involved considerations of law, and the Committee could come to its own conclusion on the evidence. 36 Cal. 1=35 I.A. 195=8 C.L.J. 436=12 C.W.N. 1095=1 Ind. Cas. 182 (P.C.).

——**Concurrent findings—Question of unconscionableness of contract.**

Their Lordships will not be disposed to differ from a concurrent finding of the Court below on a question of unconscionableness even if it be not strictly a finding of fact. (1906) 8 Bom.L.R. 491=10 C.W.N. 849=4 C.L.J. 1=1 M.L.T. 205=3 A.L.J. 495=9 O.C. 188=16 M.L.J. 292=28 A. 570=33 I.A. 118 (P.C.).

——**Concurrent findings.**

It is not any part of their duty to scrutinize with any strictness the opinion expressed by the lower Courts as to the credulity of witnesses: that being eminently a question for the Courts in India. (1904) 6 Bom.L.R. 750=26 A. 581=31 I.A. 217 (P.C.).

See also (1905) 3 C.L.J. 86=10 C.W.N. 230=16 M.L.J. 77=28 A. 215=33 I.A. 53 (P.C.).

——**Concurrent findings—Court basing decision on different ground, one Court relying on oral, and the other on documentary, evidence.**

The Privy Council will not disturb a concurrent finding of fact by two Courts, unless it is clearly erroneous, though the Courts base their decision on different grounds, one Court relying on oral, and the other on documentary evidence. (1902) 5 Bom.L.R. 6=7 C.W.N. 225=30 I.A. 41=30 C. 303 (P.C.).

4. Consolidation of appeals.

——Consolidation of appeals. *See* CIVIL P. C., O. 45, R. 4.

5. Costs.

——Costs—It is very rarely that the Privy Council interferes in a matter merely of costs. A.I.R. 1932 P.C. 13=8 O.W.N. 1378=36 C.W.N. 137=62 M.L.J. 320=59 I.A. 1=6 Luck. 556=1932 A.L.J. 663=62 C.L.J. 326=35 L.W. 118=136 Ind. Cas. 385 (P.C.).

——**Costs—Costs of litigation—Extravagance deprecated.**

Though in this case the appellant was not responsible for the particular extravagance caused by printing unnecessary records the printing being presumably thought to be necessary as a result of threatened contentions of the respondent which were not ultimately presented before the Board still, the extravagance of it was deplored, such unnecessary expenditure in litigation being enough to bring the administration of law into deserved disrepute. 32 Bom.L.R. 1553=52 C.L.J. 435=127 Ind. Cas. 739=A.I.R. 1930 P.C. 217 (P.C.).

——**Costs—Objections as to costs not raised before Registrar will not be considered by the Board.**

The Board is not a taxation tribunal. It only deals with such matters by way of appeal from the judgment of the Registrar upon items to which objection was taken before him. With record to such items, he exercises his discretion and he gives effect to the authorised scale of fees and to modern practice. If he errs in any particular an appeal may lie to this Board—a rare occurrence; but apart from such an appeal the Board will not interpose. It is accordingly clear that if fresh points of objection to the costs are stated before the Board they cannot be entertained. 111 Ind. Cas. 356=28 M.L.W. 203=A.I.R. 1928 P.C. 238=55 M.L.J. 711 (P.C.).

——**Costs—Appeal—Security for costs—Government Promissory Note—High Court Rules, Appellate Side, Part 2, Ch. 4, Rule 20.**

The marke value of Government securities given as

security for respondent's costs in an appeal to the Privy Council must be Rs. 4,000 on the date of their deposit. 9 C.L.J. 559=4 Ind. Cas. 64.

——Costs.

The deposit of Government securities of the nominal value of Rs. 4,000 is sufficient within the meaning of R. 20, Ch. 4, Part II, of the High Court; Appellate Side. 2 Ind. Cas. 844=13 C.W.N. 629 =9 C.L.J. 560=36 C. 653.

——Costs—Interest—Appeal to His Majesty in Council—Security bond—Transfer of Property Act, Ss. 58, 67, 99—C. P. Code, S. 610—Interest thereon.

No interest on costs having been allowed by the Order in Council it was not competent to any Court in India to award interest. (1905) 1 C.L.J. 118= 9 C.W.N. 372=32 Cal. 494.

——Costs—Delay in prosecuting the appeal.

Their Lordships disallowed to a successful appellant the costs occasioned by his own delay in prosecuting the appeal before the Privy Council, the appeal having been presented in December, 1900, and not having been sent down for hearing till September, 1903. (1903) 31 C. 322=8 C.W.N. 609=31 I.A. 57 (P.C.).

——Costs—Leave to appeal granted and costs of the application made—Costs in the appeal—Subsequent dismissal of the appeal for want of prosecution—Jurisdiction of the High Court to order costs of the application to be paid.

Where an application for leave to appeal to the Privy Council was granted, the costs of application being made costs in the appeal, and the appeal is subsequently dismissed for want of prosecution, the High Court has jurisdiction to order the appellant to pay the costs of the application. 1893 A.C. 538, foll. (1902) 27 B. 124=4 Bom.L.R. 947.

——Costs.

The High Court should exercise its jurisdiction over those who conduct litigation and prepare appeals from its decisions and take such steps as might be practicable to compel those who were to blame to pay the costs unnecessarily incurred. (1902) 25 M. 678=29 I.A. 156=4 Bom.L.R. 657=7 C.W.N. 1 =12 M.L.J. 299 (P.C.).

6. Criminal cases.

See also (1) C. P. CODE, S. 112; (2) CR. P. CODE, S. 404.

——Criminal case—Interference—Different conclusion possible on evidence—Practice.

It would be wholly contrary to the established practice of the Board in criminal cases to interfere with the decision of the Courts in India where there was evidence upon which the trial Court could find the appellant guilty of the crime with which he was charged, though another tribunal might have come to a different conclusion upon it. A.I.R. 1950 P.C. 72.

——Criminal cases—Criminal appeal—Jurisdiction—Judges of fact—Exclusion of inadmissible evidence—Evidence Act, S. 167.

In a criminal appeal, their Lordships of the Privy Council are Judges of fact as well as of law and it is their duty to consider whether, after throwing aside evidence to which reasonable objection can be taken, there remains sufficient to support the conviction of the appellant. 6 B.L.R. 498, foll. 77 I.A. 65=1950 A.W.R. 408=52 Bom.L.R. 508=1950 A. L.J. 305=51 Cr.L.J. 1552=54 C.W.N. 464 (P.C.).

——Criminal appeal—Function of Board—Weight of evidence—Conviction in absence of proper corroboration of accomplice evidence.

The functions of the Board in criminal cases are not those of a Court of Criminal appeal and grounds of appeal going to the weight of evidence are not readily entertained. But where there is no proper corroboration of any material part of the evidence of the accomplices which, in itself, is not by any means free from blemish and before accepting that evidence the Court below sought corroboration and found it in circumstances which ought not to have been regarded for the purpose, and it could not be assumed that it would have arrived at the same conclusion had it directed itself correctly, their Lordship of the Privy Council would be disposed to treat the misdirection as a matter of grave consequence and would, were it necessary to do so, advise that the appeal be allowed on that ground. 3 A.I.Cr.D. 392 =A.I.R. 1949 P.C. 172=50 Cr.L.J. 642 (P.C.).

——Criminal cases—Criminal appeal—Interference—Grounds.

The Privy Council is not a Court of criminal appeal, and the only question which will be considered in criminal cases is whether there has been any miscarriage of justice. A.I.R. 1948 P.C. 216 =49 Cr.L.J. 712 (P.C.)=1947 O.A. (P.C.) 71 =1947 A.W.R. (P.C.) 71.

——Criminal cases—Criminal appeal—Approver's evidence challenged—Findings of Court not challenged—Consideration of approver's evidence—If necessary.

Where the accused, while challenging the evidence of the approver, does not in any way challenge the findings of the Court with regard to the search for, and the recovery of, a revolver and its connection with the accused and with the crime, it is unnecessary for the Privy Council to go any further into a consideration of the approver's evidence because, if it is set aside, it is clear that there has been no serious miscarriage of justice. 221 Ind. Cas. 215= 12 B.R. 133=59 L.W. 104=47 Cr.L.J. 174=1946 A.I.Cr.D. 22=A.I.R. 1946 P.C. 12=I.L.R. (1947) Kar. (P.C.) 24.

——Criminal cases—Criminal appeal—Interference with verdict of jury—Omission to direct jury to consider question of provocation in case of murder—Effect.

When there has been an omission to place before the jury for their consideration a matter of such grave importance, *e.g.*, whether there was provocation for the murder charged, that they were never led to consider whether in the particular case before them the prosecution had discharged the onus which lay on them of proving murder as distinct from manslaughter the Privy Council can properly entertain an appeal and interfere with the verdict of the jury, even though the point is raised only at a late stage in the appeal. 223 Ind. Cas. 153=1946 M.W. N. 186=12 B.R. 442=1946 A.L.J. 206=47 Cr.L. J. 569=1946 O.A. (P.C.) 111=1946 A.W.R. (P.C.) 111=50 C.W.N. 362=59 L.W. 105=A.I. R. 1946 P.C. 20=(1946) 1 M.L.J. 212 (P.C.).

——Criminal cases.

Criminal appeal—Interference with findings. (1946) 1 M.L.J. 147=A.I.R. 1946 P.C. 38.

——Criminal cases—Criminal appeal—Interference—Misreception of evidence.

Before allowing an appeal in a criminal case on the ground of the misreception of evidence, the Privy Council would require to be satisfied that grave and

substantial injustice has been caused hereby. It would not quash a conviction on the ground that the statement of a witness has been wrongly admitted in evidence, when there is ample evidence to justify the conviction apart from such statement. 72 I.A. 270=I.L.R. (1945) Lah. 451=I.L.R. (1945) Kar. (P.C.) 366=1945 A.L.J. 550=1946 P.W.N. 49=12 B.R. 274=1946 M.W.N. 180=48 Bom.L.R. 284=1946 A.I.Cr.D. 71=1946 O.A. (P.C.) 82=1946 A.W.R. (P.C.) 82=222 Ind. Cas. 189=59 L.W. 92=27 P.L.T. 1=50 C.W.N. 201=A.I.R. 1946 P.C. 1=(1946) 1 M.L.J. 125 (P.C.).

——Criminal cases—Interference—Practice.

For their Lordships of the Privy Council to interfere in a criminal case, it requires more than an allegation or even proof that a Court might take a different view of the compelling force of the evidence given. They will not review or interfere with the course of criminal proceedings unless it be shown that by a disregard of the forms of legal process, or otherwise, substantial and grave injustice has been done. A.I.R. 1946 P.C. 16=1945 M.W.N. 778=72 I.A. 305=50 C.W.N. 145=12 B.R. 280=47 Cr.L.J. 489=59 L.W. 9=1946 A.L.J. 29 (2)=(1945) 2 M.L.J. 486=222 Ind. Cas. 273 (P.C.).

——Criminal cases—Appeal in—Approver's evidence challenged—Other evidence, sufficient to support conviction—No interference.

Where besides the approver's evidence challenged in appeal to Privy Council there is sufficient evidence on the record pointing to the guilt of the accused it cannot be said that there has been a serious miscarriage of justice in taking the approver's evidence into account so as to justify interference by the Privy Council in appeal. A.I.R. 1946 P.C. 12=12 B.R. 133=59 L.W. 104=47 Cr.L.J. 174=221 Ind. Cas. 215 (P.C.).

——Criminal cases—Misreception of evidence—Substantial injustice must be proved.

Before the Board will advise His Majesty to allow an appeal in a criminal case on the ground of the misreception of evidence, they require to be satisfied that grave and substantial injustice has been caused thereby. A.I.R. 1946 P.C. 1=1945 A.L.J. 550=72 I.A. 270=12 B.R. 274=50 C.W.N. 201=27 P.L.T. 1=59 L.W. 92=(1946) 1 M.L.J. 125=I.L.R. (1945) Lah. 451=222 Ind. Cas. 189 (P.C.).

——Criminal cases—Contempt cases.

The standard of care and circumspection to be observed by all Courts before exercising the jurisdiction to commit for contempt cannot be lessened but it must be remembered that the question of committal or non-committal is one for the exercise of the discretion of the Court before whom the application to commit is brought and unless there is found to be a serious disregard of the principles of natural justice, their Lordships of the Privy Council would be slow to interfere with that discretion. A.I.R. 1945 P.C. 147=1945 M.W.N. 564=(1945) 2 M.L.J. 356=47 Cr.L.J. 61=1945 A.L.J. 505=59 L.W. 1=50 C.W.N. 107=72 I.A. 226=48 Bom.L.R. 116=1945 Pesh.L.J. 147=221 Ind. Cas. 67 (P.C.).

——Criminal cases—Act authorised by law regarded as criminal—Conviction—Interference.

If a conviction has resulted from regarding as criminal an act which is authorised by law, that does amount to a breach of natural justice because it means that there has been a conviction for what the law does not recognise as an offence and hence, in such a case, the Privy Council will interfere and quash the conviction. A.I.R. 1945 P.C. 46=46 Cr.L.J. 620=(1945) 2 M.L.J. 446=11 B.R. 437=1945 M.W.N. 47=58 L.W. 62=1945 Pesh.L.J. 46=219 Ind. Cas. 373 (P.C.).

——Criminal cases—Appeal by special leave—Privy Council is concerned with whether there has been miscarriage of justice.

In a criminal appeal brought by special leave, the Privy Council is not concerned with formal rules, such as that relating to concurrent findings of fact, but only with the question whether there has been a miscarriage of justice. A.I.R. 1944 P.C. 54=57 L.W. 374=1944 M.W.N. 440=10 B.R. 667=45 Cr.L.J. 721=1944 A.L.J. 388=1944 A.W.R. 40=46 Bom.L.R. 844=71 I.A. 83=(1944) 1 M.L.J. 515=48 C.W.N. 477=I.L.R. (1944) Kar. 273=I.L.R. (1945) Mad. 237=214 Ind. Cas. 1 (P.C.).

——Criminal cases—Question as to weight to be attributed to evidence and whether evidence should be acccepted—No interference.

Matters of the weight to be attributed to the evidence given are not considerations such as would influence their Lordships acting upon the principles which guide them in considering whether an appeal in a criminal matter should be allowed. So also the question whether the appellant's evidence and explanation should be accepted is one solely for the Courts in India and is not a matter with which their Lordships would interfere. A.I.R. 1943 P.C. 192=1943 A.L.J. 507=45 Cr.L.J. 126=(1943) 2 M.L.J. 532=1943 O.W.N. 539=56 L.W. 706=48 C.W.N. 90=1944 M.W.N. 23=23 Pat. 88=70 I.A. 196=I.L.R. (1944) Kar. (P.C.) 1 Sup.=1943 A.W.R. 79=77 C.L.J. 500=46 Bom.L.R. 513=209 Ind. Cas. 276 (P.C.).

——Criminal cases—Rule as to admission of.

In criminal matters, the exercise of the prerogative, "takes place only where it is shown that injustice of a serious and substantial character has occurred." A mere misdirection on the part of the Court below, as for example in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor does the Judicial Committee advise interference merely because they themselves would have taken a different view of the evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below. Where, however, the distinction between civil and criminal liability has been inexactly drawn, the ground upon which a criminal charge is based ill-defined, and the instances of negligence increased from one to many by imputing a fresh act of negligence in the case of each death, the case is one in which the Privy Council will interfere and quash the conviction. A.I.R. 1943 P.C. 72=57 L.W. 269=44 Cr.L.J. 569=1943 A.L.J. 427=1943 A.W.R. 48=207 Ind. Cas. 107 (P.C.).

——Criminal cases—Practice (South Africa)—Ignorant native accused pleading guilty—Court, if can enter plea of not guilty—No prejudice caused—No interference by Judicial Committee.

South African practice does permit a Court to enter a plea of not guilty on behalf of a native or other ignorant person pleading guilty if it considers that he does not properly understand the effect of that plea or if he seems to have matter of exculpation that he wishes to allege:

Held, that the irregularity of leaving on the record a plea of guilty after, in effect, altering it to one of not guilty did not entail any real prejudice to the accused and did not call for any interference by the

Judicial Committee. (1941) 191 Ind. Cas. 4=42 Cr.L.J. 13=1941 M.W.N. 228=7 B.R. 203 (P. C.).

——Criminal cases—Leave to appeal — Misdirection by Judge in leaving case to jury—No miscarriage of justice—Leave, if can be granted

The Judicial Committee will not interfere with the course of criminal law unless there has been such an interference with the elementary right of an accused as has placed him outside the pale of the regular law or unless within that pale there has been so manifest a violation of the principles of natural justice that their Lordships are satisfied first that the result arrived at was opposite to the result they themselves would have reached and, secondly, that the same opposite result would have been reached by the local tribunal even in the absence of an irregularity. In very special and exceptional circumstances leave to appeal in criminal cases may be granted. But misdirection by a Judge either in leaving a case to a jury where there is no evidence or founded on an incorrect construction of the I. P. Code even if established, is insufficient for that purpose, specially where there is no miscarriage of justice. It is not right or fair to judge by one single sentence but one must not only consider the whole of the passage in which the sentence occurs, but also consider the antecedent passages and the subsequent passages in the summing. up. Hence, in considering whether a Judge has misdirected the jury, the tenor and general effect of the whole summing up should be looked at and if, upon the whole summing up, the Court is of opinion that substantially the proper direction has been given to the jury, it will not interfere, though the Judge has omitted to direct the jury expressly on some important point. A.I.R. 1939 Cal. 682=I.L.R. (1939) 1 Cal. 187=43 C.W.N. 133=41 Cr.L.J. 59=184 Ind. Cas. 614.

——Criminal cases—Interference, when proper.

It is no part of the duty of the Board of the Judicial Committee in criminal cases to sit as a Court of Criminal Appeal, but only to correct what they regard as a miscarriage of justice, if it has occurred. Where their Lordships are satisfied that there has been no miscarriage of justice in a case, and nothing which, in accordance with well-settled principles, would warrant their interference with the judgment of the High Court, they will not interfere:

Held, on the evidence and having regard to its cumulative effect, that the Courts in India were well-entitled to convict the appellant of murder. A.I.R. 1937 P.C. 179=1937 O.W.N. 540=3 B.R. 501=38 Cr.L.J. 573=41 C.W.N. 805=39 P.L.R. 426=46 L.W. 33=1937 M.W.N. 633 (2)=31 S.L.R. 300=39 Bom. L. R. 960=I.L.R. (1937) Lah. 371 =64 I.A. 134=1937 A.W.R. 1014=(1937) 2 M. L.J. 684=168 Ind. Cas. 432 (P.C.).

——Criminal cases—Interference.

The Board of the Judicial Committee does not act as a Court of review of the decisions of a Court of Criminal Appeal, unless it can be shown that the error has led to injustice of a grave character. Where the appellants, apart from the untenable contention as to the use of the deposition of a witness, made no suggestion or error on the part of the trial Judge, and their Lordships are satisfied that the trial Judge, in the view that he took of the credibility of another witness whom he heard and saw, along with the evidence and deposition of the former witness, was entitled to find the case proved against the appellants, their Lordships will decline to examine the suggestion of error on the part of the appellate Court. A. I.R. 1937 P.C. 119=1937 O.W.N. 412=3 B.R. 426 =38 Cr.L.J. 498=64 I.A. 148=(1937) 2 M.L.J. 323=41 C.W.N. 741=1937 M.W.N. 546=46 L. W. 134=39 Bom.L.R. 966=39 P.L.R. 334=1937 A.L.J. 1055=1937 A.W.R. 1128=I.L.R. (1937) Bom. 711=167 Ind. Cas. 790 (P.C.).

——Criminal cases—Interference with verdict of jury.

It is not for the Board to interfere with the verdict of the jury because its conclusion as to guilt or innocence might differ from that of the jury. But where there are no grounds on the evidence taken as a whole, upon which any tribunal could properly, as a matter of legitimate inference, arrive at a conclusion that the accused was guilty and any conclusion on the available materials would be, and is, mere conjecture or guess, which are not, in law or justice, permissible grounds on which to base a verdict, the only proper direction to the jury in these circumstances was that they must return a verdict of not guilty or that they could not safely or properly find any other verdict. But if, on the contrary, the direction was quite other than this, the verdict cannot stand. A.I.R. 1936 P.C. 289=37 Cr.L.J. 963= 44 L.W. 661=41 C.W.N. 65=1936 M.W.N. 1340 =39 Bom.L.R. 1=164 Ind. Cas. 545 (P.C.).

——Criminal cases—Appeal should be allowed.

Where there are really no materials for a conviction for murder as opposed to manslaughter and in addition the trial was so conducted as in three separate respects, namely, the exclusion of the statements, restriction of the address by Counsel, and the neglect of the rule requiring corroboration, to exhibit a neglect of fundamental rules of practice necessary for the due protection of prisoners and the safe administration of criminal justice, their Lordships will allow the appeal and set aside the convictions. A.I. R. 1936 P.C. 242=44 L.W. 253=1936 A.L.J. 869 =37 Cr.L.J. 914=40 O.W.N. 1164=1936 M.W. N. 889=38 Bom.L.R. 1101=1936 A.W.R. 741= 163 Ind. Cas. 681 (P.C.).

——Criminal cases—Admission of improper evidence—Murder case—Accused was not prejudiced—Errors of procedure of a technical character.

The Judicial Committee do not constitute a Court of Criminal Appeal. The Sovereign-in-Council does not act, in the exercise of the prerogative right to review the course of justice in criminal cases, in the free fashin of a fully constituted Court of Criminal Appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below. His Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done.

In a charge for murder against the appellant, the evidence at the trial to prove that the appellant was the murderer was partly direct and partly circumstantial. Direct evidence was given by witnesses

who saw the appellant fire the shots which caused the death and by witnesses who saw him at or near the scene of the murder at the material time. The circumstantial evidence was strong and part of it so strong as to point irresistibly to the conclusion that the appellant was guilty. In particular the appellant was proved by unimpeachable evidence to be possessed of a pair of sandals or shoes of a somewhat peculiar and unmistakable type. After the crime, one was in his possession. The other was found close to the body of the murdered man. The motive was ill-will due to the fact that the dead man had recently made accusations of criminal conduct against the appellant and that the appellant knew of and resented these accusations. It was complained that in the proof of motive, matters and documents inadmissible in evidence were put in and that they were of a nature prejudicial to the appellant and must have prejudiced the tribunals against him:

Held, that the complaint had but slight foundation. It was clearly admissible and proper, though not in any great degree important to prove that the deceased man had given such information or made such complaint to the Police. The police report put in on the character of the appellant was favourable to him and it was not objected to by counsel for him. If real injury were done by the prosecution or the Court to an accused person, the absence of objection by Counsel for the accused would not excuse it but the absence of objection with other circumstances in the case indicated very clearly that no injury was done at all by reason of the form in which the evidence was given or by the admission of the documents in question.

Held, further that it would have been more regular and more expedient if the evidence as to motive had not been given in the form in which it was given. But though irregularity is to be avoided and even an appearance of action prejudicial to an accused in the conduct of a criminal trial is to be deprecated, in this particular case there was in reality no prejudice to the case of the accused owing to any of the matters complained of and that what was done did not lead to injustice of a grave or even of a slight character. The matters of complaint in no way affected the course of the trial or contributed to its result and such errors of procedure as occurred were of a technical character and did not detract from the essential fairness and justice which marked the conduct of the proceedings in both the Courts. Consequently, no grounds existed to require or entitle their Lordships to advise His Majesty to intervene. A.I.R. 1936 P.C. 199=2 B.R. 637=17 L. 488=37 Cr.L.J. 833 =40 C.W.N. 1101=44 L.W. 125=1936 M.W.N. 743=38 P.L.R. 824=63 C.L.J. 486=38 Bom.L.R. 764=1936 A.W.R. 751=163 Ind. Cas. 7 (P.C.).

——Criminal cases—Mistake in law—Whether ground for granting special leave to appeal—Jury—Misdidection as to onus—No substantial injustice—Special leave.

Their Lordships of the Judicial Committee do not sit as a Court of Criminal Appeal. The mere fact that there has been some mistake of law does not afford sufficient ground of itself for granting special leave to appeal. Misdirection as such, even irregularity as such will not suffice. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in future.

It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed. Where the jury might have thought from a passage in the summing up that that was in fact a burden which the accused had to discharge, the direction is not correct. But when their Lordships are satisfied that there were circumstances pointing irresistibly to the guilt of the accused quite independently of this direction, and that there has been no such substantial injustice, no such deprivation of the substance of fair trial, special leave to appeal will not be granted. A.I.R. 1936 P.C. 169=37 Cr.L.J. 628=38 Bom.L.R. 700=1936 M.W.N. 653=44 L.W. 86=1936 A.L.J. 808=38 P.L.R. 789=71 M.L.J. 321=1936 A.W.R. 750=162 Ind. Cas. 450 (P.C.).

——Criminal cases—Decision of the Royal Court of Jersey—Special leave—Prerogative.

There is no right of appeal from the decision of the Royal Court of Jersey in a criminal case to His Majesty in Council, using the term "right of appeal" in its proper sense. But in a proper case. His Majesty is entitled to grant special leave to appeal. There is no Order in Council, Charter, or other instrument of authority from which it can be inferred that the King's prerogative to allow an appeal, if so advised, has been taken away in criminal matters. The cases in which the Board ought to advise His Majesty to exercise his prerogative in a criminal case are of a rare and exceptional character; but that the prerogative still exists is beyond doubt. A.I.R. 1936 P.C. 160=37 Cr.L.J. 679=44 L.W. 108=1936 M.W.N. 832=162 Ind. Cas. 470 (P.C.).

——Criminal cases—Privy Council will not usurp functions of jury.

Their Lordships of the Privy Council, even if they were a general Court of Appeal hearing the case, would not attempt to usurp, however remotely, the functions of the jury.

The Judicial Committee have always treated applications for leave to appeal and the hearing of criminal appeals so admitted as being upon the same footing. A.I.R. 1936 P.C. 160=37 Cr.L.J. 679 =44 L.W. 108=1936 M.W.N. 832=162 Ind. Cas. 470 (P.C.).

——Criminal Cases.

Their Lordships of the Judicial Committee have repeatedly declared that they are not a Court of Criminal appeal. A.I.R. 1935 Mad. 793=1935 M.W.N. 5=68 M.L.J. 93 Sup.=42 L.W. 140=37 Cr.L.J. 64=159 Ind. Cas. 240 (F.B.).

——Criminal Cases.

Their Lordships of the Privy Council do not sit as a Court of Criminal Appeal. For them to interfere with a criminal sentence, there must be something so irregular or so outrageous as to shock the very basis of justice. A.I.R. 1935 Rang. 214=13 Rang. 141 =36 Cr.L.J. 1232=157 Ind. Cas. 821.

——Criminal cases—Verdict of jury as to valuation on evidence—Question to be considered.

When the jury's verdict as to valuation on evidence is challenged, the Court of Appeal is not to consider only whether the Court would adopt the view of the jury if the decision rested with them but they have also to see if there was evidence before the jury on which they would have reached the conclusion they arrived at. A.I.R. 1934 P.C. 196=40 L.W. 180 =151 Ind. Cas. 600 (P.C.).

——**Criminal Cases.**

The Board of the Judicial Committee do not sit as a Court of Criminal Appeal. For them to interfere with a criminal sentence, there must be something so irregular or so outrageous as to shock the very basis of justice. Contentions based on the meaning and effect of a section of the Evidence Act are merely points for a Court of Criminal Appeal. A.I.R. 1932 P.C. 234=13 Lah. 479=36 L.W. 542=9 O.W.N. 914 =59 I.A. 233=34 Cr.L.J. 18 (1)=33 P.L.R. 873 =64 M.L.J. 77=56 C.L.J. 593=140 Ind. Cas. 290 (P.C.).

——**Criminal Cases.**

It is difficult to induce the Board to advise the granting of special leave to appeal in a criminal case. 123 Ind. Cas. 731=A.I.R. 1930 P.C. 291 (P.C.).

——**Criminal cases—Interference.**

The Privy Council does not sit as a Court of criminal appeal. To allow criminal proceedings to be reviewed by it there must have been substantial and grave injustice done. *Dillett's* case, (1887) 12 A.C. 459, Foll. 124 Ind. Cas. 578=34 C.W.N. 599= A.I.R. 1930 P.C. 201=32 M.L.W. 929=59 M.L. J. 127 (P.C.).

——**Criminal cases—Rule.**

Their Lordships of the Privy Council do not act in criminal matters as a Court of Criminal Appeal and are not concerned to regulate procedure of Courts in India or to criticise what is mere matter of procedure and in the complete absence of any substantial injustice or in the complete absence of anything that outrages what is due to natural justice in criminal cases Privy Council does not interfere. 122 Ind. Cas. 17=7 O.W.N. 299=1930 Cr.C. 193= 31 M.L.W. 306=31 P.L.R. 150=32 B.L.R. 529= 34 C.W.N. 565=3 M.Cr.C. 85=31 Cr.L.J. 378= 11 Lah. 192=57 I.A. 71=51 C.L.J. 455=A.I.R. 1930 P.C. 57=58 M.L.J. 363 (P.C.).

——**Criminal cases.**

The Board only recommends His Majesty to exercise his jurisdiction in appeals in criminal cases upon certain very restricted grounds. 100 Ind. Cas. 227 =5 Rang. 53=54 I.A. 96=25 A.L.J. 117=31 C. W.N. 271=1927 M.W.N. 103=38 M.L.T. 64= 4 O.W.N. 283=8 P.L.T. 155=28 Cr.L.J. 259= 6 Bur.L.J. 65=29 Bom.L.R. 813=45 C.L.J. 441 =7 A.I.Cr.R. 362=A.I.R. 1927 P.C. 44=52 M. L.J. 585 (P.C.).

——Criminal cases—Privy Council is not a Court of Criminal Appeal—Review is not permitted except in case of substantial and grave injustice due to disregard of legal forms or principles of natural justice—Refusal by Governor-General to transfer case on the ground of state of public feeling cannot be violation of the principles of natural justice—Inadequacy of direction to the Jury cannot amount to disregard of forms of process.

In dealing with petitions for special leave to appeal against sentences pronounced in the Criminal Courts of the various Dominions of the King the Privy Council will not act as Court of Criminal Appeal and will not review or interfere with the course of criminal proceedings, unless it is shown that, by disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done.

Governor-General has the power to order that the trial be held elsewhere if he thinks that in the state of public feeling a fair trial could not be obtained in the place where the offence would ordinarily be tried. To ask the Board to declare that a refusal of the Governor-General, who had all the advantages of being in the country and of judging of the real state of the feeling of the public amounted to a violation of the principles of natural justice, is nothing less than preposterous. The impropriety and uselessness of such a demand cannot be too strongly qualified.

Adequacy or otherwise of the directions to the jury would not amount to a disregard of the forms of process or violation of the principles of natural justice. 92 Ind. Cas. 212=28 Bom.L.R. 158=30 C.W.N. 557=23 M.L.W. 1=43 C.L.J. 67=1926 M.W.N. 62=3 O.W.N. 165=A.I.R. 1925 P.C. 305=49 M.L.J. 834 (P.C.).

——Criminal cases—Privy Council is not a Court of Criminal Appeal—Mere mistake in exercise of jurisdiction is not enough to sustain appeal but justice must have been set at naught.

The power of the Privy Council to entertain appeals arises not from the relation of the Board to the Court below, as a Court of criminal appeal, but as the Privy Council advising the Sovereign with regard to the exercise of the prerogative. The prerogative is that remnant of the power of the Crown which remains to the Crown to interfere with tribunals of justice. With India's march to Self-Government, this prerogative has been diminishing. Therefore, unless it can be proved that there was no proper trial at all, that the forms of all judicial procedure were disregarded, not merely according to local ordinances but according to the unvarying character, which is common to all, the Privy Council cannot interfere. If there is anything very very gross, it might come under the same category, but even then, the Crown has to be extraordinarily cautious in asserting the survivor even of that very restricted prerogative which existed fifty years ago, but which may not exist now. The Privy Council cannot take cognizance of a mere mistake which the Court in India has made in the exercise of its jurisdiction. Where justice has not been set at naught, the Privy Council has no jurisdiction. 89 Ind. Cas. 843=26 Cr.L.J. 1419=1926 M.W.N. 32=27 Bom.L.R. 704=49 Bom. 455= A.I.R. 1925 P.C. 180 (P.C.).

——**Criminal cases.**

When there has been evidence before the Court below and the Court below has come to a conclusion upon that evidence, their Lordships of the Privy Council will not disturb that conclusion; they will only interfere, where there has been a gross miscarriage of justice or a gross abuse of the forms of legal process. 12 A.C. 459, Foll. 88 Ind. Cas. 3= 6 Lah. 226=27 Bom.L.R. 707=41 C.L.J. 437=2 O.W.N. 447=23 A.L.J. 636=7 L.L.J. 324=3 Pat. L.R.Cr. 95=52 I.A. 191=1925 M.W.N. 418=26 Cr.L.J. 1059=26 P.L.R. 284=30 C.W.N. 581= A.I.R. 1925 P.C. 130=48 M.L.J. 643 (P.C.).

——Criminal cases—Privy Council will not interfere save where legal principles are involved.

The responsibility for the administration of criminal justice in India the Privy Council will neither accept nor share, unless there has been some violation of the principles of justice or some disregard of legal principles. 84 Ind. Cas. 935=26 Cr.L.J. 391 =22 M.L.W. 57=26 P.L.R. 394=48 Bom. 515= 26 Bom.L.R. 692=A.I.R. 1925 P.C. 59 (P.C.).

——**Criminal cases.**

Wrong interpretation of sections of Acts does not

justify interference by Privy Council in criminal cases. 87 Ind. Cas. 844=26 Cr.L.J. 1020=26 P.L.R. 129=21 M.L.W. 160=6 Lah. 45=6 L.R.P.C. Cr. 16=52 I.A. 121=2 O.W.N. 5=27 Bom.L.R. 701 =3 Pat.L.R. Cr. 93=A.I.R. 1925 P.C. 52=48 M. L.J. 61 (P.C.).

Criminal cases—Special leave.

Points not properly raised at the trial are not points which in ordinary circumstances deserve much consideration as grounds for special leave. 85 Ind. Cas. 47=29 C.W.N. 181=1925 M.W.N. 26=3 Pat. L.R. Cr. 1=6 L.R.P. Cr. 1=27 Bom.L.R. 148= 6 Pat.L.T. 169=52 I.A. 40=52 Cal. 197=23 A. L.J. 314=41 C.L.J. 240=26 Cr.L.J. 431=26 P.L. R. 50=A.I.R. 1925 P.C. 1=48 M.L.J. 543 (P. C.).

——Criminal cases.

The King in Council is not a Court of Criminal Appeal and the power in the Sovereign to entertain appeals of this character is only to be exercised when there has been such a gross denial of the principles of natural justice as has been defined in numerous cases. 69 Ind. Cas. 631=26 C.W.N. 57=30 M.L. T. 180=23 Cr.L.J. 743=1 Pat.L.R. Cr. 31=14 M.L.W. 558=A.I.R. 1922 P.C. 162 (P.C.).

——Criminal cases—Sedition case—Privy Council is not a Court of Appeal—Findings of fact will be rarely interfered with—Question whether law was properly applied to language used by accused in a sedition case—Privy Council will not interfere ordinarily.

In a case of sedition in respect of newspaper articles the question whether the principles of the law were properly applied by the Courts in India in detail to the language of the various articles is one which partakes so much of the nature of the question of fact that it would be difficult for the Board to interfere on this ground with the conclusions arrived at by a Court in India. The decision of such a Court must necessarily depend not only on the construction of the written matter complained of, but also on the local conditions obtaining at the time of the publication and a just appreciation of the effect which the publication under those conditions of the articles in question would be calculated to produce.

Privy Council will not revise the conclusions of facts arrived at by the lower Court in such matters, because thereby it will be constituting itself a Court of appeal in criminal matters which role it is its policy to decline to assume. 59 Ind. Cas. 641=2 Lah. 34=48 I.A. 96=19 A.L.J. 65=23 Bom.L.R. 709=33 C.L.J. 124=25 C.W.N. 701=13 M.L.W. 253=1921 M.W.N. 49=10 P.W.R. Cr. 1921=29 M.L.T. 142=22 Cr.L.J. 129=A.I.R. 1921 P.C. 29=40 M.L.J. 101 (P.C.).

——Criminal case—When leave granted.

Though the Privy Council is not a Court of Criminal Appeal, the Board will grant leave to scrutinise whether there have been a miscarriage of the fundamental principles of justice within the meaning of the ruling in Dillet's case. (1919) M.W.N. 748 =20 Cr.L.J. 709=2 U.P.L.R. (P.C.) 26=53 Ind. Cas. 703 (P.C.).

——Criminal case—Limitations on powers of interference—Press Act.

The Judicial Committee when it sits to advise His Majesty in the exercise of his prerogative in criminal cases does so under constitutional limitations which preclude it from exercising the full functions of a Court of Criminal Appeal. The Committee refused to interfere with an order of forfeiture of security under the Press Act, having found that the status applicable to the case had been properly constructed. 43 Mad. 146=46 I.A. 176=37 M.L.J. 139=17 A. L.J. 925=23 C.W.N. 986=21 Bom.L.R. 867= (1919) M.W.N. 555=10 L.W. 451=20 Cr.L.J. 593=26 M.L.T. 408=1 U.P.L.R. (P.C.) 74= 52 Ind. Cas. 209 (P.C.).

[Affirming on appeal 39 Mad. 1085=37 Ind. Cas. 525 and 39 Mad. 1164=37 Ind. Cas. 607.]

——Criminal case—Jurisdiction—Powers of interference—Constitutional limitations on.

The Judicial Committee is not a Court of review in criminal cases. It does not interfere merely on the ground that the Court below has not appreciated the evidence properly. But the Committee will interfere where there has been a disregard of the proper forms of legal process, grievous and not merely technical in character or a violation of a fundamental principle amounting to a denial of justice. 44 Cal. 876=44 I.A. 137=15 A.L.J. 475=1 Pat. L.W. 661=19 Bom.L.R. 510=21 C.W.N. 818= 26 C.L.J. 13=6 L.W. 71=22 M.L.T. 31=(1917) M.W.N. 522=18 Cr.L.J. 471=33 M.L.J. 555=11 Bur.L.T. 54=13 N.L.R. 100=39 Ind. Cas. 311 (P.C.).

——Criminal case—Stay of execution—Practice.

The Judicial Committee is not a Court of Appeal, and the stay of execution of a sentence of death pending an appeal to the Privy Council is a matter for the consideration of the Executive Government and not within the province of the Judicial Committee. 42 Cal. 739=42 I.A. 133=19 C.W.N. 674=17 M.L. T. 441=21 C.L.J. 522=17 Bom.L.R. 487=2 L. W. 602=16 Cr.L.J. 494=59 P.W.R. 1915 Cr.= 29 Ind. Cas. 334 (P.C.).

——Criminal case—Leave to appeal when granted.

Leave to appeal to the Privy Council in criminal matters is not granted, except where a clear departure from the requirements of justice exists; nor unless, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.

Misdirection as such, even irregularity as such, will not suffice. There must be something which in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future.

The jurisdiction, which the Privy Council exercises in appeals in criminal matters, involves a general consideration of the evidence and of the circumstances of each particular case in order to place the irregularities complained of, if substantiated in their proper relation to the whole matter.

Where there is a great preponderance of unquestioned evidence on a point, the Privy Council cannot in any view conclude that there has been any miscarriage of justice, substantial, grave or otherwise. Authorities reviewed. 18 C.W.N. 705=15 Cr.L. J. 326=1 L.W. 989=23 Ind. Cas. 678 (P.C.).

——Criminal case—Appeal against convictions—Functions of the Judicial Committee—Limits of interference.

The power of the Privy Council to review proceedings of a criminal nature, unless such power and authority have in any local area been parted with by statute, is undoubted. But there are reasons, both constitutional and administrative, to show that this power should not be lightly exercised. The practice

of the Judicial Committee with regard to appeals in criminal matters are laid down in *R.* v. *Joykissen Mookerjee,* (1862) 1 Moor. P. C. (N.S.) 72 and *Falkaland Isels Co.* v. *R.,* (1862) 1 Moor P. C. (N.S.) 299 has not been altered or liberalised by the decisions in In re: *Dillet,* (1887) 12 App. Cas. 459 and later cases.

The practice of the Committee in respect of criminal trials is to this effect:—It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an infringement of the elementary rights of an accused as has placed him outside the pale of regular law or unless, within that pale, there has been so manifest a violation of the principles of natural justice that the Committee as well as the local tribunal would have come to the opposite conclusion in the absence of the irregularity complained of.

The Privy Council dismissed an appeal from a conviction on a trial by jury, of the offence of defamation or criminal libel, holding that there was no misdirection or improper exclusion of evidence. 41 Cal. 1023=41 I.A. 149=18 C.W.N. 785=26 M. L. J. 621=15 Cr.L.J. 309=1 L.W. 461=7 Bur.L.T. 167 =(1914) M.W.N. 506=16 M.L.T. 79=12 A.L.J. 1042=20 C.L.J. 161=16 Bom.L.R. 544=8 L.B.R. 16=23 Ind. Cas. 661 (P.C.).

——Criminal case—Leave to appeal, when granted — Costs.

In criminal cases the Judicial Committee of the Privy Council does not lightly interfere with the decision of the Courts below; it only does so where justice has been gravely and injuriously miscarried even although the proceedings taken are unobjectionable in form.

Held, quashing the judgment and sentence appealed against, that the Court below had lost sight of the distinction between a civil and a criminal liability for appropriation of another's money, and that the sentence pronounced against the appellant formed such an invasion of liberty and such a denial of just rights as a citizen that their Lordships felt called upon to interfere.

Looking to the exceptional nature of the case, their Lordships directed the Crown to pay the appellant's costs of the appeal in a criminal case. (1914) A.C. 221=18 C.W.N. 98=26 M.L.J. 1=15 Cr.L.J. 305 =23 Ind. Cas. 657 (P.C.).

——Criminal case—Leave to appeal, when given —Misdirection to jury—Sentence.

The Judicial Committee is not a Criminal Court of Appeal entitled to go into questions of evidence and procedure. It exercises its functions under constitutional limitations and will interfere only when what has been done has been grossly contrary to the forms of justice or violates fundamental principles. In re: *Dillet* (1887) 12 App. Cas. 459, Rel.

Leave to appeal from a conviction on the ground of misdirection to the jury (where there was evidence) and the severity of sentence was refused. 41 Cal. 568=40 I.A. 241=(1914) M.W.N. 11=16 Bom. L.R. 1=12 A.L.J. 75=15 M.L.T. 84=19 C.L.J. 107=18 C.W.N. 374=7 Bur.L.T. 37=15 Cr.L.J. 144=22 Ind. Cas. 496 (P.C.).

[Affirming on appeal 6 Bur.L.T. 201=22 Ind. Cas. 432 (F.B.).]

——Criminal case—Interference when—Grave injustice — Inadmissible evidence—Want of proof.

Where in the prosecution of a person "by some disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done," the judicial Committee is bound to advise His Majesty that the conviction should not be allowed to stand.

The Privy Council set aside the conviction of a person for abetment of murder, which was based mainly on inadmissible evidence and when that evidence was excluded, there did not exist any reliable evidence on which a capital conviction safely be based. 36 Mad. 501=40 I.A. 193=17 C.W.N. 1110=14 M. L.T. 263=25 M.L.J. 518=11 A.L.J. 881=18 C. L.J. 365=(1913) M.W.N. 806=14 Cr.L.J. 577= 15 Bom.L.R. 910=21 Ind. Cas. 369 (P.C.).

[On Appeal from 20 Ind. Cas. 721.]

——Criminal case—Leave to appeal.

His Majesty-in-Council will not review criminal proceedings unless it be shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

An applicant for special leave ought to show the materials upon which one of those propositions can be established, and ought fully to inform the Board of the Judicial Committee of the facts. 13 C.L.J. 129=8 A.L.J. 147=13 Bom.L.R. 9=9 M.L.T. 200=4 Bur.L.T. 33=21 M.L.J. 374=(1911) 2 M. W.N. 159=12 Cr.L.J. 100=9 Ind. Cas. 581 (P. C.).

—Criminal case—Leave to appeal.

The High Court should be satisfied that there are grounds for thinking that grave and substantial injustice may have been caused, owing to some departure from the principle of natural justice. 33 Bom. 221=10 Bom.L.R. 973=9 Cr.L.J. 226=2 Ind. Cas. 277.

7. Death of party.

——Death of party—Decree by Privy Council against respondent in ignorance of death of one of them.

A decree passed by the Privy Council against the respondents in ignorance of the death of one of them is not a nullity, though the legal representative of the deceased was not brought on the record, the decree being an order of the Sovereign. The provisions of the Civil P. C., do not apply to appeals before the Privy Council. A.I.R. 1937 Bom. 433=39 Bom. L.R. 572=171 Ind. Cas. 844.

——Death of party—Delay in hearing of appeal caused by endless substitution and revivor proceedings—Judicial Committee ordered hearing of appeal as against respondents surviving or already brought on record.

Where in an appeal to the Privy Council to which there were 185 respondents, all belonging to the same village, represented by same counsels and solicitors, and where all of them with subsequently substituted legal representatives in the case of deceased respondents had identical interests, and where considerable delay in hearing was caused at each stage after the special leave to appeal owing to substitution and revivor proceedings in compliance with Rr. 43 (*b*), 52 and 83 of the Judicial Committee Rules of 1925, caused by the deaths at intervals of one or more of the respondents, and where further delay in hearing the appeal was apprehended on the same account, on an application by the appellants praying for setting down the appeal for hearing against the surviving respondents with liberty to proceed against the other respondents or their representatives or such

order as should seem just, the Judicial Committee directed and ordered setting down of the appeal for hearing against such of the respondents as had appeared or had been served with notice of any order in Council bringing them upon record and setting for determination if necessary at the hearing of the appeal all questions as to how any other respondents were to be proceeded against. 52 A. 8=57 I.A. 94 =128 Ind. Cas. 656=A.I.R. 1930 P.C. 264 (P. C.).

——Death of party.

Even though a party before the Privy Council might have died pending the appeal, the order made by the Privy Council in the case nevertheless has full force and effect and is to be carried out by the Courts in India. A.I.R. 1924 Mad. 695, Foll. 103 Ind. Cas. 618=39 M.L.T. 29=26 M.L.W. 72=1927 M. W.N. 426=A.I.R. 1927 Mad. 1088=53 M.L.J. 226.

——Death of party.

A decree of the Privy Council shall have full force and effect notwithstanding the death of some of the respondents before it, prior to judgment and even on the date of hearing and the same can be executed against the legal representatives of the deceased respondents. S. 23 of William IV, Ch. 41, Rel. on. 80 Ind. Cas. 85=20 M.L.W. 99=1924 M.W.N. 439=47 Mad. 618=35 M.L.T. 50=A.I.R. 1924 Mad. 695=45 M.L.J. 154.

——Death of party—Jurisdiction of High Court to add legal representatives.

After an appeal has been finally admitted before the transcript of the record and transmitted to England, the High Court has jurisdiction over the appeal and can direct substitution of the legal representatives of the deceased parties to the appeal. O. 22 of the C. P. Code, does not apply to appeals to the P.C. 10 C.L.J. 331=4 Ind. Cas. 454.

——Death of party—Death of respondent—Decree passed in ignorance of death—Effect of.

A decree passed by the Privy Council in ignorance of the death of a respondent pending the appeal is binding on all the Courts in India. (1920) P.H.C. C. 266=5 Pat.L.J. 314=1 Pat.L.T. 325=2 U.P. L.R. (Pat.) 108=56 Ind. Cas. 322.

——Death of party during hearing.

During the course of the argument in the case, a cablegram arrived stating that respondent had died. Their Lordships of the Privy Council intimated that they would proceed with the hearing of the appeal but judgment would not be given until the proper party was put upon the record. (1905) 9 C.W.N. 477=27 A. 271=32 I.A. 113=8 O.C. 155=15 M. L.J. 197 (P.C.).

8. Delay in Indian litigation.

——Delay in Indian litigation.

The tedious protraction for 12 years of Indian Litigation was adversely commented on. 39 All. 173=44 I.A. 54=15 A.L.J. 150=5 L.W. 388=21 M.L.T. 267=32 M.L.J. 383=21 C.W.N. 616=19 Bom.L.R. 433=26 C.L.J. 24=(1917) M.W.N. 453=39 Ind. Cas. 454 (P.C.).

(Affirming on appeal. 33 All. 695=11 Ind. Cas. 17).

——Delay in Indian litigation—Condemnation of.

The Privy Council condemned the inordinate delay in Indian litigation and observed that the successful party, if guilty of delay will be deprived of costs. 44 Cal. 186=43 I.A. 249=20 M.L.T. 335=31 M. L.J. 563=(1916) 2 M.W.N. 336=4 L.W. 458=18 Bom.L.R. 868=14 A.L.J. 1103=24 C.L.J. 487= 1 Pat.L.W. 1=21 C.W.N. 225=10 Bur.L.T. 177 =36 Ind. Cas. 420 (P.C.).

——Delay in Indian litigation—Reprehensible.

The Privy Council condemned the extraordinary delay in Indian litigation. 38 All. 570=43 I.A. 284 =31 M.L.J. 750=21 C.W.N. 66=20 M.L.T. 529 =14 A.L.J. 1189=(1916) 2 M.W.N. 570=19 Bom. L.R. 1=5 L.W. 189=25 C.L.J. 524=10 Bur.L.T. 131=36 Ind. Cas. 38 (P.C.).

(Affirming on appeal. 33 All. 585=9 Ind. Cas. 1013).

9. Differing decisions of lower Courts.

——Differing decisions of lower Courts.

Where a judgment of trial Judge does not proceed on what might be called his personal observation of the demeanour of the witnesses and mode of giving evidence but proceeds on inference from agreed facts, it does not give very much advantage to the Judge of first instance over the Judges in the Court of appeal and therefore where the Appellate Court differs from the trial Judge on question of fact in such a case the Privy Council would not interfere. 116 Ind. Cas. 601=28 M.L.W. 873=10 P.L.T. 321=A.I.R. 1928 P.C. 306=56 M.L.J. 286 (P.C.).

——Differing decisions of lower Courts.

Where the High Court reversed the decision of the Lower Court under a number of misapprehensions and without appreciating important points the Privy Council reversed the decision of the High Court. 32 M.L.T. 86=27 C.W.N. 725=A.I.R. 1928 P. C. 31 (P.C.).

——Differing decisions of Lower Courts—Interference with finding of Appellate Court in reversal of trial Court—Practice.

An appellant who asked the Board to upset a carefully-considered finding on a question of fact arrived at by Judges fully conversant with habits and practices of the country, takes a heavy burden on himself. The Privy Council refused to displace a carefully reasoned judgment of the Judicial Commissioner's Court on a question of fact merely in order to restore a judgment of the Subordinate Judge, which rested on a speculation of his own as to probabilities. 5 O.L.J. 440=21 O.C. 104=48 Ind. Cas. 225 (P.C.).

——Differing decisions of Lower Courts—Fresh materials before Lower Appellate Court—Interference.

Where on a pure question of fact, *viz.*, the genuineness of a will, two Courts in India differed but the materials before them were not, owing to the admission of fresh evidence by the appeal Court, entirely the same, the Judicial Committee could not reverse the appellate judgment unless satisfied that it was wrong. 36 Cal. 833=36 I.A. 221=13 C.W.N. 830 =10 C.L.J. 74=6 M.L.T. 7=11 Bom.L.R. 861= 10 M.L.J. 435=3 Ind. Cas. 465 (P.C.).

10. Evidence.

See also PRIVY COUNCIL—QUESTION AND FINDINGS OF FACT.

——Evidence—Practice—Land acquisition proceedings—Questions relating to value—No interference.

In land acquisition proceedings, the rate of com-

pensation to be allowed in cases of lands burdened with occupancy tenants is a mere question relating to value on which the local knowledge of Courts in India is of the greatest value and it is the practice of the Privy Council not to interfere in such matters. A.I.R. 1946 P.C. 75=50 C.W.N. 401=1946 M. W.N. 158=(1946) 1 M.L.J. 333=73 I.A. 44=12 B.R. 496=223 Ind. Cas. 550 (P.C.).

——Evidence—Decision of Native Tribunal on matters peculiarly within their knowledge.

Decisions of the Native Tribunal on such matters, which are peculiarly within their knowledge arrived at after a fair hearing on relevant evidence will not be disturbed by the Privy Council without very clear proof that they are wrong. (1944) 213 Ind. Cas. 195=1944 A.W.R. 1=10 B.R. 630 (P.C.).

——Evidence—Will executed by Indian in English—Construction.

The testator executed a will in the English language which was not his native tongue. The argument that the testator had used an ordinary phrase in a special and inaccurate sense did not commend itself to the Judges in India, who saw no reason for construing the crucial words otherwise than literally:

Held, that the Judges in India were more familiar than their Lordships could be with documents framed in India in the English language by persons not likely to be perfectly familiar with that tongue. Hence their Lordships would hesitate long before overruling Judges in India on such a point of construction of the crucial words. A.I.R. 1943 P.C. 121=(1943) 2 M.L.J. 163=56 L.W. 441=10 B.R. 181=48 C. W.N. 73=I.L.R. (1943) Kar. (P.C.) 117 Sup. =46 Bom.L.R. 509=209 Ind. Cas. 408 (P.C.).

——Evidence—Appreciation.

Where the Judges of the High Court had the opportunity which the Judicial Committee has not of seeing the witnesses in the box and observing their demeanour, the Judicial Committee would be very slow to disagree with them even if a perusal of the transcript of the evidence should raise a doubt in their Lordships' minds as to its true effect. (1942) 202 Ind. Cas. 373=9 B.R. 1=56 L.W. 3=1942 O. W.N. 715=1942 A.L.J. 650=47 C.W.N. 68=I.L. R. (1942) Kar. (P.C.) Sup. 143 (P.C.).

——Evidence—Appreciation—Courts in India differing.

The oral evidence as to which the Courts in India have differed must be judged mainly upon the probabilities arising out of the proved documents and the admitted facts. A.I.R. 1941 P.C. 48=54 L.W. 57=7 B.R. 892=43 P.L.R. 515=1941 A.W.R. 39 =45 C.W.N. 964=43 Bom.L.R. 850=1941 A.L.J. 673=1941 O.W.N. 1347=I.L.R. (1941) Kar.P.C. 83 Sup=68 I.A. 75=(1941) 2 M.L.J. 58=I.L.R. (1942) Mad. 886=195 Ind. Cas. 1 (P.C.).

——Evidence—Appreciation.

Where the lower Court had the great advantage of hearing the evidence of witnesses at first hand and of observing their demeanour in the witness-box, it would be quite impossible for their Lordships to differ from the conclusions at which he arrived, even if they felt inclined so to do on an examination of the printed evidence before them. (1939) 182 Ind. Cas. 416 (P.C.).

11. Income-tax cases.

See also INCOME-TAX ACT, SS. 66 AND 66-A

——New point of law.

In an Income-tax case, it is neither convenient nor conducive to accuracy that new and important points of law should be raised for the first time before their Lordships' Board, or that decisions should be given upon matters not duly submitted to the High Court. A.I.R. 1941 P.C. 120=1941 O.W.N. 1151=8 B.R. 137=54 L.W. 635=1941 A.W.R. 98=(1941) 2 M. L.J. 972=1942 M.W.N. 4=1942 A.L.J. 159=44 Bom.L.R. 196=74 C.L.J. 508=I.L.R. (1941) Kar. (P.C.) 155 Sup.=I.L.R. (1942) Lah. 1=44 P.L.R. 225=196 Ind. Cas. 707 (P.C.).

——Income-tax cases—Consideration of document not mentioned in question referred—Material before Board for doing so.

It may well be that when a certain document not mentioned in the question referred to in the High Court is considered, some question may emerge with regard to the assessee's liability to income-tax in respect of the income derived from the sources mentioned in the reference but it would clearly be contrary to their Lordships' practice to attempt to formulate any such question even if they had before them the materials for so doing. A.I.R. 1940 P.C. 158 =7 B.R. 1=52 L.W. 406=21 P.L.T. 869=1940 M. W.N. 995=42 Bom.L.R. 1182=I.L.R. (1940) Kar. (P.C.) 335 Sup=1940 A.W.R. 122=190 Ind. Cas. 1 (P.C.).

12. Jurisdiction to entertain appeal.

——Jurisdiction—Appeal from Court of British Resident in Mysore—Independence Act, 1947, S. 7—Notification issued by Crown Representative on 26th July, 1947.

In view of the provision of S. 7 (1) (*b*) of the Indian Independence Act, 1947, and of the Notification issued on the 26th July, 1947, by the Crown Representative under the authority of the Indian (Foreign Jurisdiction) Order in Council, 1937, the jurisdiction formerly exercised by His Majesty in or in relation to that part of the territory of the State of Mysore which was known as the Civil and Military Station, Bangalore, came to an end. The Courts of the District Judge and of the Resident ceased to exist. His Majesty was neither the fountain of justice nor had executive authority in the former Civil and Military Station of Bangalore. In that area, as in the rest of the State of Mysore, the Maharaja alone had sovereign powers and it was for him to make such laws as he thought fit for the administration of justice in his territory.

The laws made by the Maharaja after the retrocession in regard to the administration of justice in his territory, cannot be effective to create and vest in His Majesty in Council a jurisdiction which he has expressly surrendered and renounced.

The words "other like matters" in the proviso to S. 7 (1) of the Indian Independence Act, do not include the jurisdiction of His Majesty in Council to entertain an appeal from the Court of the British Resident in Mysore. 77 I.A. 116=I.L.R. (1950) Mad. 1039=1950 A.L.J. 392=63 L.W. 198=A.I. R. 1950 P.C. 64=54 C.W.N. 292 (P.C.).

——Jurisdiction to entertain appeal—Appeal to —Determination of election dispute by Election Tribunal.

A dispute as to the election of a member to a legislative assembly concerns the rights and privileges of a legislative assembly, and whether that assembly assumes to decide such a dispute itself or it is submitted to the determination of a Tribunal established for that purpose, the subject-matter is such that the determination must be final, demanding im-

mediate action by the proper executive authority and admitting no appeal to His Majesty in Council. The matter in dispute is one in which the prerogative right to entertain an appeal does not exist. 53 C.W.N. 825=62 L.W. 561=1949 A.L.J. 315=A.I.R. 1949 P.C. 261=1949 A.W.R. 526=(1949) 2 M.L.J. 449 (P.C.).

——Jurisdiction to entertain appeal—Crown prerogative—Exclusion of—Essentials—Appeals from Native Appellate Court of New Zealand.

The prerogative of the Crown cannot be taken away except by express words: S. 93 of Act No. 43 of 58 Vic. (New Zealand) though it declares the decisions of the Native Appellate Court "final and conclusive" does not take away the right to appeal to His Majesty which is a prerogative of the Crown. (1908) 12 C.W.N. 1081 (P.C.).

——Jurisdiction to entertain appeal—Act of Governor-General of India in Council acting in his political and sovereign character—Removal of Maharajah of Panna from his State—Act of State—Right of appeal — Commission appointed to enquire into Maharajah of Panna's case.

The act of the Governor-General of India in Council removing the Maharajah at Panna from the Government of the State of Panna was an act of State, done in the interest of the State of Panna, the inhabitants of Panna and for the peace and good government of India generally. Leave to appeal to His Majesty in Council from such an order was refused. The Commission which inquired into the charges against the Maharajah was one appointed by the Viceroy for the information of his own mind, and was not in any sense a Court, or if a Court, not one from which an appeal lay to His Majesty in Council. (1904) 8 C.W.N. 841=6 Bom.L.R. 763=1 A.L.J. 691=32 C. 1=31 I.A. 239 (P.C.).

——Jurisdiction to entertain appeal — Appeal from Kathiawar Courts—Court of Political Agent—Powers of Governor-General over Native States—Kathiawar State whether British territory.

Kathiawar is not, as a whole, within a King's dominions. Neither the decisions of the tribunals in Kathiawar, nor those of the Governor of Bombay in Council on an appeal from those tribunals, are judicial in their character whether those decisions are in civil or in political cases; and consequently no appeal lies from them to the King in Council. But if a Court administering justice on the King's behalf makes an order judicial in its nature by which some one is unjustly and injuriously affected, the person aggrieved is not precluded from applying to the King in Council to redress his wrong merely by the fact that he is not the King's subject. In the case of dominions forming part of those under the Crown, legislative action is the only regular means of carrying out reforms; but in case of foreign territories reforms can be carried out by executive orders and resolutions without recourse to legislature. The rights of the Governor-General over the Native States in India differ not only in origin, but in kind and degree in the cases of different States; so that in each instance in which the nature and extent of such rights become the subject of consideration inquiry has to be made into the circumstances of each case. (1905) 16 M.L.J. 115=3 C.L.J. 395=10 C.W.N. 361=3 A.L.J. 250=8 Bom.L.R. 129=33 Cal. 219=33 I.A. 1 (P.C.).

13. Leave to appeal.

See also C. P. CODE, SS. 109 AND 110 AND JUDICIAL COMMITTEE RULES.

——Leave to appeal against judgment of High Court in criminal appeal against judgment of mofussil Court—Jurisdiction of High Court to grant.

The High Court has no jurisdiction to grant leave to appeal to the Privy Council against its judgments in criminal appeals arising out of the judgments of mofussil Courts. I.L.R. (1949) Mad. 593=3 A.I.Cr.D. 160=A.I.R. 1949 Mad. 385=50 Cr.L.J. 541=61 L.W. 778=1948 M.W.N. 750=(1948) 2 M.L.J. 46.

——Leave to appeal—Copies of judgment and decree should accompany petition for leave.

A petition for leave to appeal to Privy Council is an application for the very purpose of calling a decree of the High Court into question, and, such a petition must comply with R. 5, Appellate Side Rules, being accompanied by the copies of the judgment and decree or orders. Where these are not filed and are not even applied for until after the expiration of limitation, the original petition for leave must be held to be inchoate and not entertainable. A.I.R. 1941 Rang. 299=1941 Rang.L.R. 391=197 Ind. Cas. 741.

——Leave to appeal—Contempt proceedings.

It is competent to the Board to give leave to appeal and to entertain appeal against orders of the Courts overseas imposing penalties for contempt of Court. In such cases, the power has to be used with great care. Such interferences, when they amount to contempt of Court, are *quasi*-criminal acts and orders punishing them should, generally speaking, be treated as orders in criminal cases and leave to appeal against them should only be granted on the well-known principles on which leave to appeal in criminal cases is given. A.I.R. 1936 P.C. 141=40 C.W.N. 801=1936 A.L.J. 671=38 P.L.R. 541=1936 M.W.N. 619=44 L.W. 15=38 Bom.L.R. 681=64 C.L.J. 36=71 M.L.J. 665=1936 A.W.R. 600=162 Ind. Cas. 92 (P.C.).

——Leave to appeal—Special leave obtained on ground that decree indirectly affected property worth over Rs. 10.000—Respondent challenging correctness in preliminary objection—Ground found incorrect—Respondents numerous and holding small properties—Application from respondents to rescind special leave held not necessary.

The appellant was a zamindar and the respondents were a large body of holders of small properties in the abadi. Special leave was applied for and granted on the ground that the decree appealed against not only directly affected properties worth more than Rs. 5,000, but indirectly affected title of the appellants to other properties worth far in excess of Rs. 10,000. Respondents raised as a preliminary objection that the decree did not indirectly affect any other property at all. It was found on enquiry that the decree did not affect any other property except the subject-matter of the proceedings.

Held, as the objection as to the competency of the special leave was put in the forefront by the respondents it was not necessary that the respondents should be required by a petition to apply that the order giving special leave should be rescinded, especially when the respondents were a veritable crowd of people of slender means and provision for their

costs would not be a sufficient protection against the risk involved by the respondents. 34 C.W.N. 667 =A.I.R. 1930 P.C. 196=52 A. 277=32 M.L.W. 116=32 Bom.L.R. 1150=57 I.A. 186=124 Ind. Cas. 910=59 M.L.J. 10 (P.C.).

——Leave to appeal—Privy Council petition and Review petition filed together—Grant of review —Reversal by Privy Council of order granting review—Original Privy Council petition revives.

On 3rd November, 1917, an appeal was accepted and the suit as instituted was dismissed by the order of a Division Bench. An application for leave to appeal to the Privy Council was duly presented within time and on the same day an application for review was made. This latter application was accepted and eventually the original order passed on the 3rd November, 1917, was reversed and the suit was decreed in full. From this order passed in review an appeal was presented to the Privy Council, who held that the review was not competent, and that the order of the 3rd November, 1917, be restored.

Held, that the application for leave to appeal to Privy Council by the applicant for review was still alive and had merely been in a state of suspended animation during this long period and therefore leave should be granted to have the case heard on merits by Privy Council. 77 Ind. Cas. 869=4 Lah. 445= A.I.R. 1924 Lah. 225.

——Leave to appeal—Application for leave to appeal—Appealable value—Decision indirectly involving amount.

Defendants who were co-sharers of the plaintiff in the Zemindari having purchased certain holdings from the tenants, the plaintiff sued them for their share of the rent due from one such holding, amounting to Rs. 330. The High Court reversing the decree of the lower Court, dismissed the suit on the ground that as there was no contract of tenancy between the parties there was no relation of landlord and tenant between them. The plaintiff in applying for leave to appeal to the Privy Council proved that there were other holdings similarly purchased by the defendants and that the decision of the High Court would have the effect of depriving him of rents of all such holdings amounting to Rs. 800 a year, which capitalized came up to over Rs. 10,000. *Held*: That the decision indirectly involved a claim or question respecting property of the value of Rs. 10,000 or upwards and leave ought to be granted. 14 C. W.N. 651=6 Ind. Cas. 598.

——Leave to appeal—Interlocutory order—Question of jurisdiction—Charter Act, Ss. 13, 40.

Leave to appeal to the Privy Council can be given where the order appealed from transferring a case from one Court to another is interlocutory, and raises a question of jurisdiction. (1904) 6 Bom. L.R. 85=28 B. 292.

——Leave to appeal—Certificate—Leave to appeal to Privy Council—Order for certificate—Propriety of granting leave—Certificate and not order to be considered.

The certificate granting leave to appeal to the Privy Council and not the order directing it to issue should be considered and acted upon in determining the propriety of the grant of leave. (1901) 23 A. 415=28 I.A. 182= 3 Bom. L.R. 469=5 C.W.N. 689 (P.C.).

——Leave to appeal—Interlocutory order—Ex parte decree, refusal to set aside—Appeal—Remand—Certificate of High Court.

An order of remand on appeal against an order refusing to set aside an *ex parte* decree is merely an interlocutory order relating to procedure and no apepal lies therefrom. (1900) 5 C.W.N. 153=11 M.L.J. 65= 3 Bom. L.R. 78=23 A. 220=28 I.A. 28 (P.C.).

14. New plea or point.

See also C. P. CODE, S. 112.

——New plea—Fault in procedure—Practice.

It would be entirely contrary to the settled practice of the Board to entertain a question whether there was any fault in procedure in a particular case, when that question was not argued in the High Court and is not referred to in the appellant's petition for special leave to appeal. 77 I.A. 52=I.L.R. (1950) Bom. 470=1950 A.L.J. 120=63 L.W. 197=51 Cr. L.J. 644=54 C.W.N. 362=1950 M.W.N. 217 (2)=52 Bom. L.R. 480=1950 A.W.R. 245=A.I.R. 1950 P.C. 26=(1950) 1 M.L.J. 302 (P.C.).

——New plea or point—Point inconsistent with plaint.

It is not open to a party before the Privy Council to raise a point of law which is not merely not raised in the Courts in India, but is inconsistent with the plaint. 76 I.A. 255=63 L.W. 45=54 C.W.N. 233=1950 A.L.J. 134=1950 A.W.R. 220=A.I.R. 1950 P.C. 1=(1950) 1 M.L.J. 163 (P.C.).

——New plea—Point not raised in lower Courts—If can be allowed to be raised in appeal to Privy Council.

It would be not only a departure from the practice of the Board but a manifest injustice to allow an appellant to take advantage of a point which was never submitted to the Courts below, and is inconsistent with the case which that appellant has till then made. 74 I.A. 203=1948 M.W.N. 214=50 Bom. L.R. 556=52 C.W.N. 82=60 L.W. 701=1947 A.L.J. 578=A.I.R. 1947 (P.C.). 192=(1947) 2 M.L.J. 498 (P.C.).

——New plea or point—Plea based upon conflict between evidence of eye-witnesses and medical witness not taken in lower Courts—Plea not allowed —Crl. P. Code (1898), Ss. 428 and 509 (2).

Where no reliance was placed in the Courts in India on a conflict between the evidence of eye-witnesses and the medical witness and the matter was not discussed in the judgments either in the Sessions Court or the High Court nor was it included in the grounds of appeal to the High Court :

Held, that it was too late to take the point for the first time before the Privy Council. If the plea had been raised before the Sessions Judge or the High Court it would have been open to the Sessions Judge under S. 509 (2) or to the High Court under S. 428 to have summoned the medical witness to clear the matter. A.I.R. 1946 P.C. 187=1946 M.W.N. 620=(1946) 2 M.L.J. 297= 1946 A.L.J. 407=59 L.W. 650=1946 A.W.R. (P.C.) 170=13 B.R. 33=1947 O.W.N. 16=I.L.R. (1946) Lah. 667=73 I.A. 195=227 Ind. Cas. 1 (P.C.).

——New plea—Plea of prescriptive possession—Evidence of possession directed to support other pleas, on record.

The Privy Council will not allow a new case of a fishy right based on prescriptive possession to be raised before it for the first time. Possession is a matter of fact and the defendants might well complain that if they were to meet a case of prescriptive possession they should have had notice of the prescriptive period of possession and of the acts of possession on which the plaintiff proposed to rely, as they could then have directed their evidence to that issue. The fact that a considerable body of evidence was adduced in the course of the case on the subject of possession is immaterial, when such evidence was directed to support the plaintiff's other pleas and not to establish a separate right founded on prescriptive possession. 73 I.A. 109=I.L.R. (1946) 2

Cal. 1=12 B.R. 607=48 Bom. L.R. 460=1946 P.W.N. 225=1946 A.L.J. 344=1946 O.A. (P.C.) 155=1946 A.W.R. (P.C.) 155=225 Ind. Cas. 1=59 L.W. 374=50 C.W.N. 606=A.I.R. 1946 P.C. 92=I.L.R. (1946) Kar. (P.C.) 100=1947 O.W.N. 333=1947 A.L.W. 320=(1946) 2 M.L.J. 93 (P.C.).

——New plea—Question of ratification or estoppel.

Issues based on ratification or estoppel are questions of fact which cannot be raised for the first time before the Privy Council. 59 L.W. 88=222 Ind. Cas. 195=12 B.R. 267=1946 A.W.R. (P.C.) 9 (1)=1946 P.W.N. 57=1946 O.W.N. 114=1946 O.A. (P.C.) 9 (1)=1946 A.L.W. 91=48 Bom. L.R. 293=1946 M.W.N. 339=A.I.R. 1946 P.C. 24=(1946) 1 .M.L.J. 123=I.L.R. (1946) Kar. 15 (P.C.).

——New plea or point—Question of factum of adoption argued in High Court—Question of validity not allowed to be raised before Privy Council—Adoption, held proved on facts.

Where the only question raised in the High Court was factum of adoption and not the legality of it, their Lordships of the Privy Council would refuse to allow the question of validity to be argued before them :

Held, on facts of the case, that adoption had been proved. A.I.R. 1945 P.C. 111=49 C.W.N. 517=12 B.R. 229=1945 Pesh. L.J. 111=221 Ind. Cas. 427 (P.C.).

——New plea or point—Practice.

A plea which was not raised in the Courts below could not be raised in the Privy Council. A.I.R. 1945 P.C. 71=49 C.W.N. 299=I.L.R. (1945) Kar. (P.C.) 134 (Sup.)=12 B.R. 173=(1945) 1 M.L.J. 305=1945 M.W.N. 221=1945 Pesh. L.J. 71=221 Ind. Cas. 398 (P.C.).

——New plea or point.

Their Lordships cannot permit the suit to be recast during pendency of appeal before them and would decline to entertain the new ground of claim put forward for the first time. A.I.R. 1940 P.C. 145=6 B.R. 870=44 C.W.N. 1013=1940 M.W.N. 949=1940 A.L.J. 667=1940 A.W.R. 114=72 C.L.J. 136=52 L.W. 669=1940 O.W.N. 1180=42 Bom. L.R. 1144=I.L.R. (1940) Kar. (P.C.) 282 (Sup.)=189 Ind. Cas. 433 (P.C.).

——New plea or point—Question of fact not put in issue in lower Courts—Such plea.

The question of assent by the executors at the time of the mortgage of the property, regarding the trust of the mortgaged property is a question of fact, and when this question had not been put in issue or maintained in the Courts, below and thier Lordships are not satisfied that the evidence already taken establishes beyond doubt that the facts, if fully investigated, would have supported the plea, they cannot, in accordance with the practice of the Board, entertain this plea at such a late stage. A.I.R. 1940 P.C. 30=6 B.R. 271=1940 O.W.N. 35=51 L.W. 44=1940 A.L.J. 66=21 P.L.T. 133=1940 M.W.N. 137=42 P.L.R. 120=44 C.W.N. 289=42 Bom. L.R. 394=(1940) 1 M.L.J. 795=I.L.R. (1940) Kar. (P.C.) 76 (Sup.)=67 I.A. 102=1940 A.W.R. 11=185 Ind. Cas. 575 (P.C.).

——New plea or point—Objection as to admissibility of evidence.

Too much stress cannot be laid upon the fact that two chiefs, unaided by legal assistance, took no objection in the trial Court to the taking of certain evidence, but where no objection to its receiption appears to have been taken even in the Court of Appeal where the parties were professionally represented, an objection as to the admissibility of such evidence cannot prevail when taken for the first time before the Privy Council. A.I.R. 1939 P.C. 143=182 Ind. Cas. 56 (P.C.).

——New plea or point.

A point not put forward either before the trial Court or before the High Court cannot be put forward for the first time before the Privy Council. A.I.R. 1939 P.C. 114=5 B.R. 534=1939 A.W.R. 50=1939 O.W.N. 461=1939 R.D. 339=I.L.R. (1939) Kar. (P.C.) 160 Sup. (1)=180 Ind. Cas. 770 (P.C.).

——New plea or point.

Where a point depends on facts requiring evidence but it was not raised in trial Court and was not entertained in High Court as being not open, it cannot be raised in appeal before the Privy Council. A.I.R. 1938 P.C. 20=18 P.L.T. 1001=4 B.R. 198 (2)=1938 A.L.J. 72=47 L.W. 3=1938 O.W.N. 158=1938 R. 214=1938 M.W.N. 145=17 Pat. 69=(1938) 1 M.L.J. 209=40 Bom. L.R. 292=66 C.L.J. 485=42 C.W.N. 593=65 I.A. 45=32 S.L.R. 276=1938 A.W.R. 19=42 C.W.N. 593=172 Ind. Cas. 443 (P.C.).

——New plea or point—Allegation of fraud in affidavit—Point fought out in High Court without any objection—Objection that fraud was not originally pleaded, if can be taken.

Where, in the affidavit evidence, allegations of fraud are made and matter is thoroughly fought out in the High Court on those lines and no objections are taken which, had they been taken, would no doubt have led to the necessary amendments being made in the original petition, the objection that fraud is not alleged in the petition cannot prevaill. A.I.R. 1937 P.C. 146=41 C.W.N. 746=3 B.R. 543=18 P.L.T. 421=1937 O.W.N 631=1937 M.W.N. 744=31 S.L.R. 306=I.L.R. (1937) All. 566=39 Bom. L.R. 963=64 I.A. 143=(1937) 2 M.L.J. 650=1937 A.W.R. 832=46 L.W. 745=168 Ind. Cas. 620 (P.C.).

——New pleas or point—Constitutional questions.

It is of special importance in constitutional questions that the Privy Council should, if possible, have the assistance of the opinion of the members of the Supreme Court and as a general rule, the Board will not be prepared in such cases to entertain claims for relief which have never been formulated in the Dominion Court. A.I.R. 1937 P.C. 93=168 Ind. Cas. 10 (P.C.).

——New plea, whether can be entertained.

Where the case has been fought on specific allegations, their Lordships would not decide the case upon a different allegation upon which their Lordships have not the assistance of the findings of the Courts below. A.I.R. 1935 P.C. 212=159 Ind. Cas. 713 (P.C.).

——New plea or point.

A point depending very largely upon questions of fact, upon the nature of the customs of a mutt and upon the conduct of the disciples and not argued in the High Court and also not raised in the memo. of appeal cannot be raised before the Privy Council. 120 Ind. Cas. 49=50 C.L.J. 513=30 M.L.W. 1032=A.I.R. 1929 P.C. 266=57 M.L.J. 771 (P.C.).

——New plea or point—New case cannot be set up for the first time before Privy Council.

It is not in accordance with justice to the parties that after an appeal has been made to the Privy Council they should for the first time learn what the true nature of the case to be made against them is, nor is such a course fair to the lower Courts whose judgments would thus be attacked upon remarks which they had not had an opportunity of considering. 109 Ind. Cas. 52=26 A.L.J. 471=41 C.L.J. 542=39 Bom. L.R. 849=32 C.W.N. 769=29 P.L.R. 392=28 M.L.W. 30=A.I.R. 1928 P.C. 106=54 M.L.J. 692 (P.C.).

——New plea or point—New case cannot be made out.

Where the plaintiff-mortgagees all along made a

substantial case as to the consideration for their mortgage.

Held, that they cannot be allowed to shift their ground and urge that the defendant-mortgagor had accepted the civil liability of his brother in respect of defalcations made by his brother in respect of plaintiff's accounts. 107 Ind. Cas. 113=24 N.L.R. 40=30 Bom. L.R. 296=47 C.L.J. 222=5 O.W.N. 226=27 M.L.W. 523=A.I.R. 1928 P.C. 39=54 M.L.J. 208 (P.C.).

——New plea or point—Amendment changing nature of suit even if permissible cannot be allowed in appeal to Privy Council.

It is not permissible by amendment to change the nature of the suit as framed ; and even if it were, such a course cannot be permitted in appeal to the Privy Council as the defendants affected by such amendment must have an opportunity to rebut such new cause of action, a course which would involve fresh written statements and a fresh trial. 100 Ind. Cas. 56=25 A.L.J. 74=1927 M.W.N. 69=8 P.L.T. 98=38 M.L.T. 74=54 I.A. 55=31 C.W.N. 469=45 C.L.J. 313=25 M.L.W. 635=6 Pat. 323=29 Bom. L.R. 796=A.I.R. 1927 P.C. 18=52 M.L.J. 402 (P.C.).

——New plea or point.

The Board of their Lordships of the Privy Council have long established it for themselves as a principal of wisdom and prudence that they should be very chary of entertaining an argument which has not been sifted in the Courts below ; and if this be true as a general rule, it is especially true when the question to be decided concerns the diversified and complicated Indian Law as to tenure of land. 94 Ind. Cas. 974=53 Cal. 533=53 I.A. 100=30 C.W.N. 745=24 A.L.J. 761=A.I.R. 1926 P.C. 41 (P.C.).

——New plea or point.

Issues abandoned at trial cannot be gone into in appeal. 74 Ind. Cas. 499=21 A.L.J. 718=4 P.L.T. 609=50 I.A. 239=50 Cal. 929=25 Bom. L.R. 1269=33 M.L.T. 365=1923 M.W.N. 803=4 L.R.P.C. 164=40 C.L.J. 10=28 C.W.N. 713=A.I.R. 1923 P.C. 189=45 M.L.J. 617 (P.C.).

——New plea or point—Specific ground of appeal not pressed in first appeal not allowed to be raised in Privy Council.

One of the grounds of appeal was that on account or irregularities in conducting the sale in execution, inadequate consideration was received. But at the hearing of the appeal no specific ground, *viz.*, that there was no statement as to revenue assessed in the sale proclamation, was insisted upon. The specific grounds on which it is alleged that the imperative provisions of law relating to proclamations were not followed did not include this matter, but at any rate it was definitely asserted that the irregularitis had resulted in an inadequate price. Upon the hearing of the appeal, the appellants appeared to have made no application whatever to be permitted to call evidence to prove that they had, in fact, suffered material damage by what had taken place. They did not ask that the matter should be sent back for hearing upon the head by the Sub-Divisional Officer, nor, indeed, that the Deputy Commissioner himself should hear evidence upon it. It appeared to have been argued on the facts as they stood, and the result was that Deputy Commissioner decided that the omission was one which was not likely to have had any effect on the bidding in the auction.

Held, in these circumstances, remembering that it lay upon the appellants to establish before the Court that they had suffered damage before they could start their application for setting aside the sale ; that they never did bring forward any evidence whatever upon the point and they never appeared to have asked for liberty to do it, it is too late now for the appellants to come and say that had they had such an opportunity they might have been able to satisfy the Court that they had suffered such damage and that the opportunity should be afforded them in final appeal. 75 Ind. Cas. 546=18 M.L.W. 137=28 C.W.N. 593=33 M.L.T. 275=1923 M.W.N. 714=4 L.R.P.C. 197=A.I.R. 1923 P.C. 93=45 M.L.J. 403 (P.C.).

——New plea or point.

Where a point which was not included in the memo. of appeal was attempted to be raised at a late stage of the proceedings,

Held, it should not be allowed to be raisd. 57 Ind. Cas. 606=48 Cal. 110=47 I.A. 255=18 A.L.J. 1095=22 Bom. L.R. 1370=3 P.W.R. 1921=82 M.L.T. 149=2 U.P.L.R. 124=25 C.W.N. 289=13 M.L.W. 49=A.I.R. 1921 P.C. 50=39 M.L.J. 195 (P.C.).

——New plea—Construction of statute.

A point which relates to the proper construction of a statute may be allowed to be raised in argument before the Privy Council although not raised in lower Courts. A.I.R. 1921 P.C. 228 (P.C.).

——New Plea—Objection to juridiction.

An objection to the juridiction, however late in the day it may be raised, must be entertained, if it be that on the facts admitted or proved it is manifest that there is a defect of jurisdiction. 83 Ind. Cas. 531=5 L.R.P.C. 216=1924 M.W.N. 79=7 N.L.J. 62=34 M.L.T. 62=19 M.L.W. 549=20 N.L.R. 33=51 I.A. 72=22 A.L.J. 386=51 Cal. 361=26 Bom. L.R. 586=28 C.W.N. 977=A.I.R. 1924 P.C. 95=46 M.L.J. 628 (P.C.).

——New point—Whether entertained.

The Privy Council cannot in appeal entertain a point not raised in the Lower Courts nor presented upon the appeal. 82 P.R. 1919=45 P.W.R. 1919=56 Ind. Cas. 723 (P.C.).

——New point—Based on rebuttable presumption—Not to be raised for the first time.

Upon an appeal to the Privy Council a new contention based at best on a rebuttable presumption, cannot be raised for the first time. A general allegation in the memorandum of appeal in the Court below could not be construed as having raised it. 42 Mad. 581=46 I.A. 64=17 A.L.J. 153=36 M.L.J. 164=23 C.W.N. 549=29 C.L.J. 551=25 M.L.T. 400=21 Bom. L.R. 885=(1919) M.W.N. 511=10 L.W. 322=49 Ind. Cas. 704 (P.C.). [**Affirmed on Appeal** 27 M.L.J. 694=27 Ind. Cas. 283].

——New point—Limitation—Not allowed.

Where there was no trace of a point as to limitation (based on the construction of a *Kabuliyat*) having been raised in the Courts below and it was obscurely suggested in the reason appended to the case of the appellant, the Privy Council refused to allow the point to be raised. 44 Cal. 759=44 I.A. 65=1 Pat. L.J. 262=15 A.L.J. 217=25 C.L.J. 279=32 M.L.J. 357=21 M.L.T. 262=21 C.W.N. 577=(1917) M.W.N. 363=5 L.W. 654=19 Bom. L.R. 450=39 Ind. Cas. 156 (P.C.).

——New point.

On appeal to the Judicial Committee unless there are any exceptional conditions, a party cannot raise a fresh point, which though raised in the pleadings and in the reasons attached to his case lodged in the Privy Council, was neither raised at the hearing in the Original Court nor in the first appeal. 17 C.L.J. 53, Affir. 32 M.L.J. 559=22 M.L.T. 202=(1917) M.W.N. 448=6 L.W. 110=21 C.W.N. 707=25 C.L.J. 567=19 Bom. L.R. 493=15 A.L.J. 432=1 Pat. L.W. 627=10 Bur. L.T. 229=38 Ind. Cas. 929 (P.C.). [**Affirming on appeal** 17 C.L.J. 53=18 Ind. Cas. 545].

——New point—Point not pressed in the High Court.

The question whether assuming the authority to adopt to have been given, the adoption of the nephew's son born sometime after the death of the testator would make him a son of the testator capable of taking under the terms of the will, was raised in the trial Court and decided in favour of the adopted son and it was not urged in the Appellate Court. The judicial Committee in the circumstances did not allow the question to be raised before them. 20 C.W.N. 650=(1916) 1 M.W.N. 377=4 L.W. 587=33 Ind. Cas. 852 (P.C.).

——New point—Ex parte hearing—Not to be allowed.

Where the hearing of an appeal was *ex parte*, the Judicial Committee refused to depart from the established practice of not allowing the appellant to make a new case based on grounds which were not urged in the Court in India nor specified in the application for leave to appeal, or even in the reasons contained in the "case" for the appellant. 35 All. 227=40 I.A. 74=25 M.L.J. 131=13 M.L.T. 437=17 C.W.N. 605=11 A.L.J. 389=(1913) M.W.N. 470=17 C.L.J. 488=15 Bom. L.R. 489=19 Ind. Cas. 291 (P.C.).

——New point—Not to be allowed.

It is not usual to allow a point to be raised on appeal to the Privy Council which has not been discussed in the Court below, and upon which Their Lordships have not got the assistance of the Court below. 34 All. 57=10 M.L.T. 551=16 C.W.N. 122=(1912) M.W.N. 29=15 C.L.J. 78=14 Bom. L.R. 30=13 Ind. Cas. 257 (P.C.).

——New plea or point—Issue not specifically raised—No surprise—New case in Privy Council.

The Judicial Committee allowed the appeal on a case, in respect of which no specific issues had been settled, the issues as settled appearing to be sufficiently wide to recover the case and their Lordships being satisfied that the respondents were not thereby unfarily taken by surprise. (1905) 15 M.L.J. 352=9 C.W.N. 1009=2 C.L.J. 194=27 A. 634=32 I.A. 203 (P.C.).

——New plea or point—Leave to apply for further hearing on fresh materials on a point not raised in the lower Courts.

In this case the Judicial Committee had upon the application of the respondent, deferred giving judgment in order that parties might have an opportunity of further considering and arguing (upon fresh materials if available) a point which was raised by the appellant for the first time before the Judicial Committee. There was a fresh hearing on the point in consequence. (1904) 8 C.W.N. 786=6 Bom. L.R. 754=32 C. 27=31 I.A. 176 (P.C.).

——New plea or point—Mortgage suit—Claim on mortgage not enforced in a prior suit—Objection first taken in Privy Council.

An objection that the mortgage on which the suit is based should have been pleaded and the claim on it enforced in a prior suit by a different mortgagee of the same property to which the present plaintiff was a party, not allowed to be taken for the first time before the Privy Council. (1903) 8 C.W.N. 609=31 C. 322=31 I.A. 57 (P.C.).

15. Order in Council.

——Order-in-Council—Parties—Pro forma respondent—Appeal by one—Reversal of decree—Effect on other suit.

Holding held by three brothers *A*, *B* and *C*—Rent suit against all decreed and holding purchased by landlord and settled with *D*—Suits by *A*, *B* and *C* to set aside sale—Suits of *B* and *C* decreed by High Court—Appeal in *B*'s suit by *D* to Privy Council—*C* made *pro forma* respondent—*B* dying during pendency and *C* made his legal representative—Judgment of High Court in suit by *B* reversed by Privy Council—Decision in *C*'s suit not expressly reversed—*C*'s share sold in execution of rent decree and purchas d by plaintiff—Suit by plaintiff against *D* for partition—Contention by *D* that decision in *C*'s suit was reversed by implication by decision of Privy Council in *B*'s suit:

Held, that the decision in *B*'s suit did not extinguish right found by High Court to exist in *C*. A.I.R. 1939 Pat. 276=5 B.R. 356=180 Ind. Cas. 127.

——Order in Council—Suit for partnership accounts—Final decree—Appeal to High Court—Remand—Appeal to Privy Council—Order-in-Council setting aside decree appealed against—Proceedings subsequent to order of High Court, if coram non judice.

A preliminary decree was passed in a suit for partnership accounts declaring the shares of the parties. A final decree was subsequently passed under which a sum of money was found to be due to one *M* by the other parties (respondents). On appeal, the decree was set aside by the Judicial Commissioner on May 7, 1925, and the suit was remanded for re-trial. The respondents appealed to the Privy Council and it was decided that the order of the Judicial Commissioner should be set aside and the case remanded to the trial Court for fresh trial, and an Order-in-Council was duly drawn up to this effect. In the meantime, the case had gone on in India, as if no appeal were pending. Under the remand order of the Judicial Commissioner, the case was tried afresh and a judgment finding considerable sums due from *M* to the respondents was delivered. Against this, appeals were filed before the Judicial Commissioner who ultimately held *M* liable to pay various sums to the respondents, *M* appealed to the Privy Council:

Held, that the intention of the Privy Council in the prior decision was that the whole order of May 7, 1925, was to be set aside and that consequently, all the proceedings in India subsequent to the order of the Judicial Commissioner dated 7th May, 1925, were *coram non judice* and should be set aside and the case should be sent back for re-trial of matters determined by the decree which was set aside in accordance with the terms of the Order in Council. A.I.R. 1934 P.C. 87=11 O.W.N. 308=66 C.L.J. 155=39 L.W. 300=36 Bom.L.R. 227=35 P.L.R. 297=38 C.W.N. 258=59 C.L.J. 49=1934 M.W.N. 312=147 Ind. Cas. 555 (P.C.).

——Order in Council—Practice—Order in Council to be in conformity with judgment.

"It is the duty of their Lordships to see that the order which His Majesty makes in Council faithfully represents the advice which in the judgment they have said they would humbly tender to him." 50 M.L.J. 1181 (P.C.), Foll. 127 Ind. Cas. 533 (P.C.).

——Order in Council—Practice—Order not in accordance with judgment—Rectification.

It is the duty of the Board that the order made by His Majesty in Council faithfully represents the advice which in the judgment they have said. 51 I.A. 211, Foll. 35 C.W.N. 117 (P.C.).

——Order in Council.

Privy Council vary their Order in Council only under exceptional circumstances. 94 Ind. Cas. 813=5 Pat. 461=53 I.A. 89=1926 M.W.N. 492=24 M.L.W. 84=30 C.W.N. 938=28 Bom.L.R. 1260=A.I.R. 1926 P.C. 31=51 M.L.J. 586 (P.C.).

——Order in Council—Order must conform to judgment pronounced.

It is the duty of their Lordships of the Privy Council to see that the order which His Majesty makes in Council faithfully represents the advice which in the judgment they have said they would humbly tender

to him ; in other words, the Order in Council must be made to conform to the judgment pronounced. 88 Ind. Cas. 198=6 Lah. 388=22 M.L.W. 304=30 C.W.N. 56=26 P.L.R. 524=23 A.L.J. 643=52 I.A. 211=6 L.R.P.C. 125=1925 M.W.N. 534=A.I.R. 1925 P.C. 168=50 M.L.J. 118 (P.C.).

——Order in council—Interpretation of order in Council when permissible.

It is no part of the functions of the Privy Council, generally speaking, to interpret Orders in Council which have been already made unless they are brought before them in the ordinary way upon appeal. But an exception to the general rule can be made in the special circumstances of a particular case.

The order in Council had remitted a case to the High Court to assess damages to which the plaintiff was entitled over and above the amount originally awarded by the decree of the High Court. A single Judge of the High Court had rejected further evidence tendered by the defendant as to the additional damages awarded by the Privy Council. On appeal to the High Court in its appellate jurisdiction, the case was adjourned in order that the parties might obtain a direction from the Privy Council as to whether additional evidence was to be allowable at the time of assessing the further damages.

In the particular circumstances of the case, the Privy Council entertained a petition with the object of interpreting the order in Council in question. 31 I.A. 64, Foll. 88 Ind. Cas. 174=52 I.A. 118=29 C.W.N. 515=49 Bom. 241=27 Bom.L.R. 781=1925 M.W.N. 402=A.I.R. 1925 P.C. 111=48 M.L.J. 610 (P.C.).

16. Practice and procedure.

——Technical objection—Practice.

A so-called technical objection may go to the root of the matter and, whether it be called technical or not, an objection which is based upon the fact that a decision rests on an issue not raised in the action, must be given effect to, if justice is to be done. 54 C.W.N. 435=A.I.R 1950 P.C. 73 (P.C.).

——Practice and procedure—Plea of absence of jurisdiction—Maintainability—Plea not included on grounds of appeal.

An omission by the appellant to include in his ground of appeal of plea that an order was made without jurisdiction, cannot preclude him from taking the point upon the appeal to the Board ; at the most it may have some bearing on the question of costs. 54 C.W.N. 435=A.I.R. 1950 P.C. 73 (P.C.).

——Practice—Precedent—Re-opening of previous decision.

The Board does not act as the House of Lords acts on the strict rule that they are bound by a previous decision based upon the same considerations. Though there is right to reopen a previous decision, the existence of some fresh material not communicated or at any rate not fully presented to the Tribunal which heard and decided the earlier case, is an element to be borne in mind when deciding whether that case should be followed or not. 1950 A.L.J. 539 (P.C.).

——Practice—Tendering advice inconsistent with previous decision—Competency.

Even where their Lordships have before them a decision upon facts which in no material respect differ from those of a case before them, it is competent for them humbly to tender advice to His Majesty inconsistent with the previous decisions, though it can only be in the most exceptional circumstances that such a course should be taken. 76 I.A. 10=1949 A.W.R. 148=A.I.R. 1949 P.C. 117=1949 M.W.N. 442=51 Bom.L.R. 440=50 Cr.L.J. 395=1949 A.L.J. 59=(1949) 1 M.L.J. 177 (P.C.).

——Practice and procedure—Special leave to appeal—Appellant, if can raise grounds other than those on which special leave was granted.

Where a case is brought before the Board, after obtaining special leave, the appellant will not be permitted to travel beyond the specific grounds on which special leave was granted to him by the Board. 76 I.A. 48=A.I.R. 1949 P.C. 187=62 L.W 579=(1949) 2 M.L.J. 1 (P.C.).

——Practice—Matters relating to accounts.

In matters relating to accounts the Board will determine any question of principle involved but will not consider items of account. 1948 A.L.J. 443=A.I.R. 1949 P.C. 25=(1948) 2 M.L.J. 472 (P.C.).

——Practice and procedure—Point abandoned in High Court—Whether may be allowed—Practice.

It would not be right for the Privy Council to allow the appeal before it to proceed upon a point which was abandoned in the High Court. 26 Pat. 555=52 C.W.N. 105=A.I.R. 1947 P.C. 213=1948 O.W.N. 48=1948 A.L.W. 45 (P.C.).

——Practice and procedure—Conclusion of there out of four Courts in India on a question of Hindu Law—Interference with.

When the conclusion of three out of the four Courts in India on a question of Hindu law is the same, their Lordship of the Privy Council would be reluctant to dissent from so strong a body of judicial opinion. 1948 A.L.W. 37=1948 O.W.N. 40 (P.C.).

——Practice—Appeal admitted—Records printed in India and transmitted to Privy Council and received there—Financier of one of the parties who though impleaded in all the proceedings remaining ex parte throughout—If can apply to the High Court in India to be added as party to appeal pending before His Majesty in Council.

Where an appeal to His Majesty in Council has been admitted (the records having been printed in India and transmitted to the Privy Council and received there, though not firmally lodged) the Privy Council has the seisin of the appeal and hence an application by a financier who had remained *ex parte*, though impleaded in all the proceedings, and his sons to be added as party respondents to the appeal before the Privy Council will not lie to the High Court from which the appeal went up to the Privy Council.

Even for substitution of a legal representative of a deceased party after the records have been despatched, the application itself is not dealt with by the High Court. It merely enquires into and expresses findings of fact upon which it reports and that report is sent to the Judicial Committee for that tribunal to dispose of the application. I.L.R. (1948) Mad. 252=60 L.W. 379=1947 M.W.N. 391=A.I.R. 1947 Mad. 383=(1947) 1 M.L.J. 357.

——Practice—Delay—Effect.

The Privy Council declined to proceed with the appeal on account of the inordinate delay. 223 Ind. Cas. 115=12 B.R. 465 (P.C.).

——Practice and procedure—Appeal to, against order discharging person from custody under S. 491, Cr. P. Code, is competent.

Appeals from decisions of Courts in the British Dominions and Dependencies to the King in Council are heard under the Royal prerogative, and the prerogative can only be curtailed by force of an Act of Parliament, that is, by the King in Parliamnet. There is no Act of Parliament which prohibits or authorises the prohibition of an appeal to His Majesty in Council by a party aggrieved against an order of a High Court discharging a person from custody under S. 491, Cr.P. Code. Hence

an appeal direct to the Privy Council from an order of a High Court discharging a person from custody under S. 491, Cr.P. Code, is competent. A.I.R. 1946 P.C. 123=1946 N.L.J. 396=50 C.W.N. 814=1946 A.L.J. 322=73 I.A. 144=I.L.R. (1946) Nag. 651=47 Cr.L.J. 831=(1946) 2 Mad. L.J. 10 (P.C.).

——Practice and procedure—Interference with direction of High Court—Suit for framing scheme for temple—High Court in framing scheme, in its discretion, allowing certain sum to Acharya as 'personal expenditure' excluding many items normally falling within that expression—Matter held within discretion of High Court and Privy Council should not interfere—C.P. Code (1908), S. 92.

In an appeal from a decree in a suit under S. 92, C.P. Code, for framing of a scheme for a temple brought by certain members of the congregation of a temple, a scheme was framed by the High Court. The High Court taking into consideration the funds of the temple and other circumstances came to the conclusion that the *Acharya* of the temple should receive a fixed allowance of Rs. 2,000 per mensem for his personal expenditure, other than the expenses of his household, including expenses of residence, food, clothing, servants, horses, carriages and elephant, and all customary expenditure on official tours or other official occasions which were to be met out of the funds of the temple. In appeal to the Privy Council it was argued that the definition of 'personal expenditure' adopted by the High Court was open to criticism that it excluded arbitrarily from the expression 'personal expenditure' many items which would normally fall within such expression :

Held, that this was true. But the intention of the High Court clearly was to give *Acharya* to the a sum of Rs. 2,000 per mensem for his private purposes over and above his normal cost of maintenance which would naturally fall upon the funds of the temple. It was in the discretion of the High Court to provide that the *Acharya* should receive what it considered to be a suitable personal allowance. In doing this the Judges in no way misdirected themselves and there was no ground upon which the Privy Council should interfere with the exercise by the High Court of its discretion. A.I.R. 1946 P.C. 100=12 B.R. 568=1946 A.L.J. 382=1946 A.W.R. P.C. 171=81 C.L.J. 306=I.L.R. (1946) Kar. P.C. 87 (P.C.).

——Practice—Precedents—Board would seldom depart from decision of old standing on constitutional questions.

No doubt in deciding an appeal before it the Judicial Committee of the Privy Council is not absolutely bound by previous decisions of the Board. But on constitutional questions it must be seldom that the Board would depart from a previous decision especially where the decision sought to be overuled has stood over a number of years and which may, therefore, be assumed to have been acted upon during that period both by the Government and the subjects. A.I.R. 1946 P.C. 88=(1946) 9 F.L.J. 50=50 C.W.N. 535=1946 M.W.N. 419=12 B.R. 635=225 Ind. Cas. 63 (P.C.).

——Practice and procedure—Appeal—Partition of estate—Basis of valuation not attacked—Privy Council will not interfere.

In an action for the partition of an estate carrying tea and rubber on it, an interlocutory decree was passed fixing the shares of parties and remitting the matter to a Commissioner to carry out actual partition. A motion by one of the parties that a sale should be ordered of the whole property was rejected and the partition was ordered in its place. The valuer, valuing at the time when the tea restrictions were on, took those into account and took their effect into account in fixing his valuation. In appeal to the Privy Council the basis of the Commissioner's valuation was not attacked.

Held, that in absence of an attack on the basis of the valuation, which would raise a question of principle, the subject of the appeal was not a proper subject for the Privy Council to consider. A.I.R. 1946 P.C. 58=50 C.W.N. 366=224 Ind. Cas. 1=1946 M.W.N. 428=12 B.R. 546 (P.C.).

——Practice and procedure.

Question of law—Question as to nature of title under grant—Construction of document of grant. 72 I.A. 211=I.L.R. (1946) Mad. 225=I.L.R. (1945) Kar. (P.C.) 314=1945 M.W.N. 637=58 M.L.W. 500=A.I.R. 1945 P.C. 165=(1945) 2 M.L.J. 352.

——Practice and procedure—Breach of contract—Court calculating damages on basis agreed upon by counsel on both sides—Privy Council will not entertain appeal.

The Privy Council cannot entertain an appeal on the ground that the basis of assessment of damages for a breach of contract was wrong where the Court from which the appeal is brought acted on the basis of assessment agreed upon by counsel on both sides and made no mistake in the calculation of damages for breach of contract. A.I.R. 1946 P.C. 57=50 C.W.N. 370=73 I.A. 24=223 Ind. Cas. 247=59 L.W. 199=I.L.R. (1946) Kar. (P.C.) 36=I.L.R. (1946) Mad. 517=(1946) 1 M.L.J. 280 (P.C.).

——Practice and procedure—Interference—Joint trial—Discretion of presiding Judge.

In England, practice is to leave the question of joint or several trial to the discretion of the presiding Judge where the discretion has been judicially exercised, the Privy Council will not override it. A.I.R. 1945 P.C. 140=1940 O.W.N. 610=(1945) 2 M.L.J. 578=1945 A.L.J. 269=58 L.W. 401=1945 M.W.N. 610=1945 Pesh. L.J. 140 (P.C.).

——Practice and procedure—Interference—Jury trial—Conviction based on evidence.

The jury are the sole Judges to determine the strength of evidence against the accused and unless some step has been taken which is contrary to natural justice or some grave and substantial injustice has been done, the Privy Council will not interfere with the conviction. A.I.R. 1945 P.C. 140=1945 O.W.N. 610=(1945) 2 M.L.J. 578=1945 A.L.J. 269=58 L.W. 401=1945 M.W.N. 610=1945 Pesh. L.J. 140 (P.C.).

——Practice and procedure—Accounts—Taking of—No principle involved.

In case of taking accounts where no question of principle is involved, the decision of the High Court on the various items should be treated as conclusive unless the appellant can prove that the decision is, beyond all questions erroneous. A.I.R. 1945 P.C. 35=1945 M.W.N. 322=47 Bom. L.R. 608=12 B.R. 231=49 C.W.N. 211—(1945) 1 M.L.J. 136=221 Ind. Cas. 451=1945 Pesh. L.J. 35 (P.C.).

——Practice and procedure—Document in vernacular—Translation.

Where the document was written in the vernacular language and there was dispute with regard to the translation of some part of it, the Board followed the usual practice and adopted the translation accepted as correct by the High Court. A.I.R. 1945 P.C. 30=49 C.W.N. 184=1945 O.W.N. 140=47 Bom. L.R. 267=79 C.L.J. 90=I.L.R. (1945) All. 231=12 B.R. 153=(1945) 1 M.L.J. 91=221 Ind. Cas. 392=58 L.W. 47=1945 M.W.N. 140=72 I.A. 27=1945 Pesh. L.J. 30 (P.C.).

——Practice and procedure—Appeal heard and decided ex parte—Re-hearing, when can be granted.

The Privy Council have and always would have every consideration for an applicant who comes and says that without any fault on his part, the case had

been heard *ex parte* and, wherever he can satisfy their Lordships that he could have put before them some considerations which might have affected their decision they would no doubt, be willing to give him an oppor. tunity of being heard again.

Where, however in a case which turned upon construction only, the High Court, after going carefully into all the arguments, adopted one construction and the Board had given a detailed judgment in which they had dealt with the points taken by the High Court and had come to an opposite conclusion and it was not suggested that there was anything which could be said to the Board, if they did grant a further hearing, which had not been considered by the Board in giving their judgment on the previous hearing :

Held, that it would be improper to cause the parties to have another hearing. A.I.R. 1944 P.C. 32=57 L.W. 382 (1)=10 B.R. 600=48 C.W.N. 443 (1)=(1944) 1 M.L.J. 476=1944 M.W.N. 553 (1)=46 Bom. L.R. 837= 71 I.A. 23=212 Ind. Cas. 577 (P.C.).

——Practice and procedure—Purely academic question.

It is the well-established practice of the Board to refuse to decide a question which is purely academic. A.I.R. 1940 P.C. 158=7 B.R. 1=52 L.W. 406=21 P.L.T. 869=1940 M.W.N. 995=42 Bom. L.R. 1182= I.L.R. (1940) Kar. (P.C.) 335 Sup.=1940 A.W.R. 122= 190 Ind. Cas. 1 (P.C.).

——Practice and procedure—Suit for administration—Accounts—Minute examination of details.

It is not the practice of Judicial Committee of the Privy Council to embark on a minute examination of the details of accounts which were subjected to a careful scrutiny by the Courts below, except in cases where some recognised principle of accounting or rule of law has been violated. A.I.R. 1939 P.C. 238=6 B.R. 26= I.L.R. (1939) Kar. (P.C.) 391 Sup.=183 Ind. Cas. 885 (P.C.).

——Practice and procedure—Appeal having no relation to existing rights.

It is contrary to the long-established practice of the Privy Council to entertain appeals which have no relation to existing rights created or purported to be created. A.I.R. 1939 P.C. 53=1939 M.W.N. 142=180 Ind. Cas. 807 (P.C.).

——Practice and procedure—Issue abandoned or not raised—Consideration of.

Their Lordships of the Privy Council are reluctant to consider an issue or an objection which has been abandoned or not raised in the lower Courts. A.I.R. 1936 P.C. 179 =1936 O.W.N. 432=2 B.R. 548= 44 L.W. 78=1936 M.W.N. 812=64 C.L.J. 90=162 Ind. Cas. 539 (P.C.).

——Practice and procedure—Prerogative of Crown to review all judicial decisions of Courts of Record in dominions overseas.

There seems no reason for limiting the general prerogative of the Crown to review all judicial decision of Courts of Record in the dominions overseas whether civil or criminal, though the discretion as to the exercise of the prerogative may have to be very carefully. guarded. A.I.R. 1936 P.C. 141=40 C.W.N. 801=1936 A.L.J. 671 =38 P.L.R. 541=1936 M.W.N. 619=44 L.W. 58= 38 Bom. L.R. 681=1936 A.W.R. 600=64 C.L.J. 36= 71 M.L.J. 665=162 Ind. Cas. 92 (P.C.).

——Practice and procedure—Review.

A decision of the Privy Council can be reviewed if proper case is made out only by the Privy Council. A.I.R. 1936 All. 422.

——Practice and procedure—Statute-law is binding on all Courts.

Although their Lordships of the Judicial Committee, as every other Court, attempt to do substantial justice and to avoid technicalities, their Lordships like any other Courts are bound by the statute law, and if the statute law says there shall be no jurisdiction in a certain event, and that event has occurred, then it is impossible for their Lordships or for any other Court to have jurisdiction. A.I.R. 1935 P.C. 5=1935 A.L.J. 44=41 L.W. 84=1935 A.W.R. 101=163 Ind. Cas. 896 (P.C.).

——Practice and procedure—Amendment of—Two appeals, one from lower Court and one from higher Court varying order of lower Court—Anomalous practice.

The jurisdiction of the Board to recommend the alteration of a former Order-in-Council on the ground that by inadvertence it does not give effect to the intention of the Board as expressed in their judgment is undoubted and it should be exercised if its exercise is necessary in order not to defeat the manifest rights of a party which were intended to be effectuated by the former decision of the Board.

It is anomalous that there should be two appeals proceeding at the same time, one from the lower Court and one from the higher Court which had already varied the order of the lower Court and it is desirable that in some manner, the recourse to two appeals to the Privy Council in such cases should be avoided. A.I.R. 1931 P.C. 104=35 C.W.N. 583=1931 M.W.N. 620=33 Bom. L.R. 940=61 M.L.J. 47=34 L.W. 356=58 C. 1281= 58 I.A. 141=131 Ind. Cas. 309 (P.C.).

——Practice and procedure—Official translation of vernacular documents.

The practice of the Board is to accept the official translation of vernacular documents as correct. 11 Pat. L.T. 587=1930 A.L.J. 1184=32 M.L.W. 324=34 C.W.N. 1161=52 C.L.J. 287=A.I.R. 1930 P.C. 242= 32 Bom. L.R. 1588=57 I.A. 296=127 Ind. Cas. 743= 1931 M.W.N. 189=7 O.W.N. 1062=59 M.L.J. 615 (P.C.).

——Practice and procedure—Prior decision on same point.

The Privy Council is not bound in law, and withou examination, to follow the decisions in a prior appeal whether they considered it to be right or wrong, although the Privy Council would hesitate long before disturbing a solemn descision by a previous Board, which raised an identical or even a similar issue for determination. 114 Ind. Cas. 25=1929 A.L.J. 129=29 M.L.W. 512=A.I.R. 1929 P.C. 84=56 M.L.J. 363 (P.C.).

——Practice and procedure—Re-hearing of case decided.

There is no inherent incompetency in ordering a rehearing of a case already decided by the Board, even when a question of a right of property is involved, but such an indulgence will be granted, in very exceptional circumstances only. It is of the nature of an extra *ordinarium remedium*. 114 Ind. Cas. 25=1929 A.L.J. 129=29 M.L.W. 512=A.I.R. 1929 P.C. 84=56 M.L.J. 363 (P.C.).

——Practice and procedure.

In cases coming before the Privy Council from the Dominions of the Crown first consideration of the Privy Council always is to secure if possible that substantial justice is done. 107 Ind. Cas. 349=A.I.R. 1927 P.C. 264 (P.C.).

——Practice and procedure.

Held, further, that inasmuch as the contestants of the adoption had failed to prove that the man had been seen attending to his ordinary avocations during the period when the opposite party asserted he had been suffering and as other circumstances left the matter entirely in doubt, there was not evidence of sufficient cogency to interfere with the judgment of the High Court

which was to the effect that the adoption had been authorised. 86 Ind. Cas. 565=22 M.L.W. 91=A.I.R. 1925 P.C. 54 (P.C.).

——Practice and procedure.

In cases involving purely question of fact their Lordships simply announce the decision of the Board, without discussing in detail the judgment of the inferior Courts. 26 Bom. L.R. 568=A.I.R. 1924 P.C. 208=46 M.L.J. 625 (P.C.).

——Practice and procedure.

It is not the practice of their Lordships of the Privy Council to construe the pleadings too strictly or to exclude a plea, which was not embodied in the plaint from being made an issue in the case. 72 Ind. Cas. 898=47 Bom. 327=28 C.W.N. 49=17 M.L.W. 405=32 M.L.T. 111=50 I.A. 49=25 Bom. L.R. 527=37 C.L.J. 464=A.I.R. 1923 P.C. 6=44 M.L.J. 471 (P.C.).

——Practice and procedure—Interest, etc.

With regard to interest, it would require very special and unusual circumstances for the Board to vary the decision as to the rate of interest as it rests on the discretion of the Courts in India. 61 Ind. Cas. 690=3 Pat. L.T. 1=26 C.W.N. 1=30 M.L.T. 1=48 I.A. 280=44 Mad. 656=19 A.L.J. 621=23 Bom. L.R. 920=34 C.L.J. 56=14 M.L.W. 270=1921 M.W.N. 540=A.I.R. 1922 P.C. 71=41 M.L.J. 33 (P.C.).

——Practice and procedure—Objection to—Valuation—Interference.

The Privy Council will not interfere with any question of valuation unless some item of valuation is shown to have improperly been excluded therefrom or there is some fundamental principle affecting the valuation which renders it unsound, but on the whole it is too late to assert for the first time at the hearing that a valuation has proceeded upon erroneous footing. 39 M.L.J. 195=47 I.A. 255=28 M.L.T. 149=18 A.L.J. 1095=22 Bom. L.R. 1370=57 Ind. Cas. 606 (P.C.).

——Practice and procedure—Ex parte hearing—Respondent not represented owing to fraud—Rehearing.

After an appeal had been heard *ex parte* judgment given for the appellant and an Order-in-Council drawn up, the respondents were allowed to have it re-instated and reheard on the ground that they had not been represented in England owing to the fraud of a person who falsely represented himself to be the agent of a Firm of London Solicitors and misappropriated the funds sent by the Respondents without giving instructions to any Solicitor. The respondents were ordered to pay the costs of the application in any event, the costs of the former hearing being reserved to be dealt with at the hearing. 44 Cal. 388=44 I.A. 87=21 M.L.T. 12=15 A.L.J. 107=(1917) M.W.N. 94=32 M.L.J. 39=25 C.L.J. 121=21 C.W.N. 383=19 Bom. L.R. 194=38 Ind. Cas. 932 (P.C.).

——Practice and procedure—Interlocutory orders—Preliminary order of High Court (Appellate)—Admitted by Privy Council—Subsequent application to be added parties—Jurisdiction of High Court.

An appeal to the Privy Council from the Preliminary order of the High Court in its appellate jurisdiction remanding the case, having been admitted by the Privy Council the High Court has no jurisdiction to entertain a subsequent application by the assignee trustees of the plaintiffs to be added as parties. 12 Ind. Cas. 69 (Mad.).

——Practice and procedure—Ex parte hearing—Review.

The Privy Council is averse to reviewing considered judgments on *ex parte* applications. 38 Cal. 526=38 I.A. 76=15 C.W.N. 417=9 M.L.T. 448=8 A.L.J. 528=13 Bom. L.R. 421=14 C.L.J. 238=(1911) 2 M.W.N. 281=21 M.L.J. 1145=10 Ind. Cas. 683 (P.C.).

——Practice and procedure—Stay of execution of decree appealed from. *See* C. P. CODE, O. 45, R. 13 (2) (*c*). 20 M.L.J. 140=4 Ind. Cas. 106.

——Practice and procedure—Appellate Court, powers of—Evidence taken on commission.

The oral evidence in the case having been taken on commission, the trial Judge had no advantage over the Judges of the appeal Court in hearing and seeing witnesses. The Judicial Committee dealt with the case upon that footing. 6 Ind. Cas. 981=12 Bom. L.R. 419=14 C.W.N. 842=37 I.A. 60=32 A. 241=7 M.L.T. 414 (P.C.).

——Practice and procedure—Objection that appeal had become incompetent—Final admission—Record, transmission of—Practice.

After an appeal to His Majesty in Council had been admitted but before the transmission of the transcript record to England it was objected by the respondent that he had attained the status of a Sovereign Prince, so that the suit could not be maintained against him in any Municipal Court and he prayed that the appeal may be declared to have abated.

Held, that although the High Court retained jurisdiction over the appeal for interlocutory matters, it would not make the order for abatement, but would transmit the petition with the report upon the truth or otherwise of the allegations made therein to be dealt with by the Judicial Committee upon the hearing of the appeal. (1909) 10 C.L.J. 330=4 Ind. Cas. 456.

——Practice and procedure—Point not submitted to either Court in India raised before the Privy Council—Issue—Construction.

Their Lordships declined to entertain a point raised by the appellants as covered by a certain issue, as the point was not submitted to either of the Courts below and the parties have by their conduct of the case, shown that they construed the issue in a narrower sense. (1907) 35 C. 232=12 C.W.N. 220=18 M.L.J. 3=5 A.L.J. 63=7 C.L.J. 112=35 I.A. 41=10 Bom. L.R. 41=3 M.L.T. 93 (P.C.).

——Practice and procedure—Uniform current of erroneous decisions.

Their Lordships will be very slow to interfere with a uniform current of decisions extending over a long time, bearing upon a statute, even though the decisions happen to be erroneous. (1907) 17 M.L.J. 444=4 A.L.J. 625=9 Bom. L.R. 1104=6 C.L.J. 379=11 C.W.N. 1005=2 M.L.T. 333=30 M. 426=34 I.A. 186 (P.C.).

——Practice and procedure—Waiver—Point not a point in the Court below.

It is out of the power of their Lordships of the Privy Council to entertain a ground of appeal on a question of fact—Namely, that of waiver which has not been subject to the consideration of the Court below. (1907) 17 M.L.J. 353=6 C.L.J. 11=34 C. 709=11 C.W.N. 739=2 M.L.T. 193=9 Bom. L.R. 651=34 I.A. 164 (P.C.).

——Practice and procedure—Disposal of case on—Admissibility of evidence.

Where the whole evidence objected to before their Lordships had been admitted in the first Court without objection their Lordships would regret to be obliged to dispose of the appeal upon a question of legal admissibility and the more so when the appeal is heard *ex parte*. (1906) 8 Bom. L.R. 705=4 C.L.J. 181=30 B. 523=33 I.A. 198 (P.C.).

——Practice and procedure—Stay of execution—Interlocutory applications.

Interlocutory applications such as those for stay of execution, ought always to be made, in the first instance at any rate, to the Court in India which has ample power to deal with the matter according to the circumstances

of the particular case and has knowledge of details which their Lordships cannot possess on an interlocutory application. (1906) 8 Bom. L.R. 497=4 C.L.J. 101=10 C.W.N. 945=16 M.L.J. 299=29 M. 379=33 I.A. 132 (P.C.).

——Practice and procedure—Partition suit.

Appeal on preliminary decree—Jurisdiction to stay proceedings only to Privy Council. *See* C. P. CODE, O. 41, R. 5. 9 C.L.J. 561=1 Ind. Cas. 812=13 C.W.N. 690.

——Practice and procedure—Non-expression of any opinion by the lower Court as to appealability—Privy Council practice.

Where a statute confers on the Provincial Courts the power of allowing an appeal to the Privy Council, the Provincial Court is bound to exercise its judgment and consider whether any particular case is appealable or not before it grants leave. Where the lower court had carefully avoided expressing any opinion on the question of competency of the appeal and had granted leave, leaving the question of competency open, their Lordships dismissed the appeal as incompetent. 10 C.W.N. 7=15 M.L.J. 461 (P.C.).

——Practice—Value in dispute—Enquiry.

Where the value is in dispute, the practice is to ascertain by evidence and enquiry what the true value is. (1905) 9 C.W.N. 370.

——Practice—Appeal—Value—Point of law—Special certificate. *See* 11 M.L.J. 56=5 C.W.N. 193=3 Bom. L.R. 154=23 A. 227=28 I.A. 11.

17. Question and finding of fact.

——Question and finding of fact—Decision of trial Judge who has observed the witnesses—Weight to be attached to.

Conclusions of fact reached by a trial Judge based principally on oral testimony and his estimate of the witnesses who all gave their evidence in his presence should not be disturbed if the evidence as a whole can reasonably be regarded as justifying the conclusion at the trial. 75 I.A. 252=I.L.R. (1949) Mad. 487=51 Bom. L.R. 932=A.I.R. 1949 P.C. 32=62 L.W. 14=1948 A.L.J. 479=(1949) 1 M.L.J. 97 (P.C.).

——Question and finding of fact—Question of custom.

Where there was no evidence as to any special custom affecting the *Lingayats* and no question as to the school of law by which the parties were bound was dicussed in the High Court, and no authorities on the matter were referred, their Lordships of the Privy Council did not allow the matter to be raised before the Board. A.I.R. 1945 P.C. 111=49 C.W.N. 517=12 B.R. 229=1945 Pesh. L.J. 111=221 Ind. Cas. 427 (P.C.).

——Question and finding of fact—Accounts of partnership—Items.

Questions whether in taking the accounts of the partnership certain items should or should not be allowed on one side or the other are purely questions of fact. Where they do not involve any question of principle whatsoever, they most emphatically are not questions that ought to be made the subject of an appeal to His Majesty in Council and the decision of the Court below on the various items of an account should be treated as conclusive unless the appellant can prove that the decision is beyond all question, erroneous. A.I.R. 1942 P.C. 61=9 B.R. 61=1942 A.L.J. 710=1942 O.W.N. 814=47 C.W.N. 115=(1943) 1 M.L.J. 16=I.L.R. (1942) Kar. (P.C.) 157 Sup.=56 L.W. 121=45 Bom. L.R. 270=45 P.L.R. 124=24 P.L.T. 26=1943 M.W.N. 187=202 Ind. Cas. 754 (P.C.).

——Question and finding of fact—Wagering transaction.

Question whether the transactions between the parties were wagering transactions or debts is one of fact, and where there are concurrent findings on the question by both the Courts in favour of the plaintiffs', the Privy Council, in accordance with its practice, will not interfere on that ground alone. A.I.R. 1942 P.C. 19=1942 A.L.J. 258=8 B.R. 640=55 L.W. 332=1942 A.W.R. 43=199 Ind. Cas. 574 (P.C.).

——Question and finding of fact.

The findings that the defendants have taken certain property themselves; that they did not, in fact, but it for a third party and that there was no agreement by which they undertook to give any share of the property which they had bought for themselves to that third party are findings of fact. A.I.R. 1941 P.C. 55=7 B.R. 985=1941 O.W.N. 1070=1941 A.L.J. 499=1941 A.W.R. 85=195 Ind. Cas. 658 (P.C.).

——Question and finding of fact—Adoption with full knowledge and comprehension.

Where it is found by the Courts that the execution of the deed by a *pardanashin* lady was not her mental or conscious act, the contention that after the execution of the deed, she had adopted it with full knowledge and comprehension clearly involves a question of fact and ought to be put in issue and investigated at the trial and the party cannot be permitted to raise the matter for the first time before the Privy Council. A.I.R. 1940 P.C. 147=1940 O.W.N. 787=7 B.R. 49=52 L.W. 448=1940 A.L.J. 662=42 P.L.R. 691=1940 M.W.N. 1101=45 Bom. L.R. 1139=1940 A.W.R. 143=45 C.W.N. 259=I.L.R. (1940) Kar. (P.C.) 341 Sup.=67 I.A. 377=189 Ind. Cas. 890 (P.C.).

——Question and finding of fact.

The Privy Council would not interfere with the finding of fact of the Court below unless that finding is or may have been influenced by evidence which ought not to have been admitted. A.I.R. 1939 P.C. 146=50 L.W. 81=41 P.L.R. 622=182 Ind. Cas. 27 (P.C.).

——Question and finding of fact—Damages, whether due to interference with in flow of river by party.

A question whether the rush of water which occasioned the damages was caused by the interference of a party, with the natural flow of a certain river, is a pure question of fact and their Lordships would not interfere with the concurrent findings on this question. A.I.R. 1937 P.C. 319=171 Ind. Cas. 387 (P.C.).

——Question and finding of fact.

Their Lordships cannot entertain an objection which depends upon a question of fact not dealt with below.

Question of active prosecution of a suit is not of fact. A.I.R. 1937 P.C. 260=3 B.R. 733=46 L.W. 198=1937 O.W.N. 708=41 C.W.N. 1130=18 P.L.T. 615=(1937) 2 M.L.J. 359=39 Bom. L.R. 1019=31 S.L.R. 652=1937 A.L.J. 1376=1937 A.W.R. 834=169 Ind. Cas. 657 (P.C.).

——Question and finding of fact—Finding of fact by High Court undisplaced.

Where findings of fact arrived at by the High Court are undisplaced, it is not possible for the appellant to maintain successfully an appeal to the Privy Council. A.I.R. 1935 P.C. 8=1 B.R. 249=41 L.W. 159=37 P.L.R. 55=1935 A.W.R. 86=68 M.L.J. 390=61 C.L.J. 53=11 O.W.N. 1367=153 Ind. Cas. 519 (P.C.).

——Question and finding of fact—Onus.

Where the whole matter turns on the credibility of the creditor and of the insolvent and the District Judge who had not seen the witnesses found their evidence unreliable but the High Court took a contrary view:

Held, that it was for the appellant (the Receiver) to satisfy their Lordships of the Privy Council that the High Court had taken an erroneous view on the ques-

tion which was purely one of fact. A.I.R. 1934 P.C. 81=11 O.W.N. 418=39 L.W. 418=38 C.W.N. 449=1934 A.L.J. 358=66 M.L.J. 404=36 Bom. L.R. 427=12 Rang. 194=1934 M.W.N. 284=61 C. L.J. 55=61 I.A. 158=37 P.L.R. 279=3 A.W.R. 471 (2)=148 Ind. Cas. 1 (P.C.).

——Question and finding of fact.

Where the oral evidence on the point at issue is very little and the only record of the oral evidence is a copy of the Judge's note showing only the combined result of question and answer containing no indication as to how far the words recorded represent the phrasecology of the witness or the phrasecology of Counsel, the Judicial Committee would be even more disinclined than is usual to review the findings of fact of a Judge who has heard and observed the witnesses, even if they thought that the oral evidence might have justified a different view. A.I.R. 1931 P.C. 272=134 Ind. Cas. 657 (P.C.).

——Question and finding of fact.

Findings of fact which are binding on the High Court are equally so on their Lordships of the Judicial Committee. (1931) 8 O.W.N. 920=36 C.W.N. 7 (P.C.).

——Question and findings of facts.

Decision on a question as to the grant of a jagir based on inferences and presumptions was reversed by the Board. 123 Ind. Cas. 145=31 M.L.W. 352=32 Bom. L.R. 515=51 C.L.J. 502=A.I.R. 1930 P.C. 45=59 M.L.J. 731 (P.C.).

——Question and findings of fact.

A finding of fact by lower Appellate Court is binding on the Privy Council as on the High Court. 111 Ind. Cas. 240=28 M.L.W. 204=32 C.W.N. 1146=48 C.L.J. 415=A.I.R. 1928 P.C. 219 (P.C.).

——Question and findings of fact.

No great importance can be attached to the findings of trial Court in a case which entirely depends upon questions of facts, and wherein neither of the Courts dealing with the case had the benefit of seeing the witnesses and had to appreciate the evidence recorded by another Judge. 107 Ind. Cas. 113=24 N.L.R. 40=30 Bom. L.R. 296=47 C.L.J. 222=5 O.W.N. 226=27 M.L.W. 523=A.I.R. 1928 P.C. 39=54 M.L.J. 208 (P.C.).

——Question and findings of fact.

Findings of first Appellate Court are conclusive and the High Court and the Privy Council are bound to accept them without further enquiry. 101 Ind. Cas. 359=8 P.L.T. 255=1927 M.W.N. 437=54 I.A. 196=31 C.W.N. 885=54 Cal. 586=39 M.L.T. 170=26 M.L.W. 642=A.I.R. 1927 P.C. 117=53 M.L.J. 117 (P.C.).

——Question and finding of facts.

Where the judgment of the High Court was substantially correct as a review of the evidence upon the question of fact, their Lordships did not interfere. In cases involving purely questions of fact, their Lordships simply announce the decision of the Board, without discussing in detail the judgments of the inferior Courts. 26 Bom. L.R. 568=A.I.R. 1924 P.C. 208=46 M.L.J 625 (P.C.).

——Question and findings of fact.

The Privy Council will not interfere with any question of valuation of unless it can be shown that some item has improperly been made the subject of valuation or excluded therefrom, or there is some fundamental principle affecting the valuation which renders it unsound. 57 Ind. Cas. 606=48 Cal. 110=25 C.W.N. 289=13 M.L.W. 49=47 I.A. 255=18 A.L.J. 1095=22 Bom. L.R. 1370=3 P.W.R. 1921=28 M.L.T. 149=2 U.P.L.R. 124=A.I.R. 1921 P.C. 50=39 M.L.J. 195 (P.C.).

——Question and findings of facts—Damages in divorce action—Action for divorce—Decision as to amount of damages will not be disturbed by Privy Council.

A decision, on the amount of damages to be paid to the husband by the co-defendant, in an action for divorce, of the Supreme Court of Ceylon, who clearly had jurisdiction to review the amount of damage :awarded, had all the facts before them ; knew the value of money in the Ceylon Island, and were in a position to form an opinion as to what was a resonable sum to be awarded in such a case, will not be disturbed by the Privy Council. A.I.R. 1927 P.C. 263 (P.C.).

——Question and findings of facts—Interference.

The Board would not disturb a finding of fact where the lower Court has carefully examined all the evidence and the accuracy of its statement of facts and the soundness of its reasoning has not been successfully criticized. 116 Ind. Cas. 601=31 Bom. L.R. 830=33 C.W.N. 734=30 M.L.W. 30=56 I.A. 248=52 Mad. 549=1929 M.W.N. 561=A.I.R. 1929 P.C. 156=57 M.L.J. 1 (P.C.).

——Question and findings of fact—Findings of fact of trial Judge should not be lightly disturbed.

Well-established principles limit the authority of Courts of Appeal to overrule findings of fact made by tribunals of first instance. A manifestly erroneous conclusion, which a reasonable judgment rejects, is not validated by the fact that it was arrived at after hearing and seeing witnesses. On the other hand, the veracity of witnesses is ordinarily to be finally determined by those before whom they give evidence. The value of corroborative or discreditive proof can best be judged by those who have before them all the persons involved. A conclusion of act of one tribunal founded upon divers admissible facts of varying importance ought not be to overset because the balance of proof upon the consideration of the matter by different minds in a new setting seems to incline against the conclusion originally drawn. 108 Ind. Cas. 727=30 Bom. L.R. 833=29 P.L.R. 439=A.I.R. 1928 P.C. 122 (P.C.).

——Question and findings of fact—Misunderstanding or non-appreciation of material evidence must be shown.

In an appeal from the decree of a High Court in a suit which involved a prolonged examination of numerous items of advances and loans and of the evidence relating to them by a High Court, those who impugn before their Lordships the findings of fact by the High Court upon which it based its decree must draw the attention of their Lordships to the material evidence which they suggest that the High Court misunderstood or failed to appreciate, and on which they contend that their Lordships should come to a conclusion different from that at which the High Court arrived. 91 Ind. Cas. 1033=24 A.L.J. 33=1926 M.W.N. 49=5 Pat. 135=7 P.L.T. 97=28 Bom. L.R. 1126=30 C.W.N. 482=52 I.A. 418=42 C.L.J. 592=A.I.R. 1925 P.C. 280=50 M.L.J. 1 (P.C.).

——Question and finding of fact—Findings of fact based on minute portions of evidence are not generally disturbed unless actual mistakes are shown.

Decisions of fact based on minute portions of evidence will not be disturbed unless actual mistakes are shown in judgment of lower Courts. Where the question depends not upon any question of law but upon the general conclusion that is to be drawn from many minute portions of the evidence, the Privy Council would not disturb the judgment of the Court below unless there were brought before them particular instances of where the Court below had gone wrong. 87 Ind. 252=21 M.L.W. 436=A.I.R. 1925 P.C. 31 (P.C.).

——Question and findings of facts—Land acquisition cases.

In connexion with proper value to be allowed for compulsorily acquired land, Privy Council cannot interfere with the figures that have been settled by the High Court unless it can be shown that there has been some real mistake in law or palpable omission which would invalidate the valuation. A.I.R. 1930 P. C. 283=34 C. W.N. 1106=32 M.L.W. 393=126 Ind. Cas. 432= 1930 M.W.N. 937=32 Bom. L.R. 1586=59 M.L.J. 392 (P.C.)

——Question and finding of fact—In land acquisition cases judgment of Indian Courts is not interfered with by Privy Council unless judgment is unsupportable.

In land acquisition cases their Lordships do not interfere with judgment of Courts in India as to matters involving valuation of property and similar questions, where knowledge of the circumstances and of the district may have an important bearing on the conclusion reached unless there is something to show not merely that on the balance of evidence it would be possible to reach a different conclusion but that the judgment cannot be supported as it stands, either by reason of a wrong application of principle or because some important point in the evidence has been overlooked or misapplied. A.I.R. 1925 P.C. 91, Foll. A.I.R. 1930 P.C. 249=34 C.W.N. 877= 124 Ind. Cas. 908=52 C.L.J. 138=57 I.A. 223=32 Bom. L.R. 1163=32 M.L.W. 277=1930 M.W.N. 958=59 M.L.J. 70 (P.C.).

——Question and finding of fact—Appeal to Privy Council regarding award—Wrong principle or neglect or misapplication of important point in evidence is necessary to justify interference.

The Privy Council will not interfere with judgments of the Courts in India as to matters involving valuation of property and similar questions where knowledge of the circumstances and of the district may have an important bearing on the conclusion reached, unless there is something to show, not merely that, on the balance of evidence, it would be possible to reach a different conclusion, but that the judgment cannot be supported as it stands, either by reason of a wrong application of principle, or because some important point in the evidence has been overlooked or misapplied. 86 Ind. Cas. 556= 27 Bom. L.R. 783=29 C.W.N. 822=26 P.L.R. 205= 6 Lah. 69=23 A.L.J. 113=52 I.A. 133=6 L.R.P.C. 64 =2 O.W.N. 137=A.I.R. 1925 P.C. 91=48 M.L.J. 386 (P.C.).

——Question and findings of facts—Maintenance cases—Discretion exercised in arriving at the fixed sum by Indian Courts should not be lightly interfered with.

Maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families a survey of the condition and necessities and rights of the members, on a reasonable view of change of circumstances possibly requiredin the future, regards being had to the scale and mode of living, and to the age, habits, wants and class of life of the parties. It is out of a great category of circumstances, small in themselves that a safe and reasonable induction is to be made by a Court of law in arriving at a fixed sum. The discretion exercised in making this induction when agreed to by two Indian Courts or even by one, should not be lightly interfered with. 5 I.A. 155, Rel. on. 116 Ind. Cas. 409=8 Pat. 840=56 I.A. 182=33 C.W.N. 637=1929 A.L.J. 695=10 P.L.T. 345=31 Bom. L.R. 816=49 C.L.J. 579=30 M.L.W. 1=6 O.W.N. 526= 1929 M.W.N. 468=A.I.R. 1929 P.C. 128=57 M.L.J. 50 (P.C.).

——Question of fact—Will genuineness.

On questions of fact the onus is on the appellant who invites the appellate Judges, who have not heard or seen witnesses, to overrule the decision of Judges who, after a prolonged and elaborate, enquiry, have arrived at the conclusion that they could not believe the evidence called in support of a will. 13 C.W.N. 782= 5 M.L.T. 384=3 Ind. Cas. 997 (P.C.).

——Question and finding of fact—Consideration of law in the process of reasoning—Possession for less than 60 years as a copy of title.

Their Lordships held that they were entitled to go into a question of fact even though there be concurrent findings on it, if at every point in the process of the reasoning on the question, consideration of law have to be regarded. In this cae, though the evidence as to possession and enjoyment was sufficient to establish a title by adverse possession for sixty years, their Lordships relied upon it as proof of title, and, on the strength of that evidence, reversed the judgments of the Courts below. (1908) 18 M.L.J. 549=10 Bom. L.R. 1101=8 C.L.J. 436=12 C.W.N. 1095=35 I.A. 195=4 M.L.T. 234= 36 Cal. 1=1 Ind. Cas. 182 (P.C.).

——Question and finding of fact.

Where a question is one of fact, their Lordships will not interfere even if it should appear that there was evidence such as might justify either view without any clear preponderance or probability. 7 C.L.J. 122= 18 M.L.J. 6=35 C. 271=10 Bom. L.R. 50=3 M.L.T. 110=12 C.W.N. 214=35 I.A. 67 (P.C.).

——Question and finding of fact—Different findings on question of genuineness of documents—Test.

In determining which of two stories is to be accepted it is necessary in India as well as for their Lordships of the Privy Council to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct. In the particular case before their Lordships, they came to the conclusion that a document represented a genuine transaction having regard to the advantages the mortgagor derived by the documents, the rate of interest, the benefit of one consolidated liability in place of a number and the securing of a friendly creditor secured to the mortgagor thereby. (1908) 30 A. 258=12 C.W.N. 609=10 Bom. L.R. 600=4 M.L.T. 141=35 I.A. 104 (P.C.).

——Question and findings of facts—Maintenance question—Rate—Decision of Indian Courts not generally interfered with.

Courts in India are better qualified to deal with a question as to the amount of maintenance, and the Privy Council will not interfere with the decision of the Indian Courts upon the same. (1905) 10 C.W.N. 95=7 Bom. L.R. 907=15 M.L.J. 312=3 A.L.J. 845=2 C.L.J. 231= 1 M.L.T. 12=28 M. 508=32 I.A. 261 (P.C.).

18. Record.

——Record—Practice—Genuineness of document in issue—Parties should produce either original document or at least photostatic copy of it.

When their Lordships of the Privy Council have to deal with the question of whether or not a document is forged, it is obviously of first importance that they should have the document before them. It should be considered to be a rule of practice in all cases where the genuiness of a document is in issue, that the parties concerned should bring before their Lordships, either the original document or, at any rate, a photostate copy of it, so that their Lordships should be in the same position as the Courts in India or elsewhere, of having the document before them and being able to form their own impression upon an inspection. It is so important that, as a general rule, it is probable their Lordships would find it necessary to adjourn any case for the production of such a document if it were not forthcoming. A.I.R. 1944 P.C. 11=25 P.L.T. 30=1944

A.L.J. 134=57 L.W. 198=1944 A.W.R. 29=48 C.W.N. 273=(1944) 1 M.L.J. 247=1944 M.W.N. 298=I.L.R. (1944) 2 Cal. 56=10 B.R. 483=I.L.R. (1944) Kar. (P.C.) 61 Sup.=71 I.A. 1=212 Ind. Cas. 1 (P.C.).

——Record—Accuracy of English translation challenged—Procedure.

When the accuracy of an English translation of a document written in the vernacular language is challenged, the rule ordinarily followed by the Board is to accept the translation as correct, if it was made by a translator appointed by a Court in India and not challenged before the Judge who had dealt with the case. Their Lordships are not in a position to say that such translation should be held to be incorrect. If they are, however, satisfied that there is a genuine doubt about its correctness, they would remit the matter to the High Court in India, from which the appeal has been brought for an inquiry into it and direct it, if necessary, to have another translation made under the direction of the Court and to transmit it to the Registrar of the Privy Council. Where the translation relied upon by one party is not made by a translator appointed by the Court but it was not only placed on the record of the trial Court, but also was included in the record printed for the Court of Appeal in India and apparently acted upon by that Court, the circumstances are such as to create a reasonable doubt about the accuracy of the official translation, which would justify an inquiry by the High Court as to which of the two translations should be accepted as correct. But held on these circumstances and admissions of counsel that such course was not necessary. A.I.R. 1937 P.C. 46=45 L.W. 361=1937 O.W.N. 311=3 B.R. 342=39 P.L.R. 217=(1937) 1 M.L.J. 479=18 P.L.T. 315=41 C.W.N. 590=65 C.L.J. 140=64 I.A. 77=1937 M.W.N. 520=I.L.R. (1937) 2 Cal. 148=31 S.L.R. 203=1937 A.L.J. 604=39 Bom.L.R. 713=1937 A.W.R. 327=167 Ind. Cas. 1 (P.C.).

——Record—Vernacular words.

Where there is a controversy as to the meaning of such words as *hukmi malguzari jama* and the like, which may mean rent or revenue, it is desirable that the word used in the vernacular should be inserted, in brackets after the English rendering so as to assist the Court in determining which meaning is applicable in the particular case. A.I.R. 1931 P.C. 5=52 C.L.J. 512=50 M.L.J. 245=33 L.W. 121=35 C.W.N. 201=1931 M.W.N. 65=10 Pat. 284=12 P.L.T. 337=58 I.A. 17=130 Ind. Cas. 620 (P.C.).

——Record.

Rule 18 merely applies to papers which form part of the record. 61 Ind. Cas. 657=2 P.L.T. 641=6 P.L.J. 114=A.I.R. 1921 Pat. 125.

——Record—Irrelevant matter.

The Judicial Committee strongly condemned the practice of printing an enormous mass of wholly irrelevant and unnecessary matter in the preparation of record. 35 C.L.J. 593=A.I.R. 1923 P.C. 44=43 M.L.J. 167 (P.C.).

——Record—Necessary documents.

It does not follow that because unnecessary documents have been printed in India, they should be included in the books bound for their Lordships. It is the duty of the solicitor in England to make a selection of the necessary documents. The other papers should be ready at hand in case they should be required. In cases of doubt the solicitor should take the advice of counsel on this point, for which purpose an application being made a fee will be allowed. 101 Ind. Cas. 50=54 Cal. 414=54 I.A. 118=1927 M.W.N. 353=29 Bom. L.R. 844=31 C.W.N. 744=45 C.L.J. 454=26 M.L.W. 40=39 M.L.T. 221=A.I.R. 1927 P.C. 60=52 M.L.J. 463 (P.C.).

——Record—Objection Regarding printing.

If one party thinks a document should be printed and the other party thinks it unnecessary, reference is made to the Registrar of the High Court who determines, at any rate, in the first instance, what should be done. 101 Ind. Cas. 50=54 Cal. 414=54 I.A. 118=1927 M.W.N. 353=29 Bom.L.R. 844=31 C.W.N. 744=45 C.L.J. 454=26 M.L.W. 40=39 M.L.T. 221=A.I.R. 1927 P.C. 60=52 M.L.J. 463 (P.C.).

——Record.

The word Registrar means the Registrar or other proper officer having the custody of the record in the Court appealed from. The Registrar is in the first instance the proper person to determine what papers shall be included in the paper-book where there is any dispute between the parties. 61 Ind. Cas. 657=2 P.L.T. 641=6 P.L.J. 114=A.I.R. 1921 Pat. 124.

——Record—Omission to print.

If the appellant has failed to print a decree in his record or place it before the Board it is impossible for the Board to vary the decree, the contents of which have not been placed before it and are not known with certainty. A.I.R. 1930 P.C. 234=53 Mad. 597=59 M.L.J. 289=1930 M.W.N. 885=52 C.L.J. 265=32 M.L.W. 548=126 Ind. Cas. 84=57 I.A. 264 (P.C.).

——Record—Orders as to paper-book.

Applications regarding orders as to paper-book, should be made to the judges who gave leave to appeal and not to the judges from whose judgment the appeal is preferred. 76 Ind. Cas. 901=49 Cal. 967=26 C.W.N. 840=A.I.R. 1922 Cal. 479.

——Record—Translation.

The practice of their Lordships' Board is to accept the official translation of vernacular documents as correct. A.I.R. 1930 P.C. 242 (P.C.)=7 O.W.N. 1062=11 Pat. L.T. 587=1930 A.L.J. 1184=32 M.L.J. 324=52 C.L.J. 287=34 C.W.N. 1161=32 Bom.L.R. 1588=57 I.A. 296=127 Ind. Cas. 743=59 M.L.J. 615.

——Record—Printing of—Costs of unnecessary printing to be disallowed.

It is the duty of practitioners in India and of the officials of the Court to see that wholly unnecessary matter is not printed so as to prevent encumbering the record. Where this was not done, the Board disallowed the costs of the successful appellant as regards the matter unnecessarily printed. 47 Cal. 415=46 I.A. 299=24 C.W.N. 553=76 Ind. Cas. 737 (P.C.).

——Record—Preparation of.

The printing of irrelevant and useless documents generally done in Indian Appeals to His Majesty adverted to and the unintelligent omission of necessary documents in the case commended on. 6 L.W. 26=21 C.W.N. 345=(1917) M.W.N. 261=10 Bur.L.T. 79=36 Ind. Cas. 20 (P.C.). [Reversing on Appeal 16 Ind. Cas. 597.]

——Record—Paper-book.

The practice of including irrelevant matter in the transcripts before the Judicial Committee condemned. (1905) 9 C.W.N. 745 (P.C.).

19. Remand.

See CIVIL P.C., O. 45, R. 5.

20. Security.

See CIVIL P.C., O. 45, R. 7.

21. Special knowledge of Indian Courts.

See (1) CIVIL P.C., S. 112.

(2) PRIVY COUNCIL—EVIDENCE.

22. Special leave to appeal.

See also JUDICIAL COMMITTEE RULES.

——Special leave to appeal—Practice—Special leave to appeal given without reserving express power to challenge competency of appeal—Respondent can challenge competency of appeal at hearing.

Contention that no appeal is competent can be raised by the respondent at the hearing of an appeal to Privy Council, notwithstanding that special leave to appeal has been given without reserving express power to challenge the competency of the appeal. A.I.R. 1946 P.C. 123=(1946) 2 M.L.J. 10=(1946) F.L.J. 995=59 L.W. 405=1946 M.W.N. 488=1946 N.L.J. 396=50 C.W.N. 814=I.L.R. (1946) Nag. 651=48 Bom.L.R. 423=73 I.A. 144=226 Ind. Cas. 50 (P.C.).

——Special leave to appeal—Granting of special leave to appeal by Privy Council.

Where the High Court in granting leave to appeal to Privy Council has not properly approached the requisite matter of ascertainment of the market value of the subject-matter of the suit and of the appeal, and the leave is therefore found to be invalid the appeal would necessarily be dismissed with costs but the Privy Council may, bearing in mind the interest of the parties and possible saving of expense grant special leave to the appellant. A.I.R. 1945 P.C. 136=1945 Pesh.L.J. 136 (P.C.).

——Special leave to appeal.

Special leave to appeal granted with liberty to respondent to contend that such leave ought not to have been granted—At hearing of appeal, respondent's contention allowed—Appeal should be dismissed—Petition to rescind leave to appeal is not necessary. A.I.R. 1944 P.C. 65=48 C.W.N. 820=1944 A.L.J. 382=(1944) 2 M.L.J. 218=57 L.W. 516 (2)=1944 A.W.R. 51=46 Bom.L.R. 849=I.L.R. (1944) Bom. 745=I.L.R. (1944) Kar. P.C. 235 (Sup.)=219 Ind. Cas. 225=71 I.A. 142=11 B.R. 413 (P.C.).

——Special leave to appeal—Appeal from Federal Court of India—Point technical and of no use in future.

An appeal from the Federal Court would not lightly be admitted by the Board, and should only be admitted if it arises in a really substantial case.

Where the matter was one concerning the construction of a very exceptional section which would have no application in the future, and it was a technical point and the Board had before it the view of the Federal Court with regard to it and, having regard to all the circumstances of the case and the ingenious argument which had been presented to them, their Lordships did not think that it was a case in which they would advise His Majesty to grant leave to appeal. A.I.R. 1940 P.C. 54=1940 O.W.N. 244=1940 A.L.J. 205=41 Cr.L.J. 413=6 B.R. 452=51 L.W. 407=1940 M.W.N. 360=21 P.L.T. 327=44 C.W.N. 401=(1940) 1 M.L.J. 706=71 C.L.J .307=I.L.R. (1940) Kar. (P.C.) 131 (Sup).=67 I.A. 122=42 P.L.R. 392=42 Bom.L.R. 619=I.L.R. (1940) Lah. 448=(1940) A.W.R. 43 (1)=(1940) F.C.R. 15=187 Ind. Cas. 1 (P.C.).

——Special leave to appeal—Criminal cases—Leave to appeal in criminal cases is granted only when there is grave and substantial injustice due to non-observance of some forms of legal process or violation of principles of natural justice.

It is indisputable that as His Majesty the King is supreme over all persons and Courts within his Dominions, a right of appeal in all cases civil and criminal to the King in Council exists, from the highest Court of each separate colony, province, State or possession, whether it be a Court of record or not, except so far as the prerogative in this behalf has been expressly surrendered. Criminal proceedings, however, are, in practice, reviewed only if it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. The Judicial Committee do not, as a rule, advise His Majesty to grant appeals in criminal cases, except where questions of great and general importance, likely to occur often, are raised, and where the due and orderly administration of the law is shown to be interrupted, or diverted into a new course which might create a precedent for the future, and where there are no other means of preventing these consequences. Such appeals lie either by the right of grant, in pursuance of leave obtained by the appellant from the Court appealed from, or by reason of special leave granted by the Judicial Committee. The latter appeals arise either where the Court below does not possess power to grant leave to appeal or where leave to appeal has been refused by the Court below, or where the leave to appeal was granted on some special point and the appellant wishes to raise points not included in the leave to appeal. Bur whether leave is granted by the Court appealed from or by the Judicial Committee, it is plain that the answer to the question, whether the case is a fit one for appeal, must depend on the same considerations. The grant of the leave to appeal is a step ancillary to the determination of the appeal, and the principles which regulate the ultimate decision of the appeal cannot obviously be ignored when an application for leave is examined. There must be something which deprives the accused of the susbatance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future. Where there is no provision like Clause 41 of the Letters Patent, 1865, applicable no Indian Court can grant leave to appeal to His Majesty in Council. In such cases, the remedy is by an application for special leave to His Majesty in Council, Execution of sentence was stayed pending the hearing of appeal to His Majesty in Councils, ((1908) App. Cas. 448, (F.). 83 Ind. Cas. 580=39 C.L.J. 1=28 C.W.N. 377=26 Cr.L.J. 52=A.I.R. 1924 Cal. 546.

——Special leave to appeal—Nigerian Ordinance.

The terms of the Public Lands Ordinance of the Colony of Southern Nigeria do not preclude the exercise of the prerogative of the Crown to give special leave to bring an appeal to the Privy Council from the decision of the Supreme Court of Nigeria on the question of the compensation payable to a person whose land has been taken by Government for public purposes. A.I.R. 1921 P.C. 212 (P.C.).

——Special leave to appeal—Patents cases.

Speaking generally a patent case has to do with the construction and infringement of one or more particular patents, and it cannot often be said that any general question is thereby raised. In such cases, where there have been concurrent judgments of the Judge of the first instance and the Court of appeal, their Lordships would deprecate the idea that leave should be given to appeal to the King in Council. 116 Ind. Cas. 593=A.I.R. 1929 P.C. 38 (P.C.).

——Special leave to appea l —Reasons.

The Board is not bound to give reasons, if it refuses to advise that leave to appeal should be granted. Indulgence in a particular case must not be taken as recognising any departure from established practice, nor affording any precedent for the future. 69 Ind. Cas. 367=18 M.L.W. 59=1923 M.W.N. 528=4 L.R. (P.C.) 36=1 Pat. L.R. (Cr.) 42=31 M.L.T. 192=49 I.A. 319=49 Cal. 845=27 C.W.N. 343=37 C.L.J. 136=25 Bom. L.R. 131=18 N.L.R. 176=A.I.R. 1922 P.C. 351=44 M.L.J. 32 (P.C.).

——Special leave to appeal—Cross-appeal, special appeal to—Addition of party.

In an appeal to the Judicial Committee by the plaintiff in a suit against three defendants upon a ground of action common to all the three defendants who had not appealed from the decree of the Court of first instance, but had been made a respondent to an appeal by another defendant and who was out of time for appealing to the Judicial Committee, was joined as a respondent and granted special leave to cross-appeal. 39 Mad. 509=43 I.A. 138=20 C.W.N. 1054=14 A.L.J. 797=31 M.L.J. 58=(1916) 2 M.W.N. 23=20 M.L.T. 137=4 L.W. 58=18 Bom.L.R. 651=24 C.L.J. 279=34 Ind. Cas. 921 (P.C.). [Reversing on Appeal 7 M.L.T. 296=5 Ind. Cas. 102 which is itself an appeal from 5 M.L.T. 108=2 Ind. Cas. 316].

——Special leave—Interlocutory matter.

Their Lordships would be very slow to give leave to appeal to bring up a case at an interlocutory stage. The case should be allowed to proceed and be determined on its merits so that it may end in a final judgment and come up to the Board at the proper time. (1914) M.W.N. 170=23 Ind. Cas. 396 (P.C.).

[On Appeal from 38 Mad. 509=21 Ind. Cas. 842.]

——Special leave—Appeal to the Privy Council direct from the decision of the Political Agent at Kathiawar without appealing to the Governor of Bombay—Procedure.

Where a party applied direct to the Privy Council for special leave to appeal from the decision of the Political Agent at Kathiawar without going on appeal to the Governor of Bombay, their Lordships granted special leave so to appeal, but with leave to the Secretary of State for India to intervene, and put in a case and appear. (1905) 8 Bom.L.R. 129=16 M.L.J. 115=10 C.W.N. 361=3 C.L.J. 395=3 A.L.J. 250=1 M.L.T. 115=33 C. 219=33 I.A. 1 (P.C.).

——Special leave to appeal—Moot and important point.

Special leave may be granted where the point is a new or moot one and is important and arguable. Where the Governor-in-Council of Bombay, to whom an appeal lay from the Court of the Political Agent at Kathiawar, has dismissed an appeal overruling the contentions which are precisely similar to those raised by petitioner, the latter is entitled to ask for special leave without previously appealing to the Governor-in-Council of Bombay. 13 M.L.J. 154 (P.C.).

——Special leave—High Court, jurisdiction of—Receiver application to appoint—Civil Procedure Code (Act 5 of 1908), Ss. 109, 112, and Or. 45, Rule 13.

Where after refusal by the High Court to grant leave to appeal to His Majesty in Council, special leave has been granted by the Judicial Comittee, the High Court has no power to entertain an application for appointment of a receiver of the property in dispute under Rule 13 of Order 45 of the Civil Procedure Code of 1908. The changes introduced in the Code of 1908 do not in this matter affect the law as it stood under the Code of 1882. (1889) 27 C. 1, app. (1909) 10 C.L.J. 326=4 Ind. Cas. 452.

——Special leave to appeal—Previous application to Indian Court, a condition precedent—Application under section 600, Civil Procedure Code.

Before applying for special leave to appeal to the Privy Council in cases where the value of the subject-matter is below the required amount, parties must apply to Indian Courts for a certificate under section 600, C.P. Code (O.C.) that the case is otherwise a fit one for appeal within the words of that section. (1901) 4 Bom. L.R. 159=6 C.W.N. 362=24 A. 174=29 I.A. 40 (P.C.).

——Special leave to appeal to Privy Council.

Special leave will not be granted by the Privy Council unless there is a substantial question of law of general interest involved. (1901) 4 Bom.L.R. 159=6 C.W.N. 362=24 A. 174=29 I.A. 40 (P.C.).

23. Value of decisions.

See also PRECEDENTS—(1) OBITER DICTA.
(2) PRIVY COUNCIL.

——Value of decisions.

It is not open to the Courts in India to question any principle enunciated by the Privy Council. 108 Ind. Cas. 501=30 Bom.L.R. 330=29 Cr.L.J. 403=52 Bom. 385=10 A.I. Cr.R. 118=A.I.R. 1928 Bom. 130.

——Value of decisions.

The judgment of their Lordships of the Privy Council is a final pronouncement in which every word must receive its full value. 96 Ind. Cas. 671=A.I.R. 1926 All. 690.

——Value of decisions.

Whenever the Privy Council lays down principle in theory it only declares what is and has always been the law, any previous declaration not in consonance with its present declaration not having been the law at all. 90 Ind. Cas. 210=A.I.R. 1926 Nag. 49.

——Value of decisions.

It is not open to the Courts in India to question any principle enunciated by the Privy Council although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them, whether on account of "Judicial dignity" or otherwise to question its decision on any particular issue of fact. Any application for review of judgment on grounds permissible by law only lies to the Judicial Committee. 91 Ind. Cas. 370=6 L.R. (P.C.) 195=3 O.W.N. 1 =28 O.C. 352=52 I.A. 398=24 A.L.J. 1=47 All. 883=1926 M.W.N. 83=43 C.L.J. 51=13 O.L.J. 19=28 Bom.L.R. 1110=30 C.W.N. 626=A.I.R. 1925 P.C. 272=50 M.L.J. 18 (P.C.).

24. Miscellaneous.

——Miscellaneous.

Where an appeal to the Privy Council was admitted and an application, by the guardian *ad litem* for certain minor respondents, was made to the High Court asking to order the appellant to England to put the guardian in funds to have the case argued on behalf of the minors before the Judicial Committee;

Held, that the High Court had no power to make such order. 106 Ind. Cas 867=55 Cal. 758=32 C.W.N. 140 =A.I.R. 1928 Cal. 286.

——Miscellaneous—Double arguments—Important point.

Having regard to the wide and general importance of the question involved, the privy Council departed their usual course and allowed the leader to resume his argument after it had been concluded and the junior had addressed the Board. 40 Mad. 112=44 I.A. 6=15 A.L.J. 92=21 M.L.T. 78=32 M.L.J. 35=5 L.W. 342=19 Bom.L.R. 206=21 C.W.N. 358=25 C.L.J. 233=10 Bur.L.T. 175=38 Ind. Cas. 683 (P.C.) (Affirming on Appeal from 39 Mad. 95=27 Ind. Cas. 386).

——Miscellaneous—Stay of execution—Appeal admitted by special leave.

The High Court has power to stay execution of a decree, an appeal against which, has been admitted by special leave to the Privy Coucnil. 38 Cal. 335=38 I.A. 74=13 C.L.J. 529=8 A.L.J. 449=13 Bom. L.R. 419=10 M.L.T. 25=(1911) 2 M.W.N. 124=4 Bur.L.T. 123=11 Ind. Cas. 384 (P.C.).

——Miscellaneous—Decree—Amendment of—Absence of petition of appeal by the respondents.

The Privy Council dismissed the appeal, but amended the decree appealed against by providing for interest subsequent to the decree in accordance with the prayer in the petition for special leave to appeal presented by the respondents who had filed their printed case without lodging a cross-appeal. 37 Cal. 623=37 I.A. 133=12 C.L.J. 231=12 Bom.L.R. 646=20 M.L.J. 630=8 M. L.T. 229 =3 Bur.L.T. 85=7 Ind. Cas. 814 (P.C.).

——Right to appeal to Privy Council.

Though as a rule of practice Their Lordships of the Privy Council give effect to certain provisions of C.P Code, these provisions do not in any way, bind their Lordships, nor do they limit the prerogative of the Crown in admitting appeals from decree of Indian Courts. The principle of the Full Bench cases applies only to the ordinary Courts, but not to an extraordinary tribunal like the Judicial Committee. A right of appeal given by law from the decree or order of the ordinary Civil Courts to a superior ordinary Court is a right of appeal and must be observed, by the superior Court, but there is no absolute and unqualified right of appeal to the Privy Council. 97 P.R. 1910=11 P.L.R. 1911=142 P.W.R. 1910=8 Ind. Cas. 999.

——Appeal filed during vacation—Limitation Act (15 of 1877), S. 5, Art. 177—Vacation—High Court when closed.

The second paragraph of S. 5 of the Limitation Act, 1877, applies to Art. 177. When, therefore, applicable tion for leave to appeal to His Majesty in Council was filed in the Privy Council department of the office of the High Court during the long vacation, when the Court was notified as closed, but the offices were open, the applicant was entitled to the benefit of the second paragraph of S. 5 of the Limitation Act. (1908) 10 C.L.J. 118= 3 Ind. Cas. 400=(1909) 10 C.L.J. 120.

——Abatement of appeal—High Court.

Where after admission of appeal to the Privy Council, the party applied to the High Court to take the case off the file on the ground that he had become a sovereign prince and so the suit had abated.

Held, that the High Court competent to deal with the application. But in this case the application was sent to the Privy Council along with its notes in the matter 10 C.L.J. 330=4 Ind. Cas. 456.

——Interpretation of decree pending appeal from order of High Court in execution proceedings.

The Privy Council declared what their meaning was in passing a decree on a petition presented for the purpose, though pending an appeal from an order of the High Court in execution interpreting the Privy Council decree in a manner not intended by the Privy Council. (1903) 27 M. 153=31 I.A. 64 (P.C.).

——Delay in presenting appeal to High Court —'Sufficient cause'—S. 5, Limitation Act.

Where the High Court refused to admit an appeal, on the ground that it was out of time, and there was no sufficient cause for not presenting it in time the Judicial Committee held that they could not interfere, unless they were satisfied that the refusal was wrong ; and that the delay which had occurred since the rejection of the appeal by the High Court and which was not accounted for militated against any interference. (1902) 30 C. 309=30 I.A. 20 (P.C.).

PRIVY COUNCIL APPEALS ACT (CANADA) (R. S. O. 1937 C. 98), S. 1—Court ordering sale of property worth $ 30,000,000—Case comes under S. 1.

Where the order in question which forms one of the final orders asked for in the statement of claim whethe it were interlocutory or not, relates to matter in controversy which exceeds the sum in value of $ 4,000 the case comes under S. 1, Privy Council Appeals Act. If a litigant is to be deprived by order of the Court of any rights over property worth $ 30,000,000, as he may be by an order of sale to which he objects, it would be reasonable to hold that there is a matter in controversy raised by the appeal exceeding the sum of $ 4,000. A.I.R. 1944 P.C. 7=1944 A.W.R. 4=10 B.R. 520=I.L.R. (1945) Mad. 1=1944 F.L.J. 46=212 Ind. Cas. 621 (P.C.).

PRIVY COUNCIL RULES. *See* JUDICIAL COMMITTEE RULES.

PRIZE. *See* SHIPPING.

PRIZE COMPETITION. *See* BOMBAY PRIZE COMPETITION ACT.

PRIZE COURT. *See also* INTERNATIONAL LAW.

——Captors seeking condemnation—Proof of suspicion —Sufficiency—Facts to be proved by claimants. 12 B.R. 509=223 I.C. 533=A.I.R. 1945 P.C. 184 (P.C.).

——Natural ship—Knowledge of shipowner that Cargo is contraband—Proof—Interference. 223 Ind. Cas. 533=12 B.R. 509=A.I.R. 1945 P.C. 184 (P.C.).

PRIZE COURT RULES—O. 28, R. 1, and O. 29—Compensation.

Where a case went up in appeal before the Privy Council, and the Privy Council confirmed the decree of the High Court, the Privy Council amended the shape of the decree with a view to avoid difficulties in the execution Court. 87 Ind. Cas. 357=52 Cal. 482=21 N.L.R. 50=23 A.L.J. 273=2 O.W.N. 336=6 L.R. (P.C.) 97= 27 Bom.L.R. 837=52 I.A. 231=1925 M.W.N. 692=30 C.W.N. 601=A.I.R. 1925 P.C. 118=49 M.L.J. 173(P.C.).

——O. 28, R. 1 and O. 29—Compensation—Treaty of Versailles, part 8, Annexure 3—Ships of tonnageover 1600 tons are within the operation of annexure 3 and Hague Convention does not affect question—Compensation for use during war cannot be granted.

Provisions of Annexure, 3, article 1, apply even on the change of nationality of shipowners after conclusion of the peace and on operation of the treaty of Versailles. There is no provision in the treaty and consequently no compensation can be awarded. The treaty of Versailles Part VIII, Annexure 3, indicates the rights of the parties in respect of shipping over 1600 tons in substitution of the Hague Convention. Owners of any merchantships of over 1600 tons tonnage have not *locus standi* in case of seizure to discuss how the allied and associated governments might deal with them *inter se*. The treaty of Versailles operates as a transfer of the former owners right on the case of ships of this tonnage and no question of handing over or of the delivery of documents of title arises where the vessel is already in the possession of the allied and associated governments. 76 Ind. Cas. 337= A.I.R. 1925 Sind 4.

——O. 28, R. 1 and O. 29—Appeal pending before the Privy Council—Compromise on behalf of persons under disability—Application for approval should be moved before the High Court in the first instance.

In all cases where it is desired to bind persons under disability by a compromise which is proposed to be entered into in an appeal pending before the Judicial Committee it is of the utmost importance, that there should be a clear expression of opinion by the proper Court in India that such compromise is beneficial one for these persons. All such questions are essentially and necessarily the proper subject for consideration of the Courts in India who are in a position to institute the inquiries, to ask the questions and to obtain the information which must always be required before sanctioning proceedings on behalf of persons who are unable to assent for themselves. The Juducial Committee may in rare cases desiring to avoid the multiplication or prolongation of proceedings entertain in the first instance an application

to sanction a compromise in such a case. 66 Ind. Cas. 154=26 C.W.N. 105=30 M.L.T. 181=48 I.A. 241=48 Cal. 994=14 M.L.W.396=A.I.R. 1922 P.C. 186 (P.C.).

——O. 28, R. 1 and O. 29—Alleged negligence of solicitor due to ignorance of statute—Local circumstances, knowledge of, necessary—Privy Council will refuse to deal with question.

The question of negligence with regard to the performance of solicitor's duty must, to some extent, be affected by local conditions and local circumstances as to which their Lordships of the Privy Council might not be perfectly informed. The question as to whether a solicitor is negligent or not in omitting to give effect to a statutory provision cannot be disentangled from the consideration of whether the statute which is involved is one which is of constant and common occurrence in practice,or whether it is one unfamiliar and remote. With those circumstance their Lordships declared their inability to deal. A.I.R. 1921 P.C. 231 (P.C.).

PRIZE LAW. *See* SHIPPING.

PRIZE LAW—Seizure of cargoes in prize—Original voyage of ship to enemy destination commenced before war—Intention to abandon voyage—Proof—Doctrine of Continuous voyage.

When the original voyage to an enemy destination commenced before the outbreak of war, has been compulsorily terminated by seizureof the cargoes in prize, the critical question is whether the climant has abandoned, at or before the time of seizure, the original intention to send the goods to an enemy destination. If he can establish that, he may claim release of the goods. The intention to be established is that of the person who has control of the voyage.

It is for the claimant to show that the goods are not liable to be condemned and to claim accordingly to recover them or their proceeds from the captor. As he is the claimant, it is obviously on him to establish his right to recover possession. His intention to abandon the voyage can only be shown by positive evidence of overt and unambiguous acts consistent only with the change of intention which he has to establish. The doctrine of continuous voyage involves that he cannot show the change of intention merely by showing that he had directed the vessel to some other port than the original hostile destination. That port may be chosen in fact not as intended to be a final destination but for the purpose of evading suspicion and as being a convenient place from which the original adventure to the enemy destination may be continued or resumed when the goods are not seized or released. A.I.R. 1947 P.C. 161.

PROBATE—Court of—Jurisdiction—Question of title.

It is not the province of a Court of Probate to determine questions of title to a property which a testator purports to dispose of by his will. 1930 M.W.N. 965= 32 L.W. 432=59 M.L.J. 529.

——Will—Interpretation—Adverse possession — Jurisdiction.

Probate may be granted, 12 years after the testator's death though during these 12 years, the legatees were in possession provided there are no debts due to or from the state, the will is genuine and the grant of probate is necessary. The Probate Court cannot decide whether the possession of the legatees for 12 years was adverse. 21 C.W.N. 1129=42 Ind. Cas. 933.

——Jurisdiction —If Court can compel executor to produce—Funds in Court.

A Probate Court has no power to compel the production in Court by the executor of the funds in his hands, for investment purpose ; nor can it impose a fine on him for failure to comply with the order to produce the funds in Court. 12 C.L.J. 602=8 Ind. Cas. 1105.

——Benares Hindu University, whether could get probate of a will.

The Benares Hindu University is a corporation and is entitled to obtain probates of a will by which benefits are conferred upon it, and probate can be granted to a corporation aggregate, though the enactment creating it does not authorise it expressly to be executor, if it would not be repugant to its functions. 23 O.C. 288=7 O.L.J. 203=2 U.P.L.R. (J.C.) 81=56 Ind. Cas. 335.

——Grounds for refusal.

Probate should not be refused on the ground that the testimony of the attesting witnesses (who are hostile) examined does not establish full compliance with the statutory requirements, when there is ample evidence on the record to show that the will was duly executed and attested (22 W.R. 189 and 4 Moor P.C. 419, Foll.).

Where the evidence of the attesting witnesses is vague, doubtful or even conflictng upon some material point, the Probate Court may, on consideration of the circumstances of the case or of other evidence, pronounce in favour of the will. 20 C.W.N. 192=34 Ind. Cas. 686.

——Right of Reversioner to be heard—Application for probate—Contents.

A reversioner is entitled to appear and be heard in probate proceedings though he has no alienable interest in the property left by the deceased since he is substantially interested in the protection and devolution of the estate.

In applicant for probate must state only the relations of the deceased. 21 C.L.J. 557=19 C.W.N. 882=30 Ind. Cas. 161.

——Caveat, if can be entered by the widow of a predeceased son—Her right to maintenance —Effect on.

The widow of a pre-deceased son of a testator has no sufficient interest to appear on probate proceedings her rights to maintenance, being unaffected by anything taking place in the probate application. (25 Bom. 263, dissented from). 17 C.W.N. 1141 =23 Ind. Cas. 539.

——Will prepared under suspicious circumstances —Suspicion to be removed before order.

The principle that whenever a will is prepared under suspicious circumstances, the Court should pronounce in its favour until the suspicion is removed, applies also to cases where th suspicion is inherent in the transaction itself and not rising from confiicting evidence. 39 Cal. 245=16 C.W.N. 265=13 Ind. Cas. 577.

——Legatee under will.

A legatee can deal with the property bequeathed to him even before obtaining Letters of Administration. 4 Bur.L.T. 135=12 Ind. Cas. 831.

——Appeal—Probate revoked.

Where probate has been revoked by the Lower Court because the will is a forgery, the parties cannot, by bringing the matter in appeal have a compromise to get the decision reversed and the probate revived. 12 C.L.J. 91=6 Ind. Cas. 912.

——Hindu heir—Letters of administration—Necessity.

It is not obligatory on a Hindu heir to obtion letters of administration. 13 C.W.N. 1190=3 Ind. Cas. 859.

——If becomes ineffectual by decree.

Probate is granted of the whole will and administration of the whole estate of the testator and there is no authority for suspposing that a probate becomes ineffectual by degrees as the legatees die or obtain their legacies. Until the estate has been administered and the will carried into effect, the administration must be regarded as incomplete and the executor is clothed will full powers given to him by law. 1 Ind. Cas. 248 (Cal.)

PROBATE AND LETTERS OF ADMINISTRATION. *See* SUCCESSION ACT, 1925, Ss. 218 TO 302.

PROBATE AND ADMINISTRATION ACT (5 OF 1881)—(Since repealed by succession Act 39 of 1925). *See also* SUCCESSION ACT (39 OF 1925), Ss. 211-369.

——Scope—The Probate and Administration Act is, as it stands, a measure purely permissive so far as the necessity for taking out probate is concerned. 94 Ind. Cas. 83=49 Mad. 261=1926 M.W.N. 297=A.I.R. 1926 Mad. 434=50 M.L.J. 308 (F.B.).

——Caveator—Who is.

A person denying the title of the testator to deal with certain property as his own and claiming adversely to him cannot be said to have an interest in the estate of the deceased as would entitle him to come in and oppose the grant of probate. 77 Ind. Cas. 534=A.I.R. 1922 Cal. 181.

——Succession by survivorship.

A person who claims to succeed by survivorship cannot be granted Letters of Administration for in that case the deceased leaves no estate. 70 Ind. Cas. 155=1922 P.H.C.C. 240=A.I.R. 1923 Pat. 96.

——Letters, when unnecessary.

No grant of letters of Administration is necessary in a case where the deceased leaves no debts or there is no difficulty in collecting the assets. 64 Ind. Cas. 61 (Cal.).

——Legal representative of Executor—Testator giving whole property to idol—Executors appointed Shebaits—Administratrix de-bonis-non is not entitled to sue for accounts—Heirs of the executors need not render accounts of the executorship of predecessors.

A testator left all his property in trust for an idol and appointed two persons as executors and Shebaits. The testator's daughter obtained letters of administration *de-bonis-non* and sued the heirs of one of the executors who had died, asking amongst other reliefs that the movable properties of the Debuttar Estate might be made over to her and that the defendants might be directed to render accounts for the period of the executor's tenure of office.

Held, that it does not follow that as the result of the grant of the letters of administration *de-bonis-non* as of necessity the administratrix will obtain any property,. If the property has become trust property it is not for the administrator to ask for accounts of those properties which are in trust.

Held, also that the defendants are no doubt bound to account for the moveables and other properties which they may have removed in a properly constituted suit; but they are under no obligation to render accounts of the executorship with whom they have no concern. 62 Ind. Cas. 476=25 C.W.N. 332=A.I.R. 1921 Cal. 142.

——Relationship to Mahomedan Law.

The statutory provisions of the Probate and Administration Act override any rules of Mahomedan Law that are inconsistent with them. 9 Bur.L.T. 236=34 Ind. Cas. 128.

——Powers of the Probate Court.

No Court other than a Probate Court is competent to hold that the letters of Administration had been imperfectly or inaccurately drawn up or that the letters have the same effect as if a copy of the terms of a will had been annexed thereto. 20 C.L.J. 148 =26 Ind. Cas. 980.

——Indian Succession Act, S. 187.

Where no probate is taken, the legal heir represents the estate of the deceased and can maintain a suit for the benefit of the estate. 18 C.W.N. 1136 =26 Ind. Cas. 21.

——Courts' Powers.

A Judge of the Bombay High Court exercising testamentary and intestate jurisdiction cannot declare that a will is invalid owing to the testator's incapacity to make one and dispose of the bequeathed property according to the will. The High Court can do it in the exercise of its original civil jurisdiction. The Judge cannot adjust civil rights to the property, nor can he ignore the will and direct letters of administration to issue, when a competent Court has not pronounced as to its invalidity though executors named therein are not willing to act. 14 Bom.L.R. 1031=17 Ind. Cas. 730.

——Application for grant of—Private agreement—Proper procedure.

Where an application was made for grant of a probate and subsequently the parties can to a private agreement and probate was granted in terms of the agreement.

Held, that the procedure was irregular and the proper way was to grant probate in terms of the will and to have recorded in it the terms of the agreement and the remedy for enforcement of the agreement was by a separate suit. 9 C.L.J. 19=1 Ind. Cas. 573.

——Bequest of property to idol—Shebait appointed executor by implication—Letters of administration with will annexed, if should be revoked and probate ordered to issue.

Where the testator having bequeathed his estate to an idol the *shebait* who was appointed by the testator's heirs was granted letters of administration with the will annexed.

Held, that although the applicant might probably have been granted probate as being executor by implication the estate being *very small* and letters of administration having been actually issued and the objector who appealed having no sort of interest in the matter, the order of the District Judge should be maintained. (1910) 15 C.W.N. 1=8 Ind. Cas. 764=10 C.W.N. 233.

——Will—Document by a Shebait appointing another shebait.

Where the shebait of an endowed property executed a document appointing another person as a shebait for the purpose of carrying out the sheba and other rites after the death of the former.

Held, that it was not a will, and probate of such a document could not be applied for. (1905) 9 C.W.N. 1021=32 C. 1082.

——Provisions of Act—Duty of Court to see to proper compliance of.

It is the duty of the Court to see that the provisions of the Probate Act are duly complied with. (1902) 4 Bom.L.R. 637=26 B. 792.

——S. 2—Will by Hindu—Probate is not necessary unless executor is asserting right in Court as plaintiff.

Per *Macleod, C.J.*:—There is no necessity for an executor or executrix under a Will executed by a Hindu to obtain probate. It is only when proceedings have to be taken in a Court of justice and when it is necessary in such proceedings for the plaintiff to prove his title under the will to the reliefs he claims that the Court will insist upon probate or

letters of administration being granted before the plaintiff can take advantage of the decree. 63 Ind. Cas. 248=45 Bom. 1186=23 Bom.L.R. 514=A.I.R. 1921 Bom. 385.

——S. 2 and Indian Succession Act of 1865, S. 331—Professing Hindu religion—Mixed parentage.

Where an intestate professed the Hindu religion though he was of mixed parentage, *held,* the Probate and Administration Act applied and not the Succession Act. 7 Bur.L.T. 133=7 L.B.R. 362=24 Ind. Cas. 638.

——S. 2—Brahmo—Hindu—Sikh—Lapse from orthodox practice, effect of.

A sikh or a Hindu by becoming a Brahmo does not necessarily cease to belong to the community in which he is born. A lapse from the standard orthodox practice binding upon a Sikh or Hindu in matters of diet and ceremonial observance cannot have the effect of excluding from the category of "Hindu" in Act (5 of 1881) one who was born within it and who never became otherwise separated from the religious communion in which he was born. 31 C. 11=13 M. L.J. 381=7 C.W.N. 895=5 Bom.L.R. 845=30 I.A. 249 (P.C.).

——Ss. 2 and 4—Executor, powers of.

S. 2 does not enable an executor appointed before 1881 to claim powers which were for the first time granted by the Act of 1881.

Quaere.—Whether S. 4 vests the property of the deceased in an executor under a will made before 1881. 36 Mad. 575=12 M.L.T. 207=23 M.L.J. 306=(1912) M.W.N. 1112=17 Ind. Cas. 4.

——Ss. 2, 87, 51, 56—"Concurrent"—"Case within his District" in S. 51.

The jurisdiction of the High Court under S. 87, extends to all Districts. The "High Court" mentioned in S. 87 is not merely confined to the appellate jurisdiction of the High Court but includes its original jurisdiction. Consequently the High Court of Calcutta on the original side has jurisdiction to grant probate or letters of administration in any case which could have been brought before any District Judge in either of the two provinces of Bengal. R. 740 of the Rules of the Calcutta High Court cannot override the express provisions of S. 87 giving the High Court concurrent jurisdiction. (1909) 37 C. 224=5 Ind. Cas. 1003.

——S. 3—Will, what is.

The fact that in the document a provision is made for the appointment of a future trustee after the death of the present trustee, does not make the document a will as defined in S. 3, Probate and Administration Act, now replaced by S. 2, Succession Act, 1925. 20 C.L.J. 307, Foll. 105 Ind. Cas. 12 =46 C.L.J. 145=A.I.R. 1927 Cal. 756.

——S. 3—Will and gift—Deed making no disposal of any immediate interest in property is not a gift but is a will.

Where the relevant portions of the document were as follows: "You shall yourself after my lifetime use and enjoy the two rooms built on the ground of the house Municipal No. 11. I shall myself enjoy the rent in respect of those two rooms so long as I may be alive. You shall yourself use and enjoy after my lifetime that rent and that ground and the two rooms from son to grandson and so on in succession with power to gift, mortgage, exchange and sale. No one has any right to or interest in those rooms. To this effect is the gift deed document executed and given in the respect of the aforesaid two rooms and their grounds."

Held, in form it is a deed of gift and not a will, but in fact it is a declaration of the intentions of the donor with respect to her property which she desires to be carried into effect after her death because there is no disposal of any immediate rights of possession or any immediate interest in the property. In this country in wills it is not uncommon for the donor to reserve to himself a life-interest in the property disposed of and such a reservation is not conclusive against the document being testamentary in its character. 10 Cal. 792 and 802, Foll. 78 Ind. Cas. 156=19 M.L.W. 434=34 M.L.T. 292=A.I.R. 1924 Mad. 605=46 M.L.J. 288.

——S. 3—Will—Document by Mahant appointing successor—Probate and Letters of Administration.

A document executed by a *Mahant* purporting to appoint his successor to the *Gaddi* and making over to him as *Mahant,* all the properties of the *Asthal* and the right of performing the *debshebha* is not a will and therefore its probate cannot be granted. 32 Cal. 1082, F. Letters of Administration cannot be granted in respect of properties held by a person as *Mahant.* 20 C.L.J. 307=27 Ind. Cas. 24.

——S. 3—Will—Authority to adopt.

A document is not a will because it is styled a will. A document giving a widow authority to adopt with a provision that she was to have a life estate in the properties in case there was a quarrel between her and the adopted son is not a will, but an authority to adopt. (1913) M.W.N. 199=18 Ind. Cas. 1006.

——S. 3—Will.

A document dedicating certain houses to the worship of Sri Thakurji and stating that the executant will himself manage the property for the worship during the life time and after his death, a committee of three persons be appointed, of whom petitioner will become Manager is not a will within the meaning of S. 3 cannot be admitted, to probate. 5 P.R. (1912)=55 P.L.R. (1912)=142 P.W.R. 1911=12 Ind. Cas. 595.

——S. 3—Will.

Where the *Mahant* of an *Akhra* appointed by a document, certain persons as trustees and *Pujaries* but did not name any successor as *Mahant* in his place it amounts simply to a letter of appointment and not a will within the meaning of the definition of that expression in the Probate and Administration Act. 9 C.W.N. 1028, foll. 1 Ind. Cas. 216 (Cal.).

——S. 3—Hindu Will—Hindu will need not be signed by the testator nor does if need attestation—Such a will if proved to be last will is sufficient to revoke a previous registered will.

In the case of a Hindu, a declaration of the intention with respect to his property which he desires to be carried into effect after his death may be legal although it is not signed by the testator nor attested by witnesses and the draft instructions given by testator or a draft will prepared on such instructions can be treated as a will so as to allow grant of probate and if it contains a clause expressly revoking a previous registered will, the latter must in that case be deemed to have been duly revoked. 104 Ind. Cas. 697=25 A.L.J. 1073=A.I.R. 1927 All. 497.

——S. 2—"District Judge" includes Additional District Judge under Bengal, Agra and Assam Civil Courts Act 1887 (Act 12 of 1887), S. 8 (2).

The Additional District Judge exercises, with respect to the cases transferred to him by the District Judge, the same powers as the District Judge. When the Additional District Judge takes seizin of a case upon a transfer made to him he becomes the "principal Civil Court of original jurisdiction." When the function of a District Judge under the Probate and Administration Act is transferred to an Additional District Judge he has the same jurisdiction as the District Judge with respect to the grant and revocation of Probates and Letters of Administration, even as regards the revocation of Probates granted by the District Judge. 78 Ind. Cas. 701=3 Pat. 609=A.I.R. 1924 Pat. 593.

——Ss. 3 and 51—Letters of Administration—Transfer of case to Additional Judge—Bengal N. W. P. and Assam Civil Courts Act, S. 8, Cl. 2.

It is competent to a District Judge to transfer an application for Letters of Administration to an Additional Judge for disposal. 41 C. 866, Overruled. 42 Cal. 842=21 C.L.J. 437=19 C.W.N. 791=29 Ind. Cas. 935.

——Ss. 3 and 6—Will by Shebait—Debutter—Grant of probate.

Where a Shebait executes a will purporting to give power to his successor to alienate certain specific properties in case of legal necessity, probate of the will could be validly granted. 23 C.W.N. 401=51 Ind. Cas. 884.

——S. 3—Will, validity and genuineness of—Proof.

No distinction between a grant of probate and a grant of Letters of Administration can be drawn so far as the proof of the genuineness and validity of the will is concerned. Both are conclusive evidence of the factum and validity of the will. *Whicker Hume* 7 H.L.C. 124, Foll. 31 M.L.J. 277=4 L.W. 248 =35 Ind. Cas. 854.

——S. 3—Suit against Executor as such—Probate.

Probate is necessary before an executor can be sued as such and as representing the testator's estate. 14 C.W.N. 256=2 Ind. Cas. 818.

——Ss. 3, 4, 23 and 77—Joint family.

Where a son applied for Letters of Administration to the estate of his father.

Held, that he was entitled to Letters of Administration under S. 23 of the Act, as the Joint family property, passing by survivorship was "property of the deceased" within the meaning of S. 4 of the Act and as such included in the terms "property and credits," in S. 77 and the word "estate" in S. 3. 33 Mad. 93=6 M.L.T. 286=19 M.L.J. 591=4 Ind. Cas. 1064.

——S. 3—Probate of oral will.

Probate may be granted of an oral will of a Hindu or Mahomedan. 24 B. 8, foll. 1903 A.W.N. 63= 25 A. 313.

——S. 3—Executors by tenor—Trustees.

The mere circumstance that property is left by a will to trustees without words referring to them as executors would not prevent persons being granted probate as executors according to the tenor, if among the duties to be discharged by them under the will there are included such duties as executors have to perform. But the liability to discharge those duties should appear from the will itself. Where a will ran as follows—"These four persons.....shall take charge of.....and shall with the income..... and by collecting alms conduct from sons to grandsons and so on in succession the daily pooja..... in the manner I conducted them."

Held, that the people appointed to take charge of the properties and manage were trustees and not executors by tenor, and were therefore not entitled to probate. (1906) 16 M.L.J. 558=30 M. 191.

——Ss. 3, 7—Executors by implication—Bequest to an idol—Right of shebait to take out probate.

Where a testator had bequeathed the bulk of his estate for the *Sheba* of a thakur and made certain other dispositions in regard to the rest of the property: *Held,* on the construction of the will, that his wife whom he had appointed shebait, having been confided with the execution of the will, was executor by implication, and as such entitled to take out probate of the will. (1905) 10 C.W.N. 232=15 C. W.N. 1=6 C.W.N. 310.

——Ss. 3, 7—Will—Executor—Executor by appointment.

The Probate and Administration Act, 1881, does not prohibit the appointment of an executor to the will by an executor thereof. (1903) 5 Bom.L.R. 639.

——Ss. 4, 12, 90—Title of executor, whether vests before grant of probate—Sale by executor before getting probate, validity of.

Under the Probate and Administration Act, 1881, the estate of a testator vests in the executor and the executor has the power to dispose of the estate from the date of the testator's death, even though probate has not been obtained.

Under the English Law, the title of an executor is derived from the will and not from the probate though it is probate alone which authenticates his right, and the Indian Legislature has not departed from this principle in the Probate and Administration Act, 1881.

Section 12 of the Act does not imply that before probate, the executor has no title but is only intended to simplify the proof of his title as dating from the testator's death by authenticating the will against all the world. A.I.R. 1932 P.C. 92=9 O.W.N. 201 =36 C.W.N. 441=62 M.L.J. 365=55 Mad. 443= 1932 A.L.J. 293=35 L.W. 532=1932 M.W.N. 486 =55 C.L.J. 263=34 Bom.L.R. 264=59 I.A. 112= 136 Ind. Cas. 111 (P.C.).

——S. 4—Joint family property—Grant of proing by survivorship does not vest in executor or administrator.

Where the property belongs to a joint Hindu family, a person claiming by survivorship is not entitled to a grant of the Letters of Administration to any portion of such property. The reason for the rule is obvious. There is no estate or assets which descended from the deceased. The rule is applicable to cases where the property is admittedly joint and applies even where the property consists of shares of a company acquired by members of a joint Hindu family with joint funds. 126 Ind. Cas. 357=A.I.R. 1930 All. 82.

——S. 4—Joint family, property—Grant of probate.

Under S. 4 nothing can vest in an executor or administrator which was joint family property and which would have otherwise passed by survivorship. The applicant gets nothing at all by the grant and it does not cause prejudice to any one. 5 Pat.L.J. 107 =(1920) P.H.C.C. 87=1 Pat.L.T. 19=54 Ind. Cas. 807.

——S. 4—Election by executor—Executor having once elected to act as such cannot refuse or renounce.

The office of executor being a private office of trust named by the testator and not by the law, one named executor may refuse the office or renounce. It is, however, too late to refuse or renounce when one has once elected to act as executor; and he may determine such election by acts which amounts to an administration. The acts which amount to an administration, so that the party cannot afterwards refuse are: (1) anything done by the executor with relation to the effects of the testator which shows an intention in him to take upon him the executorship, and (2) whatever acts will make a man not named executor in the will, liable as executor *de son tort*. 107 Ind. Cas. 70=32 C.W.N. 108=A.I.R. 1928 Cal. 275.

——S. 4—Application by executor for probate —Acceptance of office.

An Executor applying for Probate must be taken to have accepted the office of executor and the property of the deceased vests in him as the legal representative of the deceased. 16 M.L.T. 547=26 Ind. Cas. 472.

——S. 4—Property not covered by will disposed of by executor as his own without dividing it among sharers—Vendee knowing the terms of will cannot acquire good title.

Where the executor took charge of the property not mentioned in the will and instead of dividing it among the heirs of the deceased disposed it of as his own and the vendee knew of the will and had taken legal advice on its construction.

Held, that the vendee must be deemed to have been aware of the infirmity of the executor's title and he could not rely upon the conveyance. 102 Ind. Cas. 639=5 Rang. 427=54 I.A. 276=29 Bom.L.R. 1017 =1927 M.W.N. 492=39 M.L.T. 134=25 A.L.J. 713=46 C.L.J. 126=31 C.W.N. 1078=26 M.L.W. 417=A.I.R. 1927 P.C. 151=53 M.L.J. 71 (P.C.).

——S. 4—Mahomedan Law.

Under Mahomedan Law, in the absence of any Letters of Administration being granted, the estate of the deceased vests in the heirs. But the statutory vesting under the Probate and Administration Act must take effect in substitution for the vesting in the heirs which exists between the death of the deceased and the grant of the Letters. 99 Ind. Cas. 482=28 Bom.L.R. 1262=A.I.R. 1927 Bom. 16.

——S. 4—Widow adopting a son to testator under his authority—Adoption puts an end to executor's power of disposal.

A person died leaving a Will by which he appointed one *C* and his widow executor and executrix, respectively. The will contained an authority to the widow to adopt. The widow, in pursuance of the authority, adopted a boy five days after her husband's death, on the 9th September 1881. The adopted son died in 1884. The executor sold a portion of the property in 1914.

Held: that the executor has power to represent his testator and in no respect does a grant of probate decide any question as to the disposing power of the testator, or the existence of any disposable property; and that in 1914, when the sale took place, the executor, though he may still have represented the testator with regard to the property in the power of the testator to dispose of, did not and could not represent the testator with regard to the property in which the adopted son had by his adoption in 1881, acquired an interest under Hindu Law. The fact of adoption changed the whole course of devolution of this property, and the fact, that the adopted son died a few years afterwards, can, of course, make no difference in this respect. 102 Ind. Cas. 841=A.I.R. 1927 Mad. 782.

——S. 4—Executor and legatee—Executor holds property with right of testator—Property vests in residuary legatee only after administration is complete.

An executor as such is the owner of the properties of the testator and holds these properties in the right of the testator and not in the right of the beneficiaries. The result is that in all the cases coming within the Hindu Wills Act or the Probate Act the executor or the administrator as such is the legal representative of the deceased and statutory owner of property except such as would otherwise have passed by survivorship to some other person. The residuary legatee does not become proprietor until after the administration has been completed and his interest thus ascertained. This interest is subject to the payment of debts and legacies and the discharge of other trusts contained in the will. No doubt he is beneficially interested in the estate subject to these payments and the discharge of these trusts; but he is not proprietor except when a residue has been ascertained, which on completion of administration is made over to him by the executor. 83 Ind. Cas. 812=3 Pat. 880=5 P.L.T. 513=A.I.R. 1924 Pat. 721.

——S. 4—An executor or administrator by virtue of his office, *i.e.*, in the character merely of executor or administrator, takes an estate in the property of the deceased and a legal character is vested in him.

The property vests in the legatee for the purpose of enjoyment, but it vests in the executor for the purpose of administration. The enjoyment of the property must be postponed to the due administration of the property. 60 Ind. Cas. 350=2 P. L.T. 305=A.I.R. 1921 Pat. 313.

——Ss. 4 and 92—Two executors mortgagees—Payment to one.

Though the money in question formed a portion of the estate of the deceased, it did not vest in the executors' asset under S. 4, but vested in them by virtue of certain bonds which were given to them by mortgagors and therefore an endorsement by one of them did not amount to a discharge. 29 Ind. Cas. 139 (Cal.).

——S. 4—Vesting of the Estate—Time—Cases not coming under Hindu Wills Act.

The estate of the deceased vests in the executor from the time of the death of the testator.

The right of an executor to sue in respect of the estate accrues from the time of the death of the testator; the fact that probate is not taken before the suit does not affect the right.

In cases not governed by the Hindu Wills Act, S. 4 of the Probate and Administration Act and not S. 187 of the Indian Succession Act will apply. 37 Mad. 175=24 Ind. Cas. 852.

——S. 4—Vesting of property in executor.

S. 4 of the Probate and Administration Act vests the property of the testator in his executor excepting that which the testator has no right to bequeath at the time of his death. Survivorship has the effect of rendering a will invalid only with respect to property which the testator could not dispose of at the time of his death. All other dispositions are valid. 38 Mad. 369=14 M. L. T. 181=25 M. L. J. 363=1913 M. W. N. 779=21 Ind. Cas. 73.

——S. 4—Suit by executor—Plea of payment to third person—Not valid.

The plaintiff who claimed the estate of Chandubhai under her Will, had applied for probate. Beharilal had sued the plaintiff for possession of Chandubhai's estate on the ground that he had been adopted by Chandubhai. Both these proceedings were compromised by Beharilal executing a sale on behalf of the plaintiff of whatever right he may have had. Probate was granted to the plaintiff. He then sued defendant on three bonds executed by him in favour of Chandubhai. The defendant pleaded that he had adjusted the claim by a payment to Beharilal before the compromise.

Held, as the plaintiff had obtained probate of Chandhubhai's Will he was *prima facie* the only person entitled to claim performance of the contracts made with the deceased and entitled to give a discharge. The onus was on the defendant who pleaded a discharge by Beharilal to prove the latter's right to give it. The mere fact that Beharilal was making a claim did not give him a right to give a discharge or justify the defendant in making the payment to him. The adjustment having been made with a person not in possession of the bonds and whose title was, to the knowledge of the defendant disputed, was not *bona fide*. 16 N.L.R. 212=55 Ind. Cas. 418.

——S. 4—Succession Act (10 of 1865), S. 187—Hindu Wills Act (21 of 1870), S. 2—Mahomedan will—Probate—Evidence.

No legislation requires probate to be taken of a Mahomedan's will. Therefore such a will should be admitted in evidence without prebate; and the Court will determine whether it is duly proved in the suit in which it is sought to be made evidence. 8 B. 241, foll. 37 Cal. 839=15 C.W.N. 185=8 Ind. Cas. 655.

——S. 4—Probate — Right to take.

Persons, named in a document, left by a deceased *Mahant*, and purporting to grant them power to dismiss his successor, for misconduct, are not competent to take Probate and the document itself cannot be treated as will. 5 Ind. Cas. 149 (Cal.).

——Ss. 4, 12, 59, 88, 96—Probate, effect of—Estoppel.

The grant of probate does not create any estoppel against the heirs claiming adversely to a Mahomedan will, so as to prevent them from putting forward their claim as against a beneficiary under the will. 33 C. 116=32 I.A. 244=7 Bom.L.R. 876 =9 C.W.N. 938=1 C.L.J. 594=2 A. L. J. 758 =15 M.L.J. 336 (P.C.).

——S. 5—Powers of Court—S. 5 does not necessitate the proof of the will—Grant of probate is to some extent discretionary—Court has to see whether duty on the properties in respect of which grant is sought under S. 5 has been paid when probate was granted under S. 62 or 64—If entire duty is not already paid, duty on properties in respect of which grant under S. 5 is applied for, must be paid.

The jurisdiction conferred on a Court in India under S. 5 is analogous to that conferred on the Courts in England, Scotland or Ireland by the Reseal ing Statutes. The Court has no power, under S. 5, either to grant probate or letters of administration with or without the Will annexed. It has power only to grant letters of administration with a copy of properly authenticated copy of the Will annexed. The language employed by the Legislature under S. 5 is not accidental but is deliberate, and enables the Court, following the English Law to dispense with the necessity of proof of the original Will.

Under S. 5 there is some discretion in the Court to refuse the grant. The Court must be satisfied first that the executor or the administrator has given security to cover the estate of the deceased within the jurisdiction of the Court which granted probate or letters of administration as well as that within the jurisdiction of the Court asked to make a grant under S. 5 and, secondly, that he has paid the duty in respect of the estate of the deceased within the jurisdiction of the Court that granted the probate or letters of administration as well as that within the jurisdiction of the Court asked to make a grant under S. 5. When the Court is satisfied as to these facts, and it has been shown that the Will has been proved and deposited in a Court of competent jurisdiction situate beyond the limits of the province, there is no further discretion left in the Court to refuse to make a grant under S. 5. It follows therefore that either the entire probate duty is payable on the application made under S. 62 or S. 64 of the Act or that the applicant making the application under S. 5 must pay such portion of the probate duty as was not paid at the time of his application under S. 62 or S. 64 of the Act. 62 Ind. Cas. 513=2 P.L.T. 683=6 P. L.J. 411=A.I.R. 1921 Pat. 206.

——S. 5—Court-fee.

The court-fees must be regulated by the value of the estate not at the date of the application under S. 5 but at the date of the original grant under S. 62 or 64. 62 Ind. Cas. 513=2 P.L.T. 683=6 P.L. J. 411=A.I.R. 1921 Pat. 206.

——S. 5—Scope—Grant under S. 5 is merely ancillary to the grant under Ss. 62 and 64 and is not one contemplated by Court-Fees Act, Art. 11.

The grant of probate contemplated to Art. 11 of the Court Fees Act is the grant under Ss. 62 and 64 of the Probate and Administration Act. The grant made under S. 5 is only an ancillary grant in order to give efficacy to the grant already made by another Court of competent jurisdiction and the procedure laid down in S. 5 is analogous to the procedure in England which enables the Probate Court in England to re-seal Scotch, Irish or Colonial grants. Grant under S. 5 is in no sense a grant of probate or letters of administration either with or without Will annexed. 62 Ind. Cas. 513=2 P.L.T. 683=2 P. L. J. 411=A.I.R. 1921 Pat. 206.

——S. 5—Will—Deposit in Court of competent jurisdiction — Property — Authenticated copy.

S. 5 does not require that the Will should remain in Court for all time, after it has been once deposited. It is quite sufficient if the will had in fact been deposited in a foreign court of competent jurisdiction and that the Court had before it the original Will at the time it made a judicial pronouncement on the valdity of the Will. The copy of the Will, required by S. 5 of the Act does not necessarily mean a copy authenticated by the notarial seal of a notary as provided by the judicial process of a foreign court is a properly authenticated copy. 22 C.W.N. 713=44 Ind. Cas. 166.

——S. 6—Foreign will—Probate of—Grant of in British India—Conditions.

Probate of a Will by a testator domiciled abroad though not proved in the place of domicile will be granted in British India if it is valid according to the law of the place of domicile and if there are assets in British India. 20 C.W.N. 833=(1916) 1 M.W.N. 455=18 Bom.L.R. 642=43 I.A. 113=35 Ind. Cas. 323 (P.C.).

——Ss. 6 and 50—Will, proof of—Grant of probate or Letters of Administration—Duty of Court.

A Probate Court is bound to determine whether a Will was as a matter of fact made and it cannot stay its proceedings and wait indefinitely for the decision of a suit subsequently instituted in regard to validity of the Will. The finding in the suit can only be binding on the parties to it. But the decision of the Probate Court operates as a judgment *in rem* and therefore the Probate Court must come to its own conclusion as to the due execution of the Will.

In order to conclude whether a Will is genuine internal evidence is no doubt of great importance; but an improbability to prevail against direct evidence of disinterested persons must be clear and cogent. 145 P.L.R. 1915=66 P.W.R. 1915=29 Ind. Cas. 687.

——Ss. 6 and 7—Will—Death of minor legatee—Right of executor to probate.

Where a testator died leaving a Will and a codicil, the principal beneficiary being his minor son, appointing the applicant guardian till the majority of the minor and gave all property to his charge with certain directions and during the pending of the probate proceeding taken out by the applicant, the minor died, *held*, that if the codicil did make the applicant executor, then he must have probate irrespective of the minor's death but that the direction in the Will making the applicant guardian of the minor beneficiary did not make him an executor and was not sufficient for grant of probate. 44 P.L.R. 1915=220 P. W. R. 1915=27 Ind. Cas. 749.

——S. 6—Will—Proof.

A will may be proved in any proceeding other than a probate proceeding though no probate of it has been taken under the Act. But unless a probate or letters of administration has been taken a will cannot prove the title of any person named therein by the testator. 4 Ind. Cas. 508, Foll. 18 C. W. N. 1136=26 Ind. Cas. 21.

——Ss. 6 and 12—Liability to take probate.

There is nothing in the Act to prevent an executor from acting as executor and exercising the powers under the Act without obtaining probate. 36 Mad. 575=12 M. L. T. 207=23 M. L. J. 306=(1912) M. W. N. 1112=17 Ind. Cas. 4.

——S. 6—Document containing no testamentary disposition — Probate if may be granted for.

A document purporting to be a Will, which merely reiterate the lines of a disposition of a trust made by a previous trustee but which contains no testamentary disposition properly so-called, is not an instrument of which probate may be granted. But a bequest to a legatee of all that the executant died possessed of contained in the said instrument would alter its character and then it may be admitted to probate as a whole. 15 C. W.N. 1014=11 Ind. Cas. 152.

——Ss. 6 and 7—Shebait—Executor by implication.

Probate may be granted to a shebait as an implied executor. 15 C.W.N. 1=8 Ind. Cas. 764.

——S. 6—Probate, grant of, to executor.

Probate can be granted only to an executor under the will. (1902) 6 C.W.N. 787.

——S. 7—Executor can be appointed by necessary implication.

Where a will appointed a person as executor on behalf of certain minors,

Held: that under S. 7, Probate and Administration Act, corresponding to S. 222 (2), Succession Act an executor can be appointed by necessary implication, and in this particular case the minors were appointed executors by necessary implication. 105 Ind. Cas. 626=A.I.R. 1928 Cal. 164.

——S. 7—Executor—Appointment by implication.

The mere fact that an elder son is appointed by Will as a trustee of the minor younger son he is directed to deal with a certain house as a trustee of the minor is insufficient to show that he was appointed executor of the Will. 7 L.B.R. 266=25 Ind. Cas. 820.

——S. 7—Executor by tenor—Essentials.

The mere fact that a person is appointed a shebait or trustee of the whole or a large portion of the estate of the testator, is not sufficient by itself to constitute him an executor by implication. But where the testator uses the word trustee or shebait and at the same time imposes upon the person duties involving the function of an executor, there is a good appointment as executor by necessary implication. In order to constitute one an executor according to the tenor of the will, it must appear on a reasonable construction thereof, that the testator intended that he should collect his assets, pay his debts and funeral expenses and legacies which are the essential duties of an executor. The appointment of executors by necessary implication is not to be favoured, and the language of the will is not to be strained for this purpose; but in doubtful cases letters of administration with the will annexed ought to be granted. (1907) 6 C.L.J. 453.

——S. 7—Executor—Appointment of, by necessary implication—Person who was appointed to manage all properties—Others to advise him.

Where a testatrix appointed a person to be shebait of an idol and to manage all properties belonging to an idol of which she was herself a shebait as she was doing during her life-time, and also appointed a few others to advise and supervise the shebait.

Held, on the construction of the will, that the person appointed shebait must be deemed to have impliedly appointed executor and not the persons appointed to supervise him. (1901) 6 C.W.N. 310.

——S. 7—Probate application cannot be converted into one for letters of Administration—Inquiry into testation title whether permissible.

An application for probate cannot be converted into one for Letters of Administration. The Court must not inquire into the existance of title to or

capacity of testator to dispose of property covered by the will. 19 A. 458; 26 B. 792, Foll. 1 Pat. L.W. 744=41 Ind. Cas. 279.

——S. 8—Executor—Conditional appointment—Death of executor—Letters of administration.

If testator appoints the son of the executor to be an executor after the death of the latter if the son is fit for the work, it simply means that the person named as executor is free from the legal disabilities named in S. 8. On the death of an executor appointed under a will a universal or residuary legatee may be admitted to prove the will., Letters of Administration with the will annexed may be granted to him of the whole estate or of such portion thereof as may be unadministered. Where such universal or residuary legatee is a minor, his mother may be appointed administrator during his minority. 56 Ind. Cas. 841 (Pat.).

——Ss. 8 and 90—Minor — Letters to—Position of administrator.

A grant of Letters of Admitration to a minor is a nullity. An administer of the estate of a deceased is in no sense, the guardian of his minor heirs. If he sells their property as guardian, the sale is void and cannot be ratified by the minor. 9 L.B. R. 186=12 Bur. L. T. 27=50 Ind. Cas. 324.

——Ss. 8 and 9—Probate grant of, to some executors—Remedy of others.

If some out of the several executors appointed under a will obtain probate without citation upon others, the latter are entitled to apply under S. 9 and obtain probate unless they are debarred under S. 8. 45 Ind. Cas. 336 (Cal.).

——S. 8—Administrator-General.

No Letters of Administration should be issued to the Administrator-General except on the application of that Officer or of any of the parties. 9 Bur.L.T. 187=8 L.B.R. 404=34 Ind. Cas. 99.

——S. 9—Will—Probate—Grant to some executors — Application by remaining executor practice—Succession Act, S. 184.

The grant of probate to some of the Executors does not debar others frm applying therefor, but in such a case the Probate should be granted to them jointly with those to whom it had been granted already. 42 P.L.R. (1913)=110 P.W.R. 1913 =18 Ind. Cas. 16.

——S. 11—Executor given power to perform worship—Death—Survival of right to surviving executors.

The right to perform certain religious ceremonies conferred by the will exclusively on the executors passed on the death of one of them to the remaining executors, and was not transmitted to the heir of the deceased executor. 9 C.L.J. 383=13 C.W. N. 557= 1 Ind. Cas. 289.

——S. 12—Object of section.

The object of S. 12 is to get rid of multiplication of proofs. The section does not imply that before probate, the executor has no title. The title of the executor is deprived, not from the probate, but from the will though it is probate alone which authenticates his right and dispenses with the proof of the execution of the will. A. I. R. 1932 P.C. 92=9 O.W.N. 201=36 C.W.N. 441 =62 M.L.J. 365=35 L.W. 532=1932 A. L. J. 293=1932 M.W.N. 486=55 C.L.J. 263=34 Bom. L.R. 764=59 I.A. 112=55 Mad. 443=136 Ind. Cas. 111 (P.C.).

——S. 12—Effect of finding on will.

The finding as to the execution of the Will of a probate Court binds at any rate the parties and privies to the pobate proceedings. 101 Ind. Cas. 289=5 Pat. 777=8 P.L.T. 510=A. I. R. 1927 Pat. 61.

——S. 12—Mortgage of debutter property expressly inalienable is invalid.

Where, letters of administration have been granted, not upon intestacy but with copy of the Will annexed, the first portion of S. 12 is applicable, and the Will is established from the date when the testator dies, and with effect from that very date the disputed properties become absoluely vested in the legatee,

Where the properties were made expressly inalienable and not liable to seizure for the personal debts of the heir of the testators, and the devolution of the *Shebaitship* was at the same time, carefully prescribed;

Held, that upon the death of testator the ownership in the dedicated properties vested in his ancestral deity and neither his widows nor his adopted son (*shebait*) could individually or jointly create a valid title by a mortgage or transfer. 74 Ind. Cas. 630=50 Cal. 49=36 C.L.J. 35=A. I. R. 1923 Cal. 1.

——Ss. 12, 14 and 15—Letters—Grant of—Relation back to date of death of intestate—Intesmediate acts how far binding.

Letters of Administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate although they entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted the moment after his death. An administrator derives his title from the grant of letters only. A mortgage executed by an heir who afterwards becomes an administrator does not bind the estate of the intestate, but is binding on the estate of the executant. 29 C.L.J. 58=49 Ind. Cas. 532.

——S. 12—Will and gift—Court of probate admitting document as will—Court of title or Court of construction cannot hold it to be a gift.

The question whether a document alleged to be a Will is in fact a Will is a question peculiarly for the Court of Probate, and not a question for the Court of title or a Court of construction. It was open to the Court of construction to construe the Will and to say that certain person had no estate or interest under the Will. It is open to the Court of title to hold that the testator had no power to execute the Will. But it is not open to it to say that the document alleged to be a Will, and relied upon as a Will and established as a Will in Court of Probate, is in fact not a Will, but a deed of gift. 62 Ind. Cas. 611=2 P.L.T. 728=A.I.R. 1921 Pat. 397.

——S. 12—Executor — Title of.

An executor derives his title from the will of the testator and not from the probate. Probate is only evidence of title and the executor has the right to sue before grant of probate. 20 C.W.N. 833

=(1916) 1 M.W.N. 455=18 Bom.L.R. 642=43 I.A. 113=35 Ind. Cas. 323 (P.C.).

——S. 12—Executor—When represents estate.

Executor's liability to be sued does not begin till he has intermeddled with the testator's estate or proved the will. Hence a judgment passed against him till then, does not bind the testator's estate. His liability ceases if he subsequently renounced his capacity as executor. 22 C. L. J. 266=16 Ind. Cas. 690.

——S. 12—Probate—Effect of obtaining.

Obtaining a probate of a will means that the will was executed by the testator and does not decide his power to make the will or the validity of the contents. 17 C.W.N. 445=16 Ind. Cas. 48.

——S. 12—Power of the Court.

A Probate Court after it has granted a probate has no power to give the grantee possession of any property without further proceedings. 1 U. B. R. (1910) 69=10 Ind. Cas. 993.

——S. 12—Probate — Revocation — Intermediate acts of executor.

A person who in good faith derives title from an executor at a time when the probate was in force is not affected by the subsequent revocation of the probate. 7 Ind. Cas. 9 (Cal.).

——S. 12—Executor—Liability.

In spite of S. 12 an executor is not liable until he has accepted the position of the executor and he cannot be said to have fully accepted that petition until he obtains probate. 14 C.W.N. 256 =2 Ind. Cas. 818.

——S. 12—Constructive resjudicata—Decree for possession against executor and legatee—Grant of letters of administration with will annexed to legatee.

A suit was brought by the widow of a testator, before probate, against the executor and the legatee for possession of property, a consent decree was passed against the executor and an *ex parte* decree was made against the legatee who then applied for letters of adminstration with copy of the will annexed and after due service of notice on the widow, executor and relatives of the testator, the will, was duly proved. The legatee then sued to recover possession of the same property from the widow on the strength of the title of legatee.

Held, that the doctrine of *res judicata* and of constructive *res judicata* were inapplicable. Though under S. 12 is a probate when granted establishes a will from the death of the testator, yet a litigant is not bound to assert his title under the will till it has been proved in a court of empetent jurisdiction. 12 C.L.J. 486= 8 Ind. Cas. 28.

——S. 13—Grounds for unfitness.

A Court cannot refuse an executor probate because it considers him unfit to be executor, unless the unfitness is of the nature of legal incapacity, that is, minority or unsoundness of mind. 94 Ind. Cas. 73=23 M.L.W. 462=1926 M.W.N. 323=A. I.R. 1926 Mad. 605.

——Ss. 13, 31, 33 and 41—Letters of Administration—Manager of Court of Wards—Grant to a nominee of—Grant to a statutory person—Minor and disqualified proprietor.

Letters of administration cannot be granted to a minor. They may be granted to the legal guardian of the minor, provided the minor is a sole residuary legatee or a person who would be solely entitled to the estate of the intestate. Legal guardian means a guardian under the Guardian and Wards Act. The application for letters of administration must be on behalf of the guardian and not on behalf of the minor through the guardian and the guardian must, in the first instance, apply to be appointed the minor's guardian for the purpose of enabling him to obtain letters of administration for the use and benefit of the minor. Until he has obtained an order of the Court appointing him guardian he cannot be considered a legal guardian within S. 31. The right of administration follows the right to the property. It is a good general rule to grant administration to the largest interest and that the rule ought not to be departed from except under urgent necessity for the protection and preservation of the estate. The Manager of a Court of Wards is not entitled by virtue of his office to apply for letters of administration to the estate of the deceased in which the disqualified proprietor may have a large interest. While the Probate Act makes special provision for a Minor or lunatic there is no provision in the statute that takes away administration from a disqualified proprietor who is not a minor or lunatic and gives it to the Manager of the Court of Wards. The essential condition for the exercise of the Court's discretion under S. 41 of the Probate Act is the presence of such special circumstances in the case as render such a grant absloutely necessary not convenient merely as being as a saving of time or express to the applicant. The Court under no circumstances can grant letters of administration to a nominee of the Court of Wards by virtue of his office, but it may be granted to him "as some person" within S. 41. That power can only be exercised when the Court is of opinion that the estate is likely to be wasted or dissipated in the hands of the person entitled under the general provisions of the statute to the grant. 1920 P.H.C. C. 187=1 Pat.L.T. 304=5 Pat.L.J. 347=57 Ind. Cas. 583.

——S. 13—Letters of Administration—Grant of —Conflict of unequal interests.

Where there is a conflict of unequal interests between the applicants for Letters of Administration, it should be granted to the applicant having the greatest interest. (3 Ind. Cas. 719, Foll.). 46 Ind. Cas. 875 (L.B.).

——Ss. 13, 23 and 41—Letters of Administration—Minor — Sister — Adopted son.

Letters of Administration might be granted to a sister though an adopted son is put forward and his title is in dispute. Letters of Administration, cannot be granted to a minor. 10 Bur. L.T. 184 =44 Ind. Cas. 138.

——Ss. 13, 33—Letters of Administration granted to minors under the guardianship of their father.

Held, that under Act No. 5 of 1881, letters of administration cannot be granted to minors under the guardianship of their father. (1908) A. W. N. 257=5 A.L.J. 736.

——S. 14—Legal effect of grant.

A grant of administration does not decide any question of title. It merely decides the right to

administer. 94 Ind. Cas. 750=7 P.L.T. 631=1926 P.H.C.C. 118=A.I.R. 1926 Pat. 356.

——Ss. 14 and 15—Executor—Administrator—Title of.

The title of an administrator arises only from grant of Letters of Administration but the position of an executor is different. The latter derives his authority from the will of the testator and not from the grant of probate. 20 C. W. N. 833=(1916) 1 M.W.N. 455=18 Bom. L. R. 643=43 I.A. 113=35 Ind. Cas. 323 (P.C.).

——S. 16—General citation.

Where the executor to whom general citation has been issued to attend fails to attend and the validity of the will is established, the Court ought to issue special citation under S. 16, and should issue Letters of Administration if he fails or refuses to accept executorship. He is not however bound to renounce executorship till the will is established. 66 Ind. Cas. 974=47 Cal. 838.

——S. 16—Renunciation.

Renunciation of executorship can be made by the executor without issue of citation. 84 Ind. Cas. 154=51 Cal. 745=A.I.R. 1924 Cal. 864.

——S. 17—Effect of disputing will.

Where the position taken up by the applicant was that the Will was a forgery and that the ladies through whom he claimed were in possession not by virtue of the Will but adversely to the whole estate, and had acquired a title to the estate by adverse possession.

Held, that the applicant was incapable to act in the discharge of his duties as administrator. 94 Ind. Cas. 750=7 P. L. T. 631=1926 P.H.C.C. 118=A.I.R. 1926 Pat. 356.

——S. 17—Renunciation by executor is not rendered invalid by his having intermeddled with the estate of the deceased. (1894) A. C. 437, Foll. 84 Ind. Cas. 154=51 Cal. 745=A.I.R. 1924 Cal. 864.

——S. 17—Renunciation—Retraction.

A renunciation by an executor cannot be retracted. 84 Ind. Cas. 154=51 Cal. 745=A. I. R. 1924 Cal. 864.

——S. 17—Withdrawal of petition renouncing executorship not allowed, being too late after the grant of probate.

An application for probate was made by the respondent on the 8th June, 1920. On the 3rd July an application was made by the appellant that he was willing to be an executor under the will. In that petition, however, he further stated that it would be necessary to file a petition of objection to the suit. On the 17th July, 1920, he made an application asking for further time until the 27th July, 1920, for the purpose of filing objections. Then on the 27th July, 1920, an application was made by the appellant in which he said contrary to his previous statement that he did not agree to be an executor under the will. On the 7th August an order was passed granting probate. Appellant's name was not included among the probate holders. On the 27th September, 1920, the appellant prayed that he might be allowed to withdraw his application of the 27th July, 1920, and that he might be appointed an Executor along with his two brothers. The appellant did not file his petition of withdrawal until two months of petition after the petition of renunciation had been filed.

Held, when the appellant asked to withdraw the renunciation of the executorship, the grant of probate had already been made on the 7th of August, 1920, and therefore his application not being within 2 months came too late. The date of the grant of probate is the date of the passing of the order granting probate and not any subsequent date of order to issue the probate. 75 Ind. Cas. 218=27 C.W.N. 285=A.I.R. 1923 Cal. 444.

——S. 17—Probate—Official Trustee—No formal renunciation—Retraction.

Where the Official Trustee did not make any formal renunciation of his right to probate but merely intimated his idea to the solicitor of the estate and subsequently retracted the communication:

Held, that he was not precluded from applying for probate. (1907) 35 C. 156.

——S. 18—Will—Probate—Executor—Letters of Administration.

An executor called upon by citation to accept or renounce is compellable if he accepts to take out probate within a limited time, otherwise, Letters of Administration with a copy of the will annexed may be granted to any competent applicant. 40 Bom. 666=18 Bom.L.R. 766=36 Ind. Cas. 373.

——S. 18—Brahmo—Hindu—Sikh — Lapse from orthodox practice, effect of.

A Sikh or a Hindu by becoming a Brahmo does not necessarily cease to belong to the community in which he is born. A lapse from the standard orthodox practice binding upon a Sikh or Hindu in matters of diet and ceremonial observance cannot have the effect of excluding from the category of "Hindu" in Act V of 1881 one who was born within it and who never became otherwise separated from the religious communion in which he was born. 31 C. 11=13 M.L.J. 381=7 C.W.N. 895=5 Bom.L.R. 845=30 I.A. 249 (P.C.).

——Ss. 19 and 45—Executor of an administrator—If can administer estate.

The administrator of an executor is not a derivative executor. Where an executor dies without having fully administered the estate the duty of carrying on the administration of that estate does not devolve upon the deceased executor or administrator's personal representative but on a person appointed for the purpose under Ss. 19 and 45 of the act. 17 M.L.T. 61=27 Ind. Cas. 849.

——S. 19—Will—Legatee, when can obtain Letters of Administration.

A legatee cannot be allowed to administer the estate of a deceased person if there are executors willing to act and the question of their fitness or otherwise cannot be considered; but a legatee has a right to be made a party to such a proceeding for protecting his own interests in the property. 21 C. 195: 21 C. 539, Foll. 29 P.W.R. 1912=24 P.L.R. 1912=13 Ind. Cas. 171.

——S. 19—Grant of administration to universal legatee—Will—Construction.

Held, that a bequest of future interest accruing on the testator's estate between the date of the will and the testator's death was a specific be-

quest, though the amount might be unascertained, and that neither such a bequest, nor a provision that the furniture, metal utensils and jumla ashal contained in ascertained house should, after the death of two ladies, become the joint property of certain persons named in the will, could place those legatees in the position of residuary legatees entitled, within the meaning of S. 19 to ask for letters of administration to the estate of the testator. 1901 A.W.N. 108.

——S. 20—Right of representative of residuary legatee—Letters of administration.

The right of the legatee to obtain a grant of letters of Administration is a personal right and if he dies during the pendency of the application this right does not devolve on his heir. 45 Cal. 862=51 Ind. Cas. 76.

——S. 21—Duty of Court — Will must be established although administration is complete.

The delay in the application should put the Court on an enquiry as to whether there is anything to be administered, but that applies to a case where the application is for Letters of Administration, not for Letters of Administration with the Will annexed. It is of paramount necessity that the Will should be established and the establishment of the Will is one of the functions of the Probate Court, and the Probate Court cannot decline to exercise that function because the administration is complete. 94 Ind. Cas. 750=7 P.L.T. 631=1926 P.H.C.C. 118=A.I.R. 1926 Pat. 356.

——S. 21—Residuary legacy made, to Idol—Shebait and not purohit can apply for letters.

A lady after directing in her will payments of certain legacies to certain legatees including the priest the (respondent), disposed of the residue for the maintenance of worship of a certain idol established by the ancestors of her husband. The executor having failed to take out probate, the priest applied for letters of administration.

Held, that as the priest was not a **shebait**, he was not entitled to the letters of administration. The person entitled was the **shebait** of the idol. 72 Ind. Cas. 686=36 C.L.J. 447=27 C.W.N. 411=50 Cal. 233=A.I.R. 1923 Cal. 160.

——S. 21—Letters of Administration—Grant of—Attorney.

The Court cannot make a grant of Letters of Administration to an Attorney who is only authorised to produce to the Court the confirmation of the trust, disposition and settlement for the purpose of having it resealed at Calcutta or to demand, recover or collect all sums of money etc. due to the estate of the deceased. 40 Cal. 74=18 Ind. Cas. 907.

——Ss. 21 and 23—Letters of Administration — Grant of—No estate to be administered.

When there is no estate to be administered and no suggestion that any creditors have to be paid or any debts to be realised and the application is an obvious device to obtain a decision about title from the Probate Court, letters should not be granted. 17 C.L.J. 66=17 Ind. Cas. 155.

——S. 21—Letters of Administration—Creditor—Extinguishment of debt.

Though taking out Letters of Administration to the estate of his debtor by the creditor may not in itself operate as an extinguishment of the debt, if the debtor has assets which the creditor may retain to pay himself, it is an extinguishment, for possession of assets amounts to payment But this doctrine does not apply where only one of two obligees is appointed one of several executors of the obligor. 38 Cal. 342=13 C.L.J. 3=8 Ind. Cas. 837.

——S. 23.

Synopsis.

1. Discretion of Court.
2. Right to grant.
3. Scope of enquiry.

1. Discretion of Court.

——S. 23—Discretion of Judge.

It is discretionary with the Judge to grant Letters of Administration. 96 P. L. R. 1917=42 Ind. Cas. 737.

——S. 23—Letters of Administration — Ulterior object.

Where the object of the litigation appears to be not to administer the estate left upon the death of the deceased but merely to obtain a declaration of heirship so as to fortify the position of the successful party in a regular suit that may be instituted, no grant of Letters of Administration ought to be made. 17 C.L.J. 65=16 Ind. Cas. 588. [See also 16 C.W.N. 798=16 Ind. Cas. 453.]

——Ss. 23, 64—Hindu, death of; leaving widow who survived for 30 years—Application for letters of administration, when no estate left to be administered.

It is no doubt not necessary for the Probate Court to decide what assets are likely to come to the hands of a petitioner for letters of administration to consider whether there is any estate whatever to be administered. Where the object of the litigation appeared to be not to administer the estate of a deceased (a Hindu who had died so long ago as 1875 and was survived by his widow in possession till 1907) but really to obtain a declaration of heirship so as to fortify the successful party in any regular suit that may be instituted, the High Court held that no grant should be made, although objection on this ground was taken for the first time upon appeal from the Order of the the District Court granting letters of administration. (1910) 14 C.W.N. 463=5 Ind. Cas. 395 =15 C.L.J. 305.

2. Right to grant.

——S. 23 — Co-parcener can't oppose or make application for letters of administration.

A co-parcener cannot make a will of his undivided share in a joint Hindu family and under these circumstances, when he dies he cannot be said to be intestate. Where the claimant alleged that the property of the joint Hindu family and he was not claiming therefore any property of the deceased co-parcener but was disputing his right to deal with his property as his own;

Held, the applicant had not such an interest in the estate of the deceasedas entitled him either to oppose grant of Letters of Administration to an alleged son of the deceased or himself ask for

Letters of Administration. 82 Ind. Cas. 824=3 Bur.L.J. 116=A.I.R. 1924 Rang. 329.

——S. 23—Wife living apart for 8 years but not guilty of any misconduct — She is entitled to Letters of Administration in preference to grandson.

It is obvious that the broad propositions laid down in the Dhammathats can only be received with considerable qualifications and with due regard to modern customs and modes of thought. They cannot be argued as laying down strict rules of law without regard to particular circumstances. Where the wife left her husband's house, not of her own free will and lived in a house opposite that of husband's but continued to be dutiful towards her husband and there was no misconduct on her part entitling the husband to a divorce.

Held, it is quite impossible to say the wife had been guilty of any misconduct of such a nature as to disqualify her from inheriting her husband's estate. As to widow of the deceased, she had a better claim than the grandson to Letters of Administration. 75 Ind. Cas. 200=2 Bur.L.J. 58=A.I.R. 1923 Rang. 150.

——S. 23—Hindu widow has preferential right to get letters as against reversioner.

Under S. 23 of the Act, a Hindu widow who has an interest in the whole estate of her husband is entitled to a grant of Letters of Administration of his estate in preference to a reversioner who has only a contingent interest which may never vest. No grant of Letters of Administration is necessary in a case where the deceased leaves no debts or there is no difficulty in collecting the assets. 64 Ind. Cas. 61 (Cal.).

——S. 23—Letters of Administration — Rival applicants—Procedure.

Where there are rival applicants for letters and the status of one of them is disputed while the other is entitled to a portion of the estate the proper procedure is to ignore the question of status and grant Letters to the other, who is entitled to a part of the estate. 56 Ind. Cas. 764 (L.B.).

——S. 23—Letters — Rival applicants.

Where rival applicants apply for Letters of Administration one of whom is admittedly entitled to a share in the estate under S. 23 of the Act and the status of the others is disputed, the Court should grant Letters of Administration to the applicant whose status is admitted. 9 L.B.R. 174=12 Bur.L.T. 39=45 Ind. Cas. 935.

——S. 23—Probate — Person entitled to inherit.

If the person making the application is according to the law of inheritance, entitled to the whole or a part of the property, and alleges the fact that this property is of that nature and there is no other application for Letters of Administration, the applicant is clearly entitled to the grant. 5 Pat.L.J. 107=(1920) Pat. 87=1 Pat.L.T. 19 =54 Ind. Cas. 807.

——S. 23—Question of Title — Grant of Letters.

The applicant can demand his appointment as administrator if he shows that he has a beneficial interest in the property of the deceased. It is not usual to go into complicated questions of title in granting Letters of Administration.

When ownership or succession to the property can be determined only by a regular suit, Letters of Administration should not be granted. 50 Ind. Cas. 964 (Lah.).

——Ss. 23, 30 and 41—Absent sharer.

A limited grant of Letters should not be awarded to the attorney of an absent Sharer if a Sharer entitled to as much as the absent Sharer is within the province and willing to act. 8 Bur.L.T. 103=26 Ind. Cas. 743.

——Ss. 23 and 41—Letters of Administration to persons other than heirs—When can be granted.

S. 41 allows the grant of Letters of Administration to persons other than heirs in special cases. 7 Bur.L.T. 133=7 L.B.R. 362=24 Ind. Cas. 638.

——S. 23—Letters of Administration — Estate of deceased wife—What must be proved—Whether husband proper applicant.

It is sufficient under the Act if the applicant for Letters of Administration is, according to the rule for distribution of the estate of the deceased, entitled to the whole or part of the property and alleges that there is property of that nature, and a husband is therefore a proper applicant in regard to his deceased wife's estate. 17 C.W.N. 613=23 Ind. Cas. 296.

——S. 23—Letters of Administration—Grant of.

Letters of Administration were granted to **A**, admittedly a wife of the deceasd and entitled to a portion of the deceased's estate. The grant was opposed by **B** who also claimed to have been married to the deceased; but whose marriage was denied. The evidence on the record to prove the marriage of B, with the deceased was not sufficient. The question of B's marriage with the deceased should be fought out in a regular suit, and that the Letters of Administration were properly granted to **A** under S 23. 4 Bur.L.T. 129 =12 Ind. Cas. 883.

——S. 23—Grant to Creditor of insolvent debtor.

Letters of Administration to the estate of a deceased insolvent may be granted to his creditor. 15 C.W.N. 350=9 Ind. Cas. 916.

——S. 23—Scope of.

S. 23 contemplates grant of administration of the **whole** estate. Where probate of a will had been taken out and subsequently without notice to the Executors an application for Letters of Administration was put in on the ground that the legatees had only a life estate and after their death, there was an intestacy.

Held, that the applicants were not entitled to the letters as no notice was given to the executors, that a gift for maintenance was not necessarily estate and that if there was a restriction against a life alienation, it was void. 9 C.L.J. 576=1 Ind. Cas. 140.

3. Scope of enquiry.

——S. 23—Question of title—Finding as to who is entitled to letters is not res judicata in suit on title to the properties.

In a proceeding for grant of letters of administration, the question before the Court is one of representation to the estate and not of distribution, and it is only for the purpose of determining the question of representation that the Court is called upon to decide whether the applicant would be

entitled to the whole or any part of estate of the deceased within the meaning of S. 23 of the Probate and Administration Act, and that such a finding is not **res judicata** in a suit in which the question of title to the properties has to be determined. 1918 P.R. 53, Foll. 68 Ind. Cas. 671 =1 Bur.L.J. 59=11 L.B.R. 331=A.I.R. 1923 Rang. 9.

——S. 23—Grant of letters — Adoption—Injury into.

A contest between the full sister and an adopted daughter whose adoption is in dispute in appiying for Letters of Administration would justify the Court in enquiring into the factum and validity of the adoption. 9 L.B.R. 163=11 Bur.L.T. 65=45 Ind. Cas. 737.

——Ss. 23 and 41—Object of—Representation of estate—Question of adoption.

The object of proceedings under the Act is to determine the question of representation of the deceased for the purposes of administering the estate and not to determine questions of inheritance. The Court should not enter into questions of adoption in such proceedings as the decision would not be final or operate as **res judicata** in a subsequent suit. 10 Bur.L.T. 184=44 Ind. Cas. 138.

——S. 23—Caveator's claim as adopted son—Necessity to go into the question of adoption.

Where a Caveator if he establishes his adoption totally excludes the applicant from inheriting, the questions of adoption must be gone into unless the Court thinks it is unnecessary to grant letters to any. II U.B.R. (1915) 101=33 Ind. Cas. 659.

——S. 23—Scope of inquiry.

It is the duty of the Probate Court first to decide whether the deceased left any assets and if so, whether the applicant is the person, who would be entitled to a grant of Letters of Administration. 7 Ind. Cas. 1 (Cal.).

——S. 23—Scope of enquiry — Grounds for refusal.

A Court will be wrong in refusing Letters of Administration on the ground, first that there is a dispute as to whether the petitioner is the nearest heir of the deceased and second that there is a dispute as to the title of the deceased to the property. It is the duty of a probate Court to decide the former point and it has no concern with the latter. 7 Ind. Cas. 1 (Cal.).

——S. 23—Letters of Administration, application for—Questions to be considered in such proceedings.

When the applicant for Letters is a person who is, by admitted natural relationship, entitled under S. 23 to make it and whom the Court considers to be otherwise a proper person to administer the estate, the Court ought not to allow the proceedings to become protracted and costly by entering into disputed points which could be fought over again in suits for administration or for possession of the estate. 5 L.B.R. 78=3 Ind. Cas. 719.

——Ss. 24 and 25—Will lost.

Ss. 24 and 25 of the Act lay down the rule of proof for cases where the original will may have been lost. 20 C.L.J. 148=26 Ind. Cas. 980.

——S. 24—Probate of copy or draft of lost will—Secondary evidence, admissibility of. See WILL. 8 C.W.N. 821=31 C. 885.

——Ss. 31, 32, 33 and 41—Guardian of minor; grant of letters to—Moveable property —Probate proceedings—Contentious matters enquiry into.

None of the Ss. 31, 32 or 33 of the Act allows a grant of letters to the guardian of a minor when he is neither an executor nor a residuary legatee. If the estate is mainly moveable, Letters of Administration need not be obtained. Proceedings for Letters of Administration should not be lengthened by entering into questions difficult to determine in such proceedings. 10 Bur.L.T. 107= 36 Ind. Cas. 266.

——S. 31—Minor wife — Letters of administration for the use and benefit of—Husband, grant to.

The husband of a minor wife before he applies for the grant of letters of administration to him for the use and benefit of the minor must get himself fully appointed guardian for the purpose of applying for such grant as such assigned guardian. (1907) 11 C.W.N. 697=34 C. 706.

——Ss. 31 and 32—Administrator-General taking possession without prior order of Court—Conflict between — Administrator-General and Court of Wards — Nominee of Court of Wards, if can be appointed administrator — Zemindars — Administrator-General's Act (2 of 1874); S. 17.

The Court of Wards as such cannot be appointed administrator. There is nothing, however, to prevent this court in certain circumstances, e.g., in this case where the testator wished the minor's estate to be entrusted to the Court of Wards from appointing the nominee of the Court of Wards (in most instances, the manager) administrator of the testator's estate with the will annexed under S. 31 held, on the facts of the case, that the Administrator-General taking possession of the estate of the testators was illegal. (1905) 10 C.W.N. 241.

——S. 34—Administrator during pendency of an appeal can be appointed though executor has taken possession.

The taking of possession by the executors does not take away the jurisdiction of a Court to appoint an administrator during the pendency of the appeal to the High Court. The duties of an administrator and a Receiver **pendente lite** commence from the order of appointment and if the decree in action is appealed from they do not cease until the appeal is disposed of, while the functions of an administrator during the pendency of a suit terminate with a decree pronounced in favour of a will and do not continue until the executor obtained probate. 83 Ind. Cas. 597= 28 C.W.N. 576=A.I.R. 1924 Cal. 631.

——S. 34—Administrator pendente lite—Power of Court to direct payment of money to widow contesting will.

An administrator **pendente lite** in Probate proceedings is analogous to that of a receiver in a partition suit. S. 34 of the Act gives ample power to the Court to direct the administraor **pendente lite** to do such act as may be necessary in the interests of the several parties to the proceedings and direct him to advance to the widow opposing the will such sums of money as a

reasonably necessary for the maintenance of herself and her children. 44 Ind. Cas. 657 (Cal.).

——Ss. 34 and 35—Administrator pendente lite—Powers of the Court—Injunction.

Where an injunction is necessary the aggrieved party should ask the court to appoint an Administrator pendente lite under S. 34 to take charge of the entire estate of the deceased. On such application by the party, the court may grant an injunction either in the exercise of its inherent jurisdiction or under O. 39, R. 7, C. P. Code. 19 C.W.N. 205=27 Ind. Cas. 617.

——S. 34—Administrator pendente lite.

An administrator pendente lite should be appointed only when the court is satisfied that such appointment is necessary for the preservation of the estate and unless such necessity is made out, the estate ought not to be subjected to cost and incumbrance of such administration. 10 C.L.J. 263 and 13 C.L.J. 34, Foll. 13 C.L.J. 47=9 Ind. Cas. 215.

——S. 34—Administrator pendente lite.

Before appointing administrator pendente lite the Court should be satisfied that such appointment is necessary and proper. Where there is no question of appointing an executor the Court should refuse to appoint Administrator pendente lite. Where caveator desires to substitute one will for another and in both of them the caveator is named as executor, the appointment of Administrator is necessary. Debtor of the estate may be appointed executor of it, pending probate proceedings especially when the debt is small and debtor does not misrepresent the amount. 13 C. L.J. 34=2 Ind. Cas. 638.

——Ss. 34, 30 and 53—Administration pendente lite — C. P. Code, S. 499—Claim to property in hands of administrator—Appeal.

On an application for grant of letters of administration with the will annexed the District Judge ordered the Nazir to prepare an inventory of the property and to take it into his possession; and the Nazir took possession of some of the moveable property belonging to the estate. Subsequently, the District Judge appointed the Nazir administrator pendente lite. Certain persons laying claim to some of the property in the possession of the adminitrator applied to the District Judge for an order directing its delivery to them. This being refused, they appealed:

Held, that the applicants might have appealed or applied for revision of the District Judge's order directing the Nazir to take possession of the property belonging to the estate to be administered; but the present order, even if appealable which is doubtful, was not one which should be interfered with. The appellants, if the Nazir was wrongfully in possession of their property, had their proper remedy by suit. (1905) A.W.N. 127.

——Ss. 34 and 50—Propounder of will right of, to call on objector to show interest—Probate, recall of, if permissible on revocation—Proper order—Infant — Representation of—Revocation, effect of. See 10 C.L.J. 263=3 Ind. Cas. 178.

——S. 35—Executor appointed to look after legatee and estate until legatee's death — Legatee's death does not deprive executor of power to sue for debt due to estate.

In order to see whether the grant was limited in character, or unlimited, the Court must see the Will not for the purpose of construing the will but for the purpose of finding out whether the Court of probate did make a limited grant to the executor or an unlimited one. The mere fact that the will appointed a certain person executor to look after the legatee and the estate until the legatee's death, does not justify the inference that after the legatee's death the administration came to an end and the executor could not sue for debts due to estate.

Realisation of debts due to the testator is a statutory power and must remain in the executor until the Will in some way has curtailed that power. 60 Ind. Cas. 350=2 P.L.T. 305=A. I.R. 1921 Pat. 313.

——S. 37—Applicability — Mohunt of mutt—Letters of Administration — Estate — Mutt property.

The word "estate" in the Probate and Administration Act, 1881, invariably denotes the property and credit of a deceased person. To administer the estate of the Mutt in succession to a deceased Mohunt, an application for Letters of Administration is outside the scope of the Probate and Administration Acts. S. 37 of the Act applies only to property in which a deceased person had ownership so as to constitute it a portion of his estate, although he held it in trust. 16 C.W.N. 798=16 Ind. Cas. 453.

——S. 37—Letters of Administration — Mohunt Property of.

A Mohunt is not the owner of Mutt property. Hence on his death, his successor cannot apply for Letters of Administration. Letters should not be granted when the object of the applicant is only to fortify his position in a suit which is likely to be instituted. 17 C.L.J. 65=16 Ind. Cas. 588.

——Ss. 39 and 40—Right to revocation.

A person disputing the right of a deceased testator, to deal with certain property as his own, cannot be regarded as having an interest in the estate of the deceased and hence cannot apply for revocation of the Letters of Administration. 14 C.W.N. 118=2 Ind. Cas. 402.

——S. 41—Refusal to grant administration.

In a case under the Hindu Wills Act, to which S. 85 of the Probate and Administration Act applies it is not open to the Court to order that no administration grant shall be made. However, if persons, who are not next of kin and are not legatees; come before the Court asking for grant; then the Court is entitled under S. 41 to say that a proper case must be made out for making such a grant to persons to whom ordinarily no grant is made. 103 Ind. Cas. 692=31 C.W. N. 874=A.I.R. 1927 Cal. 654.

——S. 41—Administration pendente lite.

Grant of administration pendente lite requires Court-fee but the person in whose favour the full grant is subsequently ordered is, on termination of proceedings, entitled to such grant free of payment. 95 Ind. Cas. 541=5 Bur.L.J. 9=A. I.R. 1926 Rang. 89.

——S. 41 — Considerations for Court — Consanguinity of the administrator as well as safety of the estate should be looked to.

One of the elements to be taken into consideration in appointing an administrator is consanguinity. But there are other elements which must be taken into consideration, such as safety of the estate and the probability that it will be properly administered. The Court is not to be guided by the wishes or feelings of the parties, but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property. 82 Ind. Cas. 382=40 C. L.J. 24=A.I.R. 1925 Cal. 178.

——S. 41—Minor whether can obtain grant of Letters of Administration—Application by legal Guardian—Discretion of Court.

Letters of Administration cannot be granted to a minor. His legal guardian can get them if the minor is the sole residuary legatee or if the minor is a universal residuary legatee claiming the whole estate. An application for such grant must be made on behalf of the guardian and not on behalf of the minor through the guardian. S. 41 is not applicable where persons entitled to administration are not wanting. The Court has no arbitrary power to make selection from contending persons. As a rule the grant must be made to the person entitled by law to the property. The term "Legal guardian" means, a guardian appointed under the Guardian and Wards Act. A grant of probate, though discretionary, would be improper if refused to a person having the largest interest in the estate, except where the estate is likely to suffer irredeemable loss at his hands. 1920 P.H.C.C. 187=1 Pat.L.T. 304=5 Pat.L.J. 347=57 Ind. Cas. 583.

——S. 41—Guardian of minor—Grant of letters to —Moveables.

Ss. 31, 32 and 33 do not authorise the grant of letters to the guardian of a minor who is neither an executor nor a residuary legatee. No letters ase necessary when the estate consists of moveables. Proceedings under the Act should not be allowed to be protracted by entering into questions which cannot be finally determined in such proceedings. 10 Bur.L.T. 107=36 Ind. Cas. 266.

——S. 41—Application by executor's son — Discretion.

A testator bequeathed by will the whole of his property to an idol and appointed his wives and son, executrix and executor, who however; did not take out any probate, but the son mortgaged the property. After the property was sold in execution of a decree on the mortgage, the testator's grandsons under the guardianship of their mother applied for probate of the will:

Held, they being not executors were not entitled to probate, and the case was not a fit one for grant of probate under S. 41 the mother being a purdanashin lady, and the father, the defaulting executor would manage the whole business. (1908) 12 C.W.N. 747=7 C.L.J. 558.

——S. 42—Limited grant to several persons.

Different people cannot get individual grants of letters of administration limited to the particuiar property which they happen to claim.

Where there has been one partial grant already, it would seem unreasonable that there should be any other grant save with reference to the rest of the estate. 103 Ind. Cas. 692=31 C.W.N. 874 =A.I.R. 1927 Cal. 654.

——S. 42—Admission to probate, partial—When legal.

A will may, in part, be admitted to probate when on the evidence before it, the Court finds that a certain clause has been inserted in it by fraud without the testator's knowledge, but not otherwise. 15 C.W.N. 1014=11 Ind. Cas. 152.

——S. 45—Derivative executorship—Doctrine of.

The right to Letters of Administration is personal and does not pass to the heir and legal representatives. If such heir claims Letters of Administration, it is to be considered as a new claim. The doctrine of derivative executorship does not apply to India and therefore on the death of an executor, the estate remains unadministered till a new executor is appointed. (1920) 3 U.B. R. 208=57 Ind. Cas. 812.

——S. 45—Long lapse of time — Presumption of administration.

A Court has no power to grant letters under S. 45 when there is no evidence that there is any asset administered, the ordinary presumption after the long lapse of time being that the estate has been administered. The direction as to the sheba in the will in the case, even though it contemplated some administration after the death of the executor, did not relate to the private property of the testator and therefore the grant under S. 45 was erroneous. (1906) 10 C.W.N. 432.

——S. 47—Estate not completely administered—Death of minor pending whose minority letters were given — Administrator heir of such minor—Letters of administration de bonis non—Grant of.

Where letters of administration to the deceased's estate were granted to the widow limited during the minority of her infant son, and the son died before attaining majority and before the estate was fully administered.

Held, that letters of administration de bonis non to the estate of the deceased husband may be granted to the widow under S. 47 and that her being the heir to the son's estate is no bar to such grant. (1902) 6 C.W.N. 581.

——S. 50.

Synopsis.

1. Accounts required of executor.
2. Locus standi to apply.
3. Just cause.
4. Powers of Court.
5. Procedure.
6. Rejection of application—Res judicata.
7. Right to sue.
8. Scope of enquiry.
9. Time limit for application.
10. Miscellaneous.

1. Accounts required of Executor.

——S. 50—Account required is the account contemplated by S. 98, sub-S. (1), second paragraph.

The executors are not under a liability to submit accounts periodically. What the statute contemplates is the submission of one inventory and one account, What is contemplated is that an account should be filed within one year from the

grant showing the assets which have come to the hands of the executor or administrator and the manner in which such assets have been applied or disposed of. If the executor or administrator is not able to exhibit such an account within one year from the grant, he may obtain an extension of time from the Court. But the fact that time has been extended does not enlarge the scope of the account. The account of the estate which is required to be exhibited, whether it is exhibited within a year or thereafter, is the account contemplated by the second paragraph of sub-S. 1 of S. 98. 64 Ind. Cas. 997=48 Cal. 1051=33 C.L.J. 451=25 C.W.N. 977=A.I.R. 1921 Cal. 527.

2. Locus standi to apply.

——S. 50—Widow and reversioners—Probate to widow — Immediate reversioner's acquiescence—Right of more remote reversioner.

Although a reversioner under the Hindu Law has no present interest in the property left by the deceased, the reversioner, whether male or female is substantially interested in the protection or devolution of the estate, and as such, is entitled to appear and be heard in a probate proceeding. If the immediate reversioner is a female the male reversioner in the second or third degree, as the case may be (for instance where the deceased has left a widow, daughter, mother and brother) is similarly entitled to be heard. Where the immediate reversioner has rendered it impossible for herself by her own conduct, to maintain an application under S. 50 successfully, the application may be made by her sons who, as the ultimate reversioners are unquestionably proper parties to probate proceedings. 10 C.L.J. 263; 21 C.L.J. 557; 32 Cal. 62, Foll.; 21 Cal. 539; 10 C.L.J. 263 and 21 C.L.J. 555, Foll. 68 Ind. Cas. 795=35 C.L.J. 66=A.I.R. 1922 Cal. 38.

——S. 50—Minor.

A minor when properly represented can, under S. 50 of the Act, apply for revocation of the probate where the guardian was appointed without his consent and refusal to accept the citation. 59 Ind. Cas. 435=24 C.W.N. 538.

——S. 50—Revocation of Letters — Applicant's claim barred—No locus standi.

If an applicant has no right to claim his share of an estate from the administrator, he has no interest which would support an application for the revocation of the grant of the Letters of Administration. 12 Bur.L.T. 114=9 L.B.R. 273=51 Ind. Cas. 355.

——S. 50—Revocation of probate — Locus standi to apply.

A legatee under a will which is superseded by a later will is entitled to apply for revocation of the probate of the later will, on the ground of non-service of citation, even before he has obtained probate of the earlier will. 22 C.W.N. 564=45 Ind. Cas. 760.

——Ss. 50; 69 and 86—Order that a party has locus standi to contest will—Appeal — Will disinheriting son—Son's creditor.

An order of District Judge holding that a certain party has a **locus standi** to contest a will is an interlocutory order and not appealable. A judgment creditor who, but for a will, would in execution of his decree, have a right to seize the property which would descend to his judgment debtor and who alleges that the will is a forgery, set up for the purpose of defrauding the creditors has a **locus standi** to make an application for the revocation of the probate of the will. (10 Cal. 19; 28 C. 441, Foll.) 13 C.W.N. 1099=17 C. L.J. 230=15 Ind. Cas. 686.

——S. 50—Revocation of probate—Minor—Right of, on attaining majority—Estoppel, if may arise by conduct.

A minor on attaining majority has a right to apply for revocation of probate obtained by consent; but he may be barred from contesting its genuineness by acquiescence and delay for a long time or by subsequent ratification of the disposition of the will. 11 Ind. Cas. 277 (Cal.).

——S. 50—Locus standi to contest will.

A purchaser from an heir has a **locus standi** to contest that the will is a forgery and to pray for revocation.

The making of a grant without citing parties who ought to have been cited is sufficient cause. But in deciding this it must be decided whether a citation on such parties was compulsory under S. 16 or discretionary as under S. 69. 13 Bom. L.R. 38=9 Ind. Cas. 354.

——Ss. 50 and 69—Notice — Infant reversioner.

An infant son of the testator's sister, who is a reversioner, should be joined and should be represented by a disinterested person as guardian **ad litem**. If he is not joined, he can apply for revocation of the probate. 5 Ind. Cas. 164 (Cal.)

——S. 50—Revocation of Probate — Right of reversioner to apply—Procedure — Infant—Guardian ad litem.

The immediate reversionary heir is entitled to be heard in proceedings for grant or revocation of probate. **Quaere.**—Whether a remote reversioner is entitled to be heard. The alleged relationship must be proved before a petition for revocation is heard. The proper order to make in a case of revocation is to allow the application under S. 50 if good grounds are established for revocation of the probate and to recall the probate before the propounder is called upon to prove the will in the presence of the objector. There must have been a guardian **ad litem** other than the mother who had joined in the application for probate to represent an infant who afterwards applies for revocation. Citation should be issuel on such guardian. 10 C.L.J. 263=3 Ind. Cas. 178.

——Ss. 50 and 69 — Letters of administration to the estate of Hindu widow—Locus standi to apply for revocation, of person denying property left to be testator's stridhan.

When letters of administration were granted in respect of the will of a Hindu widow purporting to convey her stridhan property, a petitioner for revocation who had no interest in the estate of the deceased, but who, on the other hand; alleged that she had no stridhan property but that what property she had belonged to the joint family of which she was a member, was not competent to make the application not being "a person having an interest in the estate of the deceased" within S. 69, 17 C. 48 (1889), Foll. (1909) 14 C.W.N. 119.

——Ss. 50, 55, 69 and 83—C. P. Code (1882); S. 588—Order or decree—Purchaser from widow or deceased—Locus standi of such person to apply for revocation of probate — Appeal, right of.

A person interested in the estate of the deceased by assignment from widow (who is his next heir) may, where a will has been set up and proved at variance with his interests, apply for the revocation of probate under S. 50. The expression "order" in S. 86 does not mean such an order only as is referred to in S. 588. C. P. Code (O.C.). An application under S. 50 must be treated under provisions of Ss. 55 and 83 as a suit and when such a suit is dismissed on the ground that the applicant has no locus standi to bring the suit such decision amounts to a decree and an appeal lies to the High Court against such decree. 4 C. 360, 20 C. 87, Foll. (1904) 8 C.W.N. 748.

——S. 50—Person entitled to apply for revocation of probate—Presumptive reversioner — Sister's son — Locus standi — Widow alive.

A reversioner is entitled to apply for revocation of letters of administration under S. 50. (1902) 6 C.W.N. 912. Also (1909) 10 C.L.J. 263.

——Ss. 50 and 69—Probate granted — Revocation of — Purchaser from heir-at-law—Locus standi to ask for revocation.

A purchaser at an auction sale held under a decree against the heir-at-law of a testator has a locus standi to ask for revocation of the probate granted by the will of the testator. The purchaser is in the same position as the heir-at-law. (1901) 28 C. 587.

——S. 50—Objection that applicant for revocation did not allege any interest in the property cannot be raised for the first time in appeal.

An objection, such as that an application under S. 50 to revoke the letters of administration granted to another need not be entertained because the applicant did not allege any interest in the property of the deceased, must be taken at once and cannot be taken for the first time in appeal.

Once the Court has functioned, even if the application was made by a person not fully qualified, the order must stand unless it can be shown to be wrong on the merits. (1870) 2 N.W.P. 268, Foll. 88 Ind. Cas. 896=6 Lah. 180=A. I.R. 1925 Lah. 428.

——S. 50—Revocation of probate — Grounds—acquiescence—Waiver.

Non-citation is not by itself, a sufficient ground for revoking the probate of a will. Whether the petitioner for revocation has, by his conduct, acquiescence, waiver, or ratification debarred himself from disputing the probate or the genuineness of the will is one of many other circumstances to be considered before revoking the probate. 14 C.W.N. 1068, Foll. 21 C.L.J. 555=30 Ind. Cas. 12.

——S. 50—Revocation of probate — Application for—Will admitted and acted upon.

The sole heiress of a testator applied through her attorney for probate of a Will the probate was granted and the Will was acted upon for some years. Thereafter she applied for revocation of the probate on the ground that the Will was forged.

Held that having admitted the genuineness of the Will and taken advantage of it, she could not get the probate revoked. 17 Ind. Cas. 763 (P.C.).

——S. 50—Revocation of Probate—Estoppel.

If a party being aware of proceedings for Letters of Administration of Probate stands by and allows the proceedings to be concluded in his absence, he cannot be allowed afterwards to come in to have the grant revoked. 14 O.C. 77=10 Ind. Cas. 717.

3. Just cause.

——S. 50—Notice served not sufficient to give person opportunity to contest — Proceedings are defective.

Where before grant of probate some kind of formality was gone through on the occasion when service of notice was said to have been effected, but it was not such as would give to the person alleged to have been served an opportunity either to oppose the grant of probate or to require the will to be proved in her presence.

Held, that the service, if any was of no greater effect in law than personal service on an infant of tender years, and the proceedings were defective in substance. 107 Ind. Cas. 14=47 C.L.J. 171 =5 O.W.N. 96=30 Bom.L.R. 227=32 C.W. N. 402=9 P.L.T. 97=55 I.A. 18=7 Pat. 221= 26 A.L.J. 385=1928 M.W.N. 282=27 M.L.W. 782=A.I.R. 1928 P.C. 2=54 M.L.J. 281 (P. C.).

——S. 56—Failure to give security.

Failure to give security as required by the order by which letters of Administration have been granted is no ground for revoking the letters. 86 Ind. Cas. 563=7 L.L.J. 89=26 P.L.R. 106 =A.I.R. 1925 Lah. 354.

——S. 50—Discretion—Substantial prejudice is necessary—Date of testatrix's death misstated in application for Letters—Will forged but bequest invalid under personal law of parties—Applicant for revocation was held not to suffer any prejudice.

The power given to a Court to revoke Letters of Administration is, as the wording of the section shows, a discretionary one.

The grounds on which an application for the revocation of letters of administration with the will annexed was urged were that the date of the testatrix's death had been mis-stated and that the will was a forgery.

Held: in the circumstances of the case that the mis-representation made as to the date of the testatrix's death was not a material one. As regards the other objection, under the Muhammadan Law, by which the parties were governed, since all the property was bequeathed to one heir and all the other heirs had not consented to it, the bequest was an invalid bequest and as the applicant for revocation suffered no prejudice, the Letters could not be revoked on this ground also. 88 Ind. Cas. 614=4 Bur.L.J. 73=A.I.R. 1925 Rang. 236.

——S. 50—Grant when revoked—Service of citation on father of testator's minor widow.

The mother of the testator as executrix applied for probate. Citation was issued upon the father of the testator's childless widow who was appoint-

ed guardian ad litem for the widow. The father refused to accept the citation and it was fixed on the door of his house. Probate was granted in 1912. The widow came of age in 1913, and in 1918 a petition for revocation of probate was filed. **Held,** that the widow for several years having received benefits under the will; the proceedings could not be re-opened. 59 Ind. Cas. 664=24 C.W.N. 541.

——S. 50—Revocation of Letters—Sufficient cause—Failure to file inventory.

Where an application is made years after the grant of the Letters of Administration to revoke the letters, cause must be shown why this should be done. The mere fact that the inventory is required to be filed is not a sufficient cause, unless it can be shown that the inventory was withheld wilfully and unreasonably. 51 Ind. Cas. 561 (Cal.).

——S. 50 (4)—Revocation of Probate—Sufficient cause—Omission of executant to furnish additional security required by Court.

No inelastic rule can be formulated to test the applicability of S. 50, Cl. (4); the matter should be determined with regard to the events which have actually happened in each case. The clause is not only applicable to cases where the circumstances which have made the grant useless and inoperative, were in existence at the date of the grant though unknown to the Court and to the parties concerned, but to cases where the circumstances contemplated have happened since the date of the grant. 26 Bom. 794 and 40 Cal. 50 not foll. Where a District Judge found that the security furnished by the executor had become worthless and called upon him to furnish additional security within a reasonable time and the executor defaulted, it was a sufficient ground for revoking the probate. 47 Cal. 115=23 C.W.N. 763=29 C.L.J. 496=51 Ind. Cas. 936.

——S. 50—Revocation of Probate — Absence of notice just cause.

An applicant for revocation of probate though not cited, had parted with her interest by sale and was represented in the probate proceedings by her vendee. **Held,** that the mere absence of notice was not "just cause" within S. 50 of the Act for holding that the probate proceedings were defective in substance and liable to be set aside. 51 Ind. Cas. 24 (Nag.).

——S. 50—Revocation of Probate.

A Court is not bound to revoke a Probate on the ground that an inaccurate inventory is furnished, especially when an accurate one is not possible in the circumstances, because the power of revocation under S. 50 is a discretionary one. 34 Ind. Cas. 435 (Mad.).

——S. 50—Purchaser when could apply to revoke the probate granted—Procedure.

A person who has acquired an interest by purchase in the deceased's properties subsequently to death of deceased, is entitled to be heard in the proceedings for grant of probate; where a probate was obtained fraudulently by concealing from the Court the sale of the deceased's estate made to another, just before the grant of probate, the purchaser has a "just cause" for revocation of probate under S. 50.

After the granting of a probate, no question of genuineness of will arises for consideration till a "just cause" for revocation on one of the grounds mentioned in S. 50 is made out; hence an application for revocation of probate could not be dismissed owing to the insufficiency of the evidence to throw doubt on the genuineness of the will. 19 C.W.N. 1108=31 Ind. Cas. 702.

——Ss. 50, 62 and 69—Revocation of Probate—Duty of person applying for probate—Special citation—Misleading statements as to relation—Burden of proof—Knowledge—Acquiescence.

Although a Hindu reversioner has no present alienable interest in the property left by the deceased, he is substantially interested in the protection or devolution of the estate and as such is entitled to appear and be heard in a probate proceeding. If the applicant for probate chooses to make a statement as to the relations of the deceased, the information he gives to the Court must be correct and not misleading. Where a will is propounded, which alters the devolution of property, the District Judge should under S. 69 direct special citation to persons whose rights are immediately affected by the will. Where a statement as to the relation of the deceased was made and misled the Court so that it did not direct the issue of special citation on the person who was entitled to intervene, the proceeding to obtain the grant was defective in substance within S. 50, Expl., Cl. (1). The rule that a person is bound by proceedings to which he is no party and of which he has received no notice depends on his full knowledge of the proceedings and his capacity to make himself a party. Where, in answer to an application for revocation by a person on whom citation should have been issued, it is pleaded that he did not intervene though aware of the proceedings, the burden of proof that he had full knowledge is on the person who alleges it; the party who applies for revocation need not prove that no special citation was served on him nor that he had no knowledge of the proceedings. 19 C.W.N. 882=21 C.L.J. 657=30 Ind. Cas. 161.

——S. 50—Revocation of Probate—Partial.

When an executor who is also a legatee, before liquidating the testator's debts as provided in the will, appropriates the whole of the sale proceeds of a part of the estate, it is a sufficient reason for revoking the grant of Probate if the remaining assets far exceed the liabilities as shown in the schedule especially where the main creditor does not object to the manner of administration of the estate. 84 P.W.R. 1915=179 P.L.R. 1915==29 Ind. Cas. 754.

——Ss. 50 and 69—Revocation of probate—Party cognizant of proceedings—Citation—Minor—Sound and disposing mind.

The principle that a party cognizant of the proceedings for probate or letters of administration is bound by their result has no application where the person affected by the will was the infant son of the testator, the infant's mother being also an infant and his three uncles were named as successive executors in the will. All persons whose interests are or may be adversely affected by the decree of the Probate Court should have notice of the proceedings and an opportunity of intervening for the protection of their interests. This purpose is not achieved merely by issue of citations

to infants. The proper course for the propounder of the will to follow is to have a guardian-ad-litem appointed for the infant concerned. The onus is on the executor to establish that the deceased had a sound and disposing mind at the time when he is said to have executed the will. The Court before pronouncing for the will, must be satisfied beyond all reasonable doubt, that the testator was fully cognizant of its contents and was in a condition to exercise and did exercise judgment and reflection respecting the act he was doing. 19 C. W.N. 747=21 C.L.J. 287=28 Ind. Cas. 574.

——S. 50—Revocation of Probate.

Absence of citation or failure to serve notice is insufficient for revoking a probate granted separate. The executor should be given an opportunity of proving the will in solemn form. 41 Cal. 819=24 Ind. Cas. 27.

——S. 50—Expl. 4—'Just cause'—Maladministration—Joint administrators—Grant becoming useless and inoperative.

The words "become useless" and "inoperative" in S. 50, Expl. (4) of the Act imply the discovery of something which, if known at the date of the grant, would have been a ground for refusing it, e.g., the discovery of a later will or codicil, or the subsequent discovery that the will was forged, or that the alleged testator was still living. (26 B. 792, Foll.) Maladministration or disagreement between joint administrators is not a just cause for annulling the letters. 40 Cal. 50=16 C.W.N. 880=15 Ind. Cas. 44.

——S. 50—Revocation of probate—Minor heir not represented—Revocation, effect of.

An executor must prove a will in solemn form. A probate obtained by a son without giving notice to a minor daughter or of the deceased testator was revoked on her application several years after. The subsequent revocation of a probate does not render invalid any changes created by the executor while the probate was in force. 35 C. 955, Foll. 7 Ind. Cas. 9 (Cal.).

——S. 50—Probate to Official Trustee.

Though the Official Trustee of Bengal may not be authorised to accept probate, the Judge cannot be said to have acted without jurisdiction in granting probate to him and hence the probate cannot be revoked. 37 Cal. 387=6 Ind. Cas. 973.

——S. 50—Revocation of probate—Proof in solemn form.

A will was proved by an executrix in common form without issuing citation to the next reversioner. She was the sole legatee under the will. On her death, her heir took possession of the property as heir:

Held, that the heir of the executrix may be ordered to prove the will in solemn form in the presence of next reversioner. In default, the probate was revoked. (1907) 5 C.L.J. 560.

——S. 50—Citation on minor—Minor represented by applicant as guardian—Proceeding defective—Revocation, application for — Applicant acting in concert with another.

Where an applicant for probate of a will took out citation upon a minor who was represented by the applicant herself as guardian,

Held, that the proceedings to obtain the grant were defective in substance and the grant should be revoked. The fact that the petitioner for revocation of probate was acting in concert with somebody else could not take away the right which she otherwise possessed of applying for revocation. 12 C.W.N. 6.

——S. 50—"Just cause". See 9 C.W.N. 49=31 C. 914 (P.C.).

——S. 50—Application to recall—Proof of genuineness of will.

A deceased person's brother got probate of a will. The widow applied for its being recalled, she not receiving any intimation of the application for probate, and prayed that it should be proved in her presence.

Held, that the probate of will should be recalled, and kept in the record till the case is decided. (1903) 7 C.W.N. 450=30 C. 528.

——S. 50—Revocation of probate—Section, how far exhaustive.

The explanation of the words 'just cause' in S. 50 is not merely illustrative but exhaustive. (1902) 4 Bom.L.R. 637=26 B. 792.

——S. 50, Expl. 5—Omission to furnish inventory—Not wilful—Effect of.

A mere omission to furnish inventory and accounts which is not wilful, is no ground for revoking a probate. (1902) 4 Bom.L.R. 637=26 B. 792.

——S. 50, Expl. (5)—False statement as to rate of interest charged—Ground for revocation of probate—Inventory submitted incorrect—Effect—Inventory not untrue in material respects.

S. 50, Cl. (5), does not apply where the person holding the probate merely makes a false statement as to the rate of interest charged. Under S. 50, Cl. (5), the mere fact that the inventory filed is incorrect is not enough to justify the revocation of probate. It must be untrue in material respects. (1902) 4 Bom. L. R. 974=27 Bom. 140.

——S. 50, Expl. 5—Court not ordering executors to exhibit accounts—Omission to exhibit accounts—Ground for revoking probate.

In the absence of any evidence of an order calling on the executors to exhibit accounts, it is not open to the Court to put forward as a just cause for revocation of the grant of probate the omission to exhibit an inventory and accounts. (1902) 4 Bom.L.R. 637=26 B. 792.

——S. 50, Expl. (4)—'Useless and inoperative', meaning of—Property comprised in the will vesting in a stranger—Effect of—Revocation of probate.

The words "become useless and inoperative" in Expl. 4 to S. 50 imply the discovery of something which if known at the date of the grant would have been a ground for refusing it, such as the discovery of a letter, will or codicil, or subsequent discovery that will was forged or that the alleged testator is still living. So the mere fact that after the grant of the probate the property comprised in the will has come to belong to a person not mentioned in the will and whom it will not bind is no ground for revoking the probate. (1902) 4 Bom.L.R. 637=26 B. 792.

4. Powers of Court.

——S. 50—Inherent powers.

S. 50 is exhaustive and not merely illustrative, but irrespective of S. 50 when the condition, on the fulfilment of which alone the grant can be made, is not satisfied the Court has inherent power to withdraw the order for grant so as to prevent an abuse of its process. 47 Cal. 115, Appr. 94 Ind. Cas. 329=7 Lah. 270=27 P.L.R. 384=A.I.R. 1926 Lah. 352.

——S. 50—Review.

The right of review is an entirely different right from that given by S. 234 of the Succession Act or S. 50 of the Probate and Administration Act. The powers of review given by the Code of Civil Prcoedure can be exercised by a Court which has been dealing with a contentious matter in proceedings for the grant of Letters of Administration. 91 Ind. Cas. 509=3 Rang. 261=A. I. R. 1925 Rang. 314.

——S. 50—Letters—Grant for part of estate—Probate proceeding—Duty of Court—Illegal Acts of Guardian—When minor can repudiate.

There is no provision in the Act for granting letters in respect of only a part of the testator's estate. A Court cannot refuse administration of the whole estate and limit it to a fractional undivided portion thereof where the applicant is not an executor appointed for the administration of a particular fund. 3 Pat.L.J. 415=(1918) P H. C.C. 349=46 Ind. Cas. 117.

——S. 50—Revocation of an ex parte order granting Letters—Power of Court—C. P. Code, Ss. 144 and 115.

An order granting Letters of Administration to a particular person could not be revoked without giving him notice. It is open to the District Judge to reconsider an order granting Letters of Administration when the matter comes back before him either under S. 114 or under S. 151, C. P. Code apart from S. 50 of the probate and Administration Act. A Court ought not to grant Letters of Administration to a person without having good **prima facie** evidence that he had such an interest in the estate of the deceased as would entitle him to the Letters. A person who satisfies the Court either that he is the heir or one of the heirs or that he is a creditor, has such an interest. 37 All. 380=13 A.L.J. 44=29 Ind. Cas. 133.

——S. 50—Revocation of probate.

Revocation by District Judge of a probate, which was never issued, is without jurisdiction. 37 Bom. 158=15 Bom.L.R. 192=19 Ind. Cas. 406.

——S. 50—Jurisdiction — Probate Courts, if can compel executor to produce fund in Court—Fine, imposition of, for disobedience of order, if legal.

A Probate Court has no jurisdiction to compel the executor to produce the funds in his hands in Court for the purpose of investment; neither can it pass an order imposing fine for failure to comply with the previous order. (1910) 12 C.L.J. 602=8 Ind. Cas. 1105.

——S. 50—Power of District Judge to commence revocation proceedings **suo motu**—No. (1904) 8 C.W.N. 578=31 Cal. 628.

5. Procedure.

——Ss. 50 and 99—Letters granted to widow—Not to be collaterally attacked—Remedy by revocation.

Where Letters of Administration have been granted to a Hindu widow and she deals with the property under orders of Court, the remedy of the reversioner questioning the propriety or legality of the grant of Letters is to apply for revocation of the probate. He cannot question the propriety of the order granting Letters in a suit instituted to declare the invalidity of an alienation by the widow 23 C.W.N. 1045=31 C. L. J. 3=54 Ind. Cas. 197.

——S. 50—Motion—Rule nisi.

Revocation of probate under S. 50 should be had by motion on notice not by **rule nisi**. Revocation of probate on the ground that the will is forged must be sought in a suit framed in accordance with the form 115 (2) of Schedule IV, Part E, of the Code of Civil Procedure, though where the ground of revocation is irregularity in making the grant, revocation can be had by motion on notice. (1900) 5 C.W.N. 383. **Also** (1900) 5 C.W.N. 377.

6. Rejection of application—Res judicata.

——S. 50—Scope—No limitation exists for putting forth a good and just cause—Omission to take the plea precludes taking the plea later—Rejection of application to revoke grant on any ground has the same effect.

S. 50 prescribes no period of limitation for alleging a just cause. Omission to put a particular just cause precludes reagitating the cause later. Rejection of an application to revoke a grant for a just cause on the ground of **res judicata** does not differ in principle from rejection on the ground that the party failed to put it when the opportunity was given to him. Absence of special citation by itself is not a just cause for revocation of the grant of probate where the person to whom citation has not been issued is otherwise aware of the proceedings. No doubt S. 50 allows one party after another to attack in turn the grant of probate but this does not mean that every succeeding opponent is entitled to re-open all previous attacks nor does it enable parties already defeated to press their attacks over again. 79 Ind. Cas. 44=34 M.L.T. 141=A.I.R. 1924 Mad. 578=46 M.L.J. 383.

7. Right to sue.

——S. 50—Suit for declaration, that will, of which probate has been granted, is invalid and inoperative—Maintainability of.

A suit is maintainable in an ordinary Civil Court for a declaration as to the effect of the terms of a will of which probate has been granted. A probate cannot be revoked by the probate Court on the ground that the terms of a will are contrary to the provisions of Mahomedan Law. The Civil Court can question the validity of a will of which probate has been granted though effect may be given to its provisions. 23 C.W.N. 658=29 C. L.J. 37=49 Ind. Cas. 128.

8. Scope of enquiry.

——S. 50—Dismissal of application.

No question of genuineness of will arises for consideration if the Court has decided that the grant of probate or letters of administration should be revoked under S. 50. Application for revocation cannot be thrown out on the ground that the applicant had not adduced evidence sufficient to throw doubt upon the genuineness of the will. Grant of letters of administration without citation to reversioner is defective. All persons whose interest may be adversely affected must have notice and infants must be represented by guardians. 84 Ind. Cas. 689=40 C.L.J. 297=A.I.R. 1925 Cal. 223.

——S. 50—Revocation of probate or letters of administration—Issues.

Where an application was made for revocation of letters of administration with the will of the deceased annexed and it was prayed that the will should be proved before the applicant.

Held, that until the applicant made out a case for revocation the question of the genuineness of the will could not be gone into. English practice and practice of mofussil courts in India distinguished. (1906) 10 C.W.N. 955=33 C. 1001.

9. Time limit for application.

S. 50—Revocation of Probate — Application after long delay—Onus of proof.

An application, made more than thirty years after the grant of Letters to call in the Letters and prove the will in solemn form ought not to be entertained, especially where the object of the application is to prevent the terms of the will, standing for so many years, from being carried into effect. In any case, it is for the applicant to establish why the Letters should be called in and the will proved, having allowed an undue length of time to elapse. 51 Ind. Cas. 593 (Cal.).

——S. 50—Time for revocation.

There is no limit of time fixed for an application for revocation of probate, by a person on whom no citation had been issued. Where a will is found to be forged, probate could be revoked even after a delay of thirty three years. 23 C.L.J. 82=33 Ind. Cas. 273.

——S. 50—Revocation of Probate—Acquiescence.

An application for revocation of a probate must give some reasonable and true explanation for the delay in bringing it where knowledge, acquiescence and lapse of time are shown. 42 Cal. 480=19 C.W.N. 366=28 Ind. Cas. 886.

10. Miscellaneous.

——S. 50—Knowledge of proceedings.

A person is bound by the proceedings for obtaining Letters of Administration to which he is no party but of which he has received knowledge and whereto he has had a capacity to make himself a party. 21 Cal.L.J. 557, Foll. 69 Ind. Cas. 611=1 Pat. 86=A.I.R. 1922 Pat. 406.

——S. 50—Executor's right to possession.

Where although some of the duties imposed on the executors have been performed, there are others which still require to be carried out, and where the person entitled to the estate has not taken it out of the possession of the executors, they are entitled to continue in occupation of the estate. 64 Ind. Cas. 997=48 Cal. 1051=33 C.L.J. 451=25 C.W.N. 977=A.I.R. 1921 Cal. 527.

——S. 50—Revocation, application for—Whether a suit.

Quaere.—Whether an application for probate is a suit. (1906) 4 C.L.J. 492.

——S. 51—Additional District Judge.

The Additional District Judge exercises, with respect to the cases transferred to him by the District Judge, the same powers as the District Judge. When the Additional District Judge takes seizin of a case upon a transfer made to him he becomes the "principal Civil Court of original jurisdiction." When the function of a District Judge under the Probate and Administration Act is transferred to an Additional District Judge he has the same jurisdiction as the District Judge with respect to the grant and revocation of Probates and Letters of Administration, even as regards the revocation of Probates granted by the District Judge. 78 Ind. Cas. 701=3 Pat. 609=A.I.R. 1924 Pat. 593.

——S. 51—The Additional Dt. Judge exercising powers as a District Judge can grant probate or letters of administration in all cases whether there was contention or not. 68 Ind Cas. 940=A.I.R. 1923 Nag. 41.

——Ss. 51, 76—Probate — Practice — Taking a surety bond by Court when administrator is appointed—How far Court 'functus officio' after that —Power of Court to ask for fresh surety in case a surety is discharged by Court.

Under Ss. 51, 78, a Court does not become functus officio immediately a surety is accepted. In case the Court discharges the surety before the administration is over, it can call for a fresh surety. (1901) 6 C.W.N. 7=29 C. 68.

——S. 52—Probate — When binds parties and privies.

Probate granted in a solemn form binds the parties and privies, i.e., persons who remain silent in spite of the knowledge of the proceedings. Probate granted in common form in a contentious proceeding as a result of a compromise cannot be provoked except on the proof of fraud either on Court or on parties. Such a probate cannot be embodied in an order of Court because the Court cannot always enforce its terms. Such a proceedings binds the parties to the compromise only and not the privies. The Court will not make an order binding minors in the compromise effected solely between majors. A minor on attaining age may apply for revocation unless ratification or acquiescence is proved against him. 14 C.W.N. 1068 =7 Ind. Cas. 740.

——S. 53—Interpretation.

The words "and all matters connected therewith" in S. 53 do not include proceedings under S. 19-H of the Court Fees Act. Those words have reference to matters such as the revocation of probate, the production of accounts, and similar other matters. A proceeding under S. 19-H merely decides a revenue dispute between the Collector and the holder of probate. 72 Ind. Cas. 472=50 Cal. 239=A.I.R. 1923 Cal. 406.

——S. 53—Will—Probate—Adoption mentioned in Will—Whether can be tried.

Although the question as to the alleged adoption may be considered with reference to the genuineness of the will, it would not be tried as a material and vital issue on an application for grant of probate, the necessary parties to such an issue not being before the Court. 20 C.W.N. 617=30 M.L.J. 624=(1916) 1 M.W.N. 358=4 L.W. 214=33 Ind. Cas. 790 (P.C.).

——S. 54—Title of testator — Enquiry—Jurisdiction.

The probate Court cannot inquire into the title of the testator in the properties covered by the will. 1 Pat.L.W. 370=35 Ind. Cas. 416.

——S. 55—Dismissal of application for probate.

The dismissal for default of an application for probate will not debar an application by another person claiming interest under the will.

Where an application for probate by a legatee has been dismissed for default, the legatee's heirs can nevertheless plead the existence of the will as a defence to a suit for the property. 14 C.W.N. 924, Foll. 87 Ind. Cas. 621=21 M.L.W. 415 =1925 M.W.N. 285=A.I.R. 1925 Mad. 861.

——S. 55—Compromise.

An application for Probate cannot be disposed of by compromise. The law imposes on the Court the duty of determining whether the will is genuine or not. (1917) P.H.C.C. 192=2 Pat.L.J. 535= 5 Pat.L.W. 230=40 Ind. Cas. 345.

——S. 55—Interrogatories—Relevance.

In matters of probate the strictest relevancy in the interrogatories may not be required, but the Court should exclude whatever is offensive or improper. O. 11 of the C. P. Code applies to proceedings in Probate and a party can therefore ask of the opposite party to make a discovery of the assets of the deceased after delivering interrogatories into the Court. 43 Cal. 300=23 C.L.J. 480=34 Ind. Cas. 227.

——Ss. 55, 64 and C. P. Code, O. 32, R. 3—Discovery of minor heir—Procedure.

In a probate proceeding as soon as the judge becomes aware of the existence of a minor heir of the deceased, he must issue notice upon the minor and have a guardian **ad litem** appointed. (20 C.W.N. 200, Foll.) 23 C.L.J. 79=33 Ind. Cas. 14.

——Ss. 55 and 83—Application to revoke.

An application for revocation of probate comes under S. 55 and not under S. 83. 12 C.L.J. 91 =6 Ind. Cas. 912.

——S. 56—Fixed abode does not necessarily mean permanent abode.

One **C**, the deceased, had been stationed as a Railway Guard at Bina for 20 years where he occupied quarters in the Railway lines. When he died he was in possession of the furniture of his quarters. The District Judge held that on the date of his death **C** had no fixed place of abode at Bina because he was liable to be transferred.

Held, the deceased's residence had been fixed at Bina for 20 years. "Fixed" cannot possibly mean "permanent" because no one in this world can be said to have a permanent place of abode. 71 Ind. Cas 816=6 N.L.J. 49=19 N.L.R. 54= A.I.R. 1923 Nag. 145.

——S. 56—Bifurcation of the district—Effect.

The jurisdiction to grant probate cannot be taken away, because the properties dealt with in the probate are within the jurisdiction of another Court by reason of a bifurcation of the district. 31 Ind. Cas. 499 (Mad.).

——S. 57—Forum—Application for probate presented in Alipore Court, deceased having lived in Calcutta and owning most properties there—All witnesses to will resident in Calcutta—No sufficient ground exists for dismissing application.

The fact that the deceased lived in Calcutta, that the major portion of his (the testator's) property is situate in Calcutta, or that all the witnesses to the will live in Calcutta, is not ground for dismissing an application for probate presented in the Alipore Court. The applicant is **dominus litis** and his choice should be given effect to unless there are sufficient grounds made out to show as to why the proceedings should not be held at the Alipore Court. If the respondent does not agree on this point, that is no ground in itself for deciding in his favour.

Quaere.—Whether the words "Districts" in S. 57 applies to the High Court. 63 Ind. Cas. 523 =33 C.L.J. 386=A.I.R. 1921 Cal. 124.

——S. 58—Letters of Administration, grant of—Government, if has locus standi to oppose—Confidential proceedings, legality of.

Where an application by a person for grant of Letters of Administration was taken up as a contested case and meanwhile the Chairman of the Local Municipality made a report to the Sub-Divisional Officer that the will produced by the applicant in the suit was a forged one whereupon the latter took some confidential proceedings and sent in a record to the Collector asking him to oppose the grant of Probate who opposed it accordingly on behalf of the Government, **held** that the "confidential proceedings" of the Sub-Divisional Officer were not in accordance with law and that at the inception of the proceedings the Government had a **locus standi** in the matter but that as soon as it appeared that there were "heirs" in existence, the Government ought to have retired from the case. 29 Ind. Cas. 682 (Cal.).

——Ss. 59 and 84—Revocation of probate or letters is not retrospective.

The revocation of probate or letters does not have retrospective effect and does not invalidate all such acts done under them as are not expressly declared to be valid in the Probate and Administration Act. In this respect there is no distinction whatever between probate and letters of administration. A person died after obtaining a redemption decree and obtained probate of his will. He however failed to make payment within time and the decree was made absolute. Subsequently probate granted was revoked, and the heir of the deceased brought a fresh redemption suit,

Held, that grant of probate did not become void **ab initio** on revocation. The decree made absolute was therefore binding on the estate and the fresh redemption suit was barred by **res judicata**. 128 Ind. Cas. 359=8 Rang. 463=A.I.R. 1931 Rang. 15.

——S. 59—Probate grant of—Effect on question of title or construction of will.

Under S. 59 a probate when granted shall be

conclusive as to the representative title of the grantee only in certain respects. The construction of a will or the determination of the rights of certain persons under it are outside the scope of the probate. 8 A.L.J. 1063=11 Ind. Cas. 235.

——S. 59—Suit for declaration of right to succeed to joint family property.

S. 59 does not affect a suit for a declaration of the plaintiff's right to succeed to the property held to be the joint family property of the deceased and her adopted son. 6 M.L.T. 116=4 Ind. Cas. 1046.

——S. 62—Under the Probate and Administration Act, the estate of the testator vests in the executor and the executor has the power to dispose of the estate from the date of the testator's death, even though probate has not been obtained.

Under English Law, the title of an executor is derived from the will and not from the probate though it is a probate alone, which authenticates his right, and Indian Legislature has not departed from this principle in the Act. A.I.R. 1932 P. C. 92=9 O.W.N. 201=36 C.W.N. 441=62 M. L. J. 365=1932 A.LL.J. 293=35 L.W. 532=1932 M.W.N. 486=55 C.L.J. 263=34 Bom.L. R. 764=59 I. A. 112=55 Mad. 443=136 Ind. Cas. 111 (P.C.).

——S. 62—Oral will — Application for probate, maintainability of—Fact that substance of will was taken down at the time, effect of.

An application for the grant of probate of an oral will can be entertained under the Probate and Administration Act (5 of 1881).

The fact that the substance of the oral will was taken down at the time the will was made would not make any difference in the eye of the law. That fact would only be a strong piece of evidence to prove the contents of the oral will. A. I. R. 1931 All. 489=1931 A.L.J. 711=53 All. 687=136 Ind. Cas. 284 (F.B.).

——Ss. 62 and 5—S. 5 does not necessitate the proof of the will — Grant of probate is to some extent discretionary — Court has to see whether duty on the properties in respect of which grant is sought under S. 5 has been paid when probate was granted under S. 62 or 64—If entire duty is not already paid, duty on properties in respect of which grant under S. 5 is applied for, must be paid.

The jurisdiction conferred on a Court in India under S. 5 is analogous to that conferred on the Courts in England, Scotland or Ireland by the Resealing statutes. The Court has no power, under S. 5, either to grant probate or letters of administration with or without the will annexed. It has power only to grant letters of administration with a copy of a properly authenticated copy of the Will annexed. The language employed by the Legislature under S. 5 is not accidental but is deliberate, and enables the Court, following the English Law, to dispense with the necessity of proof of the original Will.

Under S. 5 there is some discretion in the Court to refuse the grant. The Court must be satisfied first, that the executor or the administrator has given security to cover the estate of the deceased within the jurisdiction of the Court which granted probate or letters of administration as well as that within the jurisdiction of the Court asked to make a grant under S. 5 and, secondly, that he has paid the duty in respect of the estate of the deceased within the jurisdiction of the Court that granted the probate or letters of administration as well as that within the jurisdiction of the Court asked to make a grant under S. 5. When the Court is satisfied as to these facts, and it has been shown that the Will has been proved and deposited in a Court of competent jurisdiction situate beyond the limits of the province, there is no further discretion left in the Courts to refuse to make a grant under S. 5. It follows therefore that either the entire probate duty is payable on the application made under S. 62 or S. 64 of the Act or that the applicant making the application under S. 5 must pay such portion of the probate duty as was not paid at the time of his application under S. 62 or S. 64 of the Act. 62 Ind. Cas. 513=2 P.L.T. 683=6 P.L.J. 411=A.I.R. 1921 Pat. 206.

——S. 62—Court-fee is payable only on the properties covered by the grant.

Probate duty is payable in respect of the property as to which a probate is granted; not in respect of the property which may be ultimately administered by the executor, but when it is said that probate duty is not payable in respect of properties which are not the subject matter of the grant, but are ultimately administered by the executor, all that is meant is this: that such properties are not taxable because in respect of them probate was not granted. But to take the assets out of the statute it must appear that the assets which are ultimately administered by the executor were altogether outside the grant. 62 Ind. Cas. 513=2 P.L.T. 683=6 P.L.J. 411=A.I.R. 1921 Pat. 206.

——S. 62 and 58—Application for Letters—Duty of Court.

Where an application is made for the grant of Letters of Administration with a will annexed, the Court should not refuse to grant the letters unless it finds (1) that the will is not executed by the deceased or (2) that he was not in a sound and disposing state of mind at the time of making it or (3) the will was not his own voluntary act. 110 P.W.R. 1918=45 Ind. Cas. 974.

——S. 64—Petition for limited grant.

An application for the grant of Letters of Administration with the will annexed relating to one particular item need not contain in inventory of the entire property and can be granted. 90 Ind. Cas. 620=7 L.L.J. 288=26 P.L.R. 608=A. I.R. 1925 Lah. 493.

——S. 64—Finding in succession proceedings.

A finding as to relationship in proceedings under the Succession Certificate Act is not a bar to trial of the same question between the same parties in a proceeding under S. 64 of the Probate and Administration Act. 88 Ind. Cas. 612=A. I.R. 1925 Oudh 670.

——S. 64—Deceased and applicant members of joint Hindu family—Jurisdiction of Court to grant letters.

A member of a joint Hindu family with the deceased is not competent to apply for Letters of Administration under S. 64 of the Probate and Administration Act. 56 P.R. 1919=51 Ind. Cas. 651.

——S. 64—Minor, not cited—Effect.

A minor neither cited nor properly represented in a probate proceeding by which her interests have been affected can come in, even after great lapse of time and have the will proved in solemn form, in her presence. 23 C.L.J. 79=33 Ind. Cas. 14.

——S. 67—Verification.

The provision as to verification by attesting witness is directory and not mandatory and the omission can be cured. 68 Ind. Cas. 940=A.I.R. 1923 Nag. 41.

——S. 69 — Relations mentioned in application—Parties.

Relations whose names are given in an application for probate are not necessary parties to the proceedings as the law does not require notice to be given to them. 100 Ind. Cas. 162=A.I.R. 1927 Lah. 609.

——S. 69—Interpretation — Person entitled to a portion of the testator's estate or a right to maintenance therefrom is "a person having interest."

Per Devadoss, J —A person who is entitled to any portion of the estate left by the deceased or a right to claim maintenance from the estate of the deceased has an interest within the meaning S. 69. It is not necessary that he should claim through the testator in order to enable him to oppose the grant of probate of a forged will or an invalid will. He has sufficient interest to enter a caveat.

Per Waller, J.—The words "claiming to have any interest in the estate of the deceased" are intended to bear the same meaning as the words in the English Act "having or pretending interest in the (personal) estate affected by a will." 28 Cal. 441, Foll. 98 Ind. Cas. 259=49 Mad. 960 =24 M.L.W. 502=1926 M.W.N. 785=A.I.R. 1926 Mad. 1193=51 M.L.J. 563.

——S. 69—Caveat — Reversioners — Immediate and remote.

In a testamentary suit where the immediate reversioner challenges the will but in the course of the proceedings enters into a compromise with the propounders of the will and gives up his contention, the next immediate reversioners have a locus standi to enter caveats.

Quaere.—Whether any interest however slight or the bare possibility of an interest is sufficient to entitle a party to oppose a will? 27 C.L.J. 320=45 Ind. Cas. 59.

——S. 69 — Revocation of probate — Who can apply.

Under S. 69, no application for the revocation of Probate lies unless the applicant can show that he has some interest in the estate of the deceased. An applicant claimed to be joint in estate with the deceased while he was living as a member of a joint family.

Held, that as the interest of the deceased terminated with his death, the applicant could have no interest in the deceased's estate as required by S. 69. 1 Pat.L.W. 308=39 Ind. Cas 573.

——Ss. 69 and 90 (4)—Probate or Letters of Administration, grant of—Creditor's right to object.

A creditor has no interest in the immovable properties of the deceased debtor and has no locus standi to object to the grant of probate or Letters of Administration under S. 90 (4) which refer to immovable property only unless on the ground that the will is in fraud of creditors. 7 Bur.L.T. 245=7 L.B.R. 293=25 Ind. Cas. 48.

——S. 69—Notice of probate proceeding—"Interest of Estate of deceased"—Objection to probate—Person claiming independently of Will.

A person who claims independently of a Will and disputes the testator's right to deal with the property, is not a person claiming an 'interest in the estate of the deceased," and is not therefore entitled to notice of the probate proceeding and has no locus standi to apply for revocation of the probate. 20 Ind. Cas. 342 (Cal.).

——S. 69—"Interest"—Meaning of.

The word "interest" in S. 69 cannot cover the case of a mere reversioner; so the sisters of the deceased cannot object to the grant of a probate to the widow and the daughters of the deceased. 78 P.W.R. 1912=70 P.L.R. 1912=13 Ind. Cas. 433.

——Ss. 69 and 70—Caveat — Person "claiming an interest in the estate of the deceased."

Judgment creditors of the testator's son who have attached his property are persons "claiming an interest in the estate of the deceased" testator and can oppose an application for probate of the Will by the son who is a beneficiary under the Will. 6 Cal. 429; 28 Cal. 441, Foll. 34 Mad. 405=9 M.L.T. 138=(1910) M.W.N. 819=8 Ind. Cas. 351.

——S. 69—Reversionary heir of Hindu, if entitled to appear and be heard in probate proceedings.

Any interest, however slight, and even if it seems the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper or instrument. Although a reversioner under the Hindu Law has no present alienable interest in the property left by the deceased he is substantially interested in the protection or devolution of the estate, and as such is entitled to appear and be heard in a probate proceeding. 3 Ind. Cas. 178=10 C.L.J. 263.

——Ss. 69, 70 and 71 — Caveat by reversioner—'Person claiming to have an interest in the estate', meaning of.

Where caveators in a probate case objected to the grant of probate on the grounds that the will was spurious and that the testatrix had no power to dispose of the property by will, and that the properties belonged to them as reversionary heirs of the husband of the testatrix:

Held, that persons claiming outside and independent of the will, have no interest in the estate of testatrix, within the meaning of S. 69 and have no right to intervene and challenge the will set up. (1905) 1 C.L.J. 258.

——S. 69—'Persons claiming to be interested in the estate of the deceased', meaning of—Judgment-creditor of the heir-at-law.

The words 'persons claiming to be interested in the estate of the deceased" in S. 69 mean "persons interested in the property left by the deceased." A judgment creditor of the heir at law of the deceased who, but for the will would have succeeded to the estate is a person claiming to be interested in the estate of the deceased when he asserts that the will was set up by the heir-at-law

to defraud his creditors. As such person he is entitled to impeach the will. (1901) 28 C. 441.

——Ss. 69, 70 and 73—Title—Power of Court to go into question of caveat—Paramount title by Caveator—Applicant's interest—Proof of— "Contention" in S. 73.

A Court of probate is not merely entitled, but is bound to enter into questions of title if necessary in order to determine which of the two contesting parties is entitled to the grant of the Letters. But when the objector sets up a paramount title, e.g., that he being an adopted son is entitled to the whole estate not by inheritance but by survivorship, the probate Court is not entitled to go into the merits of the title set up by the objector and the nature of the estate left by a deceased. (3 C.W.N. 277; 6 C.W.N. 345; 28 Bom. 644, Foll.) The objector is fully entitled to deny the right which the applicant for letters of administration claims. The objector cannot be allowed to raise in a Probate Court a separate case based upon a paramount title and not a preferential claim to Letters of Administration which, if the objector has also applied for letters, would have been properly in issue to be decided by the Probate Court. Ss. 64, 69 anl 70 do not authorise a Probate Court to discuss the question of paramount title set up by the caveator who puts forward title to the property for the purpose of preventing a grant to others. (17 C.W.N. 613, Foll.) "Contention" used in S. 72 does not empower the objector to oppose the proceedings on the ground that there was no estate at all to which Letters of Administration could be taken. 5 Pat.L.J. 107=(1920) P.H.C.C. 87=1 Pat.L.T. 19=54 Ind. Cas. 807.

——S. 69—Disputed will — Duty to examine all attestors and witnesses if required by parties.

On an application for probate of a will, it was proved that the will had twelve witnesses, that the testator did not sign his own name, but that his name was written by his uncle. The trial Judge suggested that it was not necessary for the applicant to prove the signatures of attestors by citing them as witnesses.

Held, that this was a defect in procedure. The will required to be carefully scrutinised and it was necessary to place before the Court all the available evidence so that the Judge could form a right conclusion having a free mind. 51 Ind. Cas. 1007 (Cal.).

——S. 69—Probate—Refusal of—Points not raised by parties.

In granting probate of a will, the Court must satisfy itself on all points regarding the will, and in coming to its conclusion must proceed on the evidence on the record and have due regard to the contentions of the parties. Where the Court below refused probate of a will on consideration of a point not raised in the written statement or in the issues, the High Court set aside the order refusing to grant probate and directed the grant of probate to the petitioner. 51 Ind. Cas. 335 (Cal.).

——S. 69—Probate—Delay in application—Effect of.

There is no rule of law that a will propounded very late is incapable of being proved. Long delay in propounding a will, will give room to much suspicion and the Courts are in such cases bound to scrutinize the evidence very carefully. 22 C.W.N. 424=45 Ind. Cas. 187.

——S. 69—Probate — Application for — Delay — Terms of will, natural—Genuineness.

When an application for the Probate of a will was made, seven months after the death of the testator, probate should not be refused on the mere ground of delay. If the will appears to be natural will and in accordance with the tenor of life of the testator, it should be maintined. 36 All. 93 (P.C.), Foll. (1917) P.H.C.C. 85=43 Ind. Cas. 195.

——S. 69—Probate proceedings in—Scope of enquiry.

The title of a testator to the properties covered by his will or the question whether or not a person was adopted by a testator are not matters which could be decided in Probate proceedings. 1 Pat.L.W. 370=35 Ind. Cas. 416.

——S. 69—Will—Special citation.

The District Judge under S. 69 must order special citation to the person whose rights are affected when a Will alters the devolution of property. 21 C.L.J. 557=19 C.W.N. 882=30 Ind. Cas. 161.

——S. 69—Scope of enquiry—Legality of—Will—Legacy.

A District Judge in Probate proceedings cannot question the testator's disposing power and so he cannot go into the question whether the requests in the will are illegal and void. 9 N.L.R. 152=21 Ind. Cas. 599.

——S. 69—Absence of citation—Effect.

When however the citation is discretionary, mere absence of such citation does not invalidate the grant, but is sufficient cause for inquiring into the genuineness of the will. 13 Bom.L.R. 38=9 Ind. Cas. 354.

——S. 70—Who can oppose grant.

Grant of letters of administration may be opposed by person claiming interest in estate by purchase at sale in execution of decree against sons of deceased who would have taken estate in event of intestacy. 6 Cal. 460 and 10 Cal. 413, Foll. A.I.R. 1928 Cal. 277.

——S. 70—Evidence.

Where there is a will propounded, and the attesting witnesses and the writer of the document support it, and where their testimony is not seriously impaired in cross-examination, it behoves the Court of Probate to listen with the greatest caution to a caveator whose case rests for the most part on grounds of suspicion. On the other hand, this principle should not be applied in India without considerable discrimination. 86 Ind. Cas. 642=1925 P.H.C.C. 33=A.I.R. 1925 Pat. 363.

——S. 70—Verification—Objections to petition for Letters should be verified.

The grounds of objection to an application for Letters of Administration should be in the form of a pleading and properly verified in accordance with the provisions of O. 6, R. 15. Similarly the reply of the applicants to the objection should be properly verified, and the proceedings should then take the form of a suit in which an issue should be framed and the parties should be examined on oath. 82 Ind. Cas. 973=3 Bur.L.J. 68=A.I.R. 1924 Rang. 273.

——S. 70—Probate proceeding—Parties.

Even the possibility of an interest is sufficient to entitle a person to become a party to a probate proceedings. (1918) P.H.C.C. 276=5 Pat.L.W. 216=3 Pat.L.J. 409=46 Ind. Cas. 398.

——S. 70—Probate proceeding—Court, duty of.

In a probate proceeding the Court has no concern with the devolution of the property, but only with the point whether the will is genuine and duly executed. (1918) P.H.C.C. 349=3 Pat. L.J. 415=46 Ind. Cas. 117.

——S. 70—Probate proceedings—Caveator—Onus on applicant to prove a prima facie case—Death of one executor—Suit against survivor.

The petitioner in a probate proceeding should prima facie prove that the caveator cannot possibly have any interest which he claims and then the caveator should be called upon to rebut the presumption arising from the evidence produced by the propounder.

There is no rule in the Act for the discharge of caveat. The only rule of procedure governing such a proceeding is O. 1, R. 10, C. P. Code. A caveat should only be discharged if caveator has no interest in the estate. If one of two executors dies, the representation of the estate of the deceased and of the interests of the beneficiaries vests in the remaining executor. It is open to the caveators to proceed against him alone. 3 Pat. L.W. 198=41 Ind. Cas. 705.

——S. 70—Caveat—Meaning.

A caveat which is similar to a precautionary measure to assure that there shall be no proceeding in respect of the estate of the deceased without notice to the person who files a caveat is not necessary if the persons interested in the estate of the deceased appear upon a citation. 20 C.W.N. 787=36 Ind. Cas. 38.

——S. 70—Probate — Application for — Creditor when entitled to interfere.

Semble.—Only where a will is put forward to defraud creditor, a creditor would have a locus standi to come in probate proceedings. 30 Ind. Cas. 538 (Cal.).

——S. 70—Proceedings, nature of—Scope of inquiry.

A probate proceeding is not in the nature of a suit in which property is in dispute. The controversial point is the right to represent the estate of the deceased. The Court is not competent to investigate into questions of title of the deceased or the conflicting titles of the parties to the proceedings. (20 C. 888; 25 C. 324; 25 B. 644, Foll.). 19 C.W.N. 205=27 Ind. Cas. 617.

——S. 70—Probate—Caveat—Right to enter.

The mere fact that in a probate application a certain party was stated to have applied for Letters of Administration to the estate of the testatrix, and the Court had issued a citation upon him, would not entitle him to oppose the grant of probate, if it was found that he had no interest in the estate of the deceased. 40 Cal. 82=16 C.W.N. 1094=15 Ind. Cas. 225.

——S. 70—Letters of Administration — Christian sister—Caveat—Questions to be gone into—Enquiry into extent of estate.

The sister of a deceased Christian has no right to object to the application by the wife of the deceased for Letters of Administration.

It is beyond the scope of an inquiry into an application for Letters of Administration to determine the extent of the estate of the deceased. 78 P.W.R. 1912=70 P. L. R. 1912=13 Ind. Cas. 433.

——S. 70—Scope and object—Title, question of.

In proceedings under the Act on an application for Letters of Administration the nature and contents of estate of the deceased need not be decided. Question of title can only be decided in a regular suit. (1910) 1 U.B.R. 69=10 Ind. Cas. 993.

——S. 70—Proceedings under — Questions to be decided by the Court granting probate.

In proceedings under the Act, the Court is bound to grant a probate unless it finds that the will was not executed by the testator or that he was not in a state of mind to exercise his testamentary powers or that it was not the voluntary act of the testator. The Court has no concern to go into other questions such as testator's power to make the will and its validity on other grounds. 141 P.L.R. 1911=220 P.R. 1912=233 P.W.R. 1911=10 Ind. Cas. 130.

——Ss. 70 and 72 — Letters of Administration—Mahant.

A person can oppose application for probate or Letters of Administration without caveat as under Ss. 70 and 72. In proceedings relating to grant of Letters of Administration, the District Court cannot decide what property belongs to the estate of the deceased. Property acquired by a Mahant belongs to the religious shrine of which he is the Mahant and therefore Letters of Administration relating to such property can be granted only to the persons shown to have near spiritual relationship with the deceased Mahant. 46 P.W.R. 1910=6 Ind. Cas. 650.

——S. 71—Caveat by brother of deceased — Preliminary issues as to the caveator's interest in filing the caveat—Question of title — Practice.

In applications for probate, the practice in Bombay is for the court not to enter on a question as to the title to the property which the testator by his will purported to leave. Where a caveat was entered by the brother of the deceased on the ground that the property left by the testator was joint and that letters of administration should not be granted as though the property was separate:

Held, that the court will not enter into the question of title. 19 A. 458, app. 6 C.W.N. 345 foll. The reasons which operate to limit the scope of the inquiry when probate is sought are equally applicable to a petition for the Letters of Administration...The grant will in no way hurt or prejudice the caveator; it is general in its terms specifying no item of property and prejudging nothing to the detriment of the caveator, and adequate security is taken on the grant. (1904) 6 Bom. L. R. 966=28 Bom. 644. See 4 Bom. L. R. 637=26 Bom. 792. Also 12 Bom. L. R. 694.

——S. 73—Contentious proceedings.

Withdrawal of the pleader on the opposite side does not make contentious suit a non-contentious one, but its effect is to make the suit an undefended suit. 84 Ind. Cas. 65=39 C.L.J. 569=A.I.R. 1925 Cal. 75.

——S. 73 — Letters of Administration — Question of title—Jurisdiction.

It is not the practice of the High Court in its testamentary and intestate jurisdiction to go into questions of title so that in an application by a husband for grant of Letters of Administration to the estate of the deceased wife, an issue as to whether the property was her Jantaka Shridhana should not be allowed to be raised. 17 C.W.N. 613=23 Ind. Cas. 296.

——S. 76—General grant.

A general grant made in terms of S. 76 is operative under S. 82 until the probate shall have been recalled or revoked for the reason, amongst others, specified in S. 50 that the grant has become useless and inoperative through circumstances. (Indian and foreign case law discussed). 66 Ind. Cas. 882=34 C.L.J. 457=A.I.R. 1921 Cal. 292.

——Ss. 76 and 98—Accounts, order for exhibiting.

Sections 76 and 98 of the Act contemplate the submission of an initial inventory and final accounts after the completion of the administration. Orders purporting to fix the capital of the trust and making provisions for effecting repairs and submitting half yearly accounts are outside their scope. 12 S.L.R. 27=47 Ind. Cas. 750.

——S. 77—Validity of will denied.

It is open to an executor to openly assert outside the Court that he is renouncing his executorship, but it is by his statement in the Court that he will stand or fall. The executor may challenge the genuineness of the will and at the same time claim probate if it is proved to be genuine. 47 Cal. 838, Foll. 94 Ind. Cas. 73=23 M.L.W. 462=1926 M.W.N. 323=A.I.R. 1926 Mad. 605.

——S. 77—Procedure.

When the application for probate does not mention that the petitioner is appointed the executor and he is not also appointed executor by the will, the Court should grant only letters of administration with will annexed under S. 77. 68 Ind. Cas. 940=A.I.R. 1923 Nag. 41.

——S. 77—Letters, grant of — Practice outside India—Colonial Probates Act (55 and 56 Vic. 6.)

Excepting in India, in other parts of the British Empire the Colonial Probate Act applies and the practice is not to make a grant of Letters of Administration with a copy of the will annexed but to send an exemplification of the probate granted in any part of the United Kingdom and this is resealed by the Court to which it is sent. That practice and the Act have not been extended to British India and the practice here is to require administration with will annexed to the estate of the deceased British subject, who left property in India. 40 Cal. 74=18 Ind. Cas. 907.

——S. 78—Assignment of bond.

Report of a Commissioner as to the liability of administrator to the estate is not binding on the surety unless the latter has the opportunity of testing its correctness. Nor are the proceedings of assignment of the administration bond binding on him unless he is party to those proceedings. 98 Ind. Cas. 459=4 Rang. 358=A.I.R. 1927 Rang. 28.

——S. 78—Discharge.

A surety to an administration bond is not entitled as a matter of right to be relieved of future obligation at his choice by merely alleging misconduct on the part of the administrator. 76 Ind. Cas. 1009=A.I.R. 1925 Cal. 153.

——S. 78—Liability of surety.

Sureties to an administration bond are bound thereby so long as the administration of the estate is incomplete, and are not absolved from the liability to suit their own convenience. 4 U.B.R. 22=A.I.R. 1921 U.B. 25.

——S. 78—Guarantee under.

In the case of letters of administration, the only creditor can be the Judge of the Court, and there are no fresh contracts for him to enter into as the letters have been granted once for all. In such a case the guarantee cannot be held be a continuing guarantee within the meaning of S. 130. 4 U.B.R. 22=A.I.R. 1921 U.B. 25.

——S. 78—Fresh security.

There is no provision in the Probate and Administration Act as to what is to be done or what the Court can do in the event of the death of the surety or his discharge. The Court of Probate is competent to require a new bond or additional security where the interests of the estate require it and especially where some new situation arises such as an unforeseen increase of assets or the unexpected breakdown or death of one or both the sureties. 29 C. 68 and 47 C. 115, Foll. 66 Ind. Cas. 367=2 P.W.R. 1922.

——S. 78—Breach of terms.

Where there is a technical breach of the terms of an administration bond executed in favour of a Court, the whole of the amount of the bond is not recoverable and only reasonable compensation can be awarded. 64 Ind. Cas. 366 (Cal.).

——S. 78—Security—Power to call for additional security—Revocation of probate.

Under S. 78 of the Act the Probate Court is competent to require a new bond or additional security from the executors where the interests of the estate require it, especially where there is an increase of assets or the unexpected breakdown of the original surety or sureties. If the order of the Court calling upon the executor to furnish security is not complied with, probate may be revoked. 47 Cal. 115=29 C.L.J. 496=23 C.W.N. 763=51 Ind. Cas. 936.

——S. 78—Liability of Hindu Widow under administration bond.

Where a Hindu widow obtained Letters of Administration to the estate of her deceased husband and executed the usual administration bond under S. 78, her liability under the bond is confined only to such acts of waste and mismanagement as could be attributed to her as administratrix and not to any such acts attributable to her as the widow in possession of her husband's estate under the Hindu Law after administration is over. 17 M.L.T. 61=27 Ind. Cas. 849.

——S. 78—Assignment of administration bond.

A District Judge cannot assign an administration bond under S. 78 again while the first assignment is still in force. 39 Cal. 563=15 C.L.J. 332=16 C.W.N. 662=13 Ind. Cas. 690.

——S. 78—Contract Act (IX of 1872), S. 129—Revocation of surety bond.

Where Letters of Administration are granted to a person becoming a surety under S. 78, the surety has no right to withdraw his surety bond and the surety bond is not continuing guarantee within the meaning

of S. 129 of the Contract Act and is not revocable. The High Court or the District Court has no power to cancel a surety bond given under the Act. 31 A.U. 56=6 A.L.J. 19=(1908) A.W.N. 288=1 Ind. Cas. 143.

——S. 78—Administration bond—Security, order on executor to furnish can be made after grant of probate.

It is only when a Judge grants probate that he may direct that a person to whom the grant is made should give security under S. 78. Such an order made for the first time on an application for the revocation of the probate (which application was refused) set aside. (1904) 8 C.W.N. 668=31 C. 688.

——S. 78—Security, amount of, executor, to be furnished by.

The District Judge has a discretion, under S. 78 to require security even from an executor. Security is required only to guard against malpractices and security is enough if it affords reasonable protection against malpractices which require time to be carried out. Security for a 3 or 4 months' income is a sufficient safeguard against serious or continuous mismanagement. (1904) 1 C.L.J. 180. *Also* (1907) 6 C.L.J. 454.

——S. 79—Assignment of bond—Procedure.

The assignment of bond under S. 79 of the Act could be effected only on a petition to the Court which could be satisfied of the breach of the conditions of the bond. The Court may impose any conditions as to security, etc. The assignment to be legal must be completed under the signature of the Judge. The assignee cannot sue merely to recover his own costs, but must sue in a representative character as trustee of all interested in the estate to recover the full amount of wastage. (1913) 1 U.B.R. 174=21 Ind. Cas. 297.

——S. 82—Executor—Right to sue on behalf of the estate.

Under S. 82 of the Prob. and Admn. Act and O. 31, R. 1, C. P. Code no one but an exectuor is competent to prosecute a suit with respect to matters arising out of the estate of the deceased. 2 U.P.L.R. (Pat.) 31=55 Ind. Cas. 504.

——Ss. 82 and 90—Muhammadan Law—Alienation by heirs for debts.

It is doubtful whether the alienation of the estate of a deceased Muhammadan by some of his heirs in possession of the estate, for discharging the debts of the decesased, will bind even the proportionate shares of the alienees when it is made in contravention of Ss. 82 and 90 of the Probate and Administration Act. The Administrator is the only person who, by his acts, could bind the shares of the other heirs. 9 Bur. L.T. 236=34 Ind. Cas. 128.

——S. 82—Executors, one of several—Taking out probate—Others precluded from acting—Subsequent grant of probate, effect of.

Per *Wallis, C.J.* (*Seshagiri Iyer, J. contra*).—When one of the two executors takes out probate, the others are precluded from dealing in any manner with the estate and the subsequent grant of probate cannot validate acts done by them in disobedience of express provisions of S. 82 of the Act. 39 Mad. 365=28 M.L.J. 285=2 L.W. 241=28 Ind. Cas. 221.

——S. 82—Suit for share.

Where letters were granted to the widow of the deceased and the present plaintiff had sued for a declaration of his right to share as legatee, his present suit to recover shares of rent from a tenant is maintainable. 15 Ind. Cas. 542 (Cal.).

——S. 81—Caveator—Interest of creator. *See* SUCCESSION ACT (1865), S. 250. 12 Bom. L.R. 366=34 B. 459=6 Ind. Cas. 523.

——S. 83—Nature of proceedings.

A contested application for probate is not a "suit". 33 Bom. 256 and 41 Cal. 637, Foll. 107 Ind. Cas. 34=50 All. 238=25 A.L.J. 972=A.I.R. 1928 All. 51.

——S. 83—Contentious probate proceedings.

Contentious probate proceedings must take the form of a suit. 38 Bom. 309=16 Bom. L.R. 5=23 Ind. Cas. 325.

——S. 83—"Suit".

Probate proceedings fall within the description of "suit" not in point of fact, but of form for the limited purpose of applying to it 'as nearly as may be', the provisions of C. P. Code. 33 Bom. 256=10 Bom. L.R. 1197=2 Ind. Cas. 283.

——S. 83—Costs—C.P. Code, S. 34.

If an application for probate is strongly opposed and the petitioner is put to very heavy and needless expense, the Court has ample power to award his costs. 57 Ind. Cas. 739 (Pat.).

——S. 83—C. P. Code, O. 9, R. 9—Scope.

O. 9, R. 9, applies to the dismissal of an application for probate. 52 Ind. Cas. 639 (Mad.).

——S. 83—C. P. Code, O. 23, R. 3—Divisions of testator's property before will is proved—Objector's right to resile from compromise.

Parties cannot be permitted by the Court to divide the testator's property before the will is proved. A compromise in a probate case only makes the case non-contentious, but does not take away the Court's duty to grant or refuse probate. An objector in probate proceedings may, despite his agreement to compromise, subsequently require the question of the execution of the will to be tried. 20 C.W.N. 986=1 Pat. L.J. 377=1 Pat. L.W. 41=37 Ind. Cas. 12.

——S. 83—Letters of Administration—Probate—Question of title.

Obiter.—On a *bona fide* application for Probate or Letters of Administration, the Court will not go into questions of title with reference to the property, of which the deceased purported to dispose, or in respect of which he died intestate. 20 C.L.J. 307=27 Ind. Cas. 24.

——S. 83—"Defendant".

The mere citing of a person in a probate application does not make him a defendant. Under S. 83 of the Act, the case must be contentious and the person cited must appear to oppose the grant before he becomes a defendant. 41 Cal. 819=24 Ind. Cas. 27.

——S. 83—Rules and Orders of the High Court, Ch. VI, Rr. 36-A, 42-A—Probate proceeding—Pleader's fee—Ad valorem fee—Valuation.

A proceeding under the Act is a miscellaneous proceeding and pleader's fee is Rs. 80, under rule 42-A., Chap. VI of the Rules and Orders of the High Court. The valuation of the property cannot be regarded as the valuation of suit and Rule 36-A does not apply and there is no other rule authorising assessment of *ad valorem* pleader's fee. 41 Cal. 637=18 C.L.J. 643=22 Ind. Cas. 402.

——Ss. 83 and 86—Order setting aside dismissal for default—Right of appeal.

An order setting aside the dismissal for default of appearance of an application made under the Act, is not an order made under any given power given by that Act within S. 86. It is a matter of procedure governed under S. 83; the C. P. Code does not give a right of appeal from an order setting aside a dismissal for default of appearance. 6 Bur. L.T. 87=7 L.B.R. 24=20 Ind. Cas. 281.

——S. 83—C. P. Code, S. 103, if applies to probate proceedings—Dismissal of application for probate

for default—Executor if may propound will again—Res judicata—Deterrent costs sufficient remedy against vexatious conduct.

A refusal to admit a will to probate is conclusive of the facts necessary to support the decision. But if probate has been refused not on the merits but merely by reason of the insufficiency of some matter of form or procedure, there is no adjudication that the instrument is not entitled to probate and therefore it may be again propounded. If therefore an application for probate by the executor of a will has been dismissed for default that fact itself cannot debar an application by any other person claiming an interest under the will, and therefore necessarily also, by the executor himself. An executor presenting an application for probate of a will cannot be regarded as a plaintiff who brings a suit in respect of a cause of action. S.103, C.P. Code (1882) would therefore be in terms inapplicable to such an application. (1910) 14 C.W.N. 924=12 C.L.J. 185=7 Ind. Cas. 126.

——**S. 84**—Payment to executor—Executor under revoked probate entitled to reimburse himself of sums advanced to estate. *See* 6 C.W.N. 787.

——**S. 84—Revocation of probate—Effect.**

There is nothing in the Act to suggest that the revocation of probate or letters has retrospective effect and invalidates all acts done under them which are not expressly declared to be valid. Thus the proceeding instituted by an executor will be binding on the estate. 8 Rang. 463=128 Ind. Cas. 359=A.I.R. 1931 Rang. 15.

——**Ss. 85 and 86—Jurisdiction—Power of Dt. Judge to entertain application for Letters of Administration—Appeal.**

An order of a Dt. Judge, deciding that he has jurisdiction to entertain an application for Letters of Administraction under Act (V of 1881), is not open to an appeal under S. 86 as it is not an order by him by virtue of the powers expressly conferred upon him by the Act; nor can such order be revised under S. 70 (*a*) of Act (XVIII of 1884), because there can be no revision from an interlocutory decision of a subordinate Court. 51 P.R. 1889, foll. 123 P.L.R. 1910=7 P.R. 1910=94 P.W.R. 1910=7 Ind. Cas. 710.

——**S. 86—Interference by High Court.**

High Court will not interfere with the decision exercised by the lower Court unless it is satisfied that that discretion was unreasonably exercised. 94 Ind. Cas. 750=7 P.L.T. 631=1926 P.H.C.C. 118=A.I.R. 1926 Pat. 356.

——**S. 86—Condition for appeal.**

An appeal under S. 86 is subject to there being a right of appeal against an interlocutory order under the C.P. Code. An order holding that a certain person has a *locus standi* to oppose the appliacation for the grant of letters of administration with the Will annexed is not appealable. 17 C.L.J. 230, foll. 90 Ind. Cas. 729=A.I.R. 1926 Cal. 180.

——**S. 86—Order permitting sale of immovable property is appealable.**

The word "rules" in S. 86 relates to rules of procedure regarding appeal laid down in the Civil Procedure Code, and therefore all orders made by the District Judge or District Delegate by virtue of the powers conferred upon him thereunder are subject to appeal in accordance with the rules of procedure laid down in the Code of Civil Procedure. An appeal lies to the High Court against an order passed by a District Judge or Delegate granting permission to an administrator to dispose of immoveable property under S. 90 of the Probate and Administration Act. 80 Ind. Cas. 746=2 Rang. 117=A.I.R. 1924 Rang. 237.

——**S. 86—Orders under—Whether appealable.**

By virtue of S. 86 all orders under the Act made by a District Judge are appealable and the procedure provided by the C. P. Code for appeals applies to such appeals. 20 C.W.N. 28=33 Ind. Cas. 143.

——**S. 86—Order refusing to issue probate as no succession duty was paid—Appeal.**

An order refusing to issue probate till a sum of money not legitimately leviable is paid as succession duty refuses in effect the application for probate and is therefore appealable under S. 86 of the Act. 43 Cal. 625=20 C.W.N. 472=22 C.L.J. 370=30 Ind. Cas. 394.

——**S. 86—Order disallowing caveator to oppose grant of appeal—Caveator—Locus standi—Revision.**

No appeal lies against an order refusing to allow a caveator to oppose the grant of probate of a will on the ground that he has no interest sufficient to enable him to appear in the probate proceedings. 21 C. 539; 18 C.L.J. 612, Foll. The High Court in this case, however, interfered under S. 115 of the C. P. Code and held that the will in the particular case seriously affected the interests of the caveator and that he had sufficient interest to oppose the grant and directed the will to be proved in solemn form in the presence of the caveator as in a contentious case. 19 C.W.N. 1169=21 C.L.J. 292=28 Ind. Cas. 578.

——**S. 86—Order refusing permission to oppose if appealable.**

No appeal lies against an order refusing to allow a party to oppose an application for probate on the ground that he has no *locus standi*. 18 C.L.J. 612=22 Ind. Cas. 276.

——**S. 86—Appeal.**

There is no appeal from an order assigning an administration bond. 39 Cal. 563=15 C.L.J. 322=16 C.W.N. 662= 13 Ind. Cas. 690.

——**S. 86**—"Order"—Not restricted to orders under S. 588, C. P. Code. *See* S. 50. 8 C.W.N. 748.

——**Ss. 86, 90—Appeal—Sanction to sell—'Hereby' meaning of.**

The word 'hereby' in S. 86 means by the whole Act and not merely by the chapter in which the section occurs. An order made by a District Judge granting permission to dispose of immoveable property under the Probate and Administration Act is appealable. (1900) 5 C.W.N. 443=28 C. 149.

——**S. 86—Procedure—What to accompany memorandum of appeal.**

S. 86 of the Act with O. 41, R. 1 and O. 43, R. 2 of C. P. Code renders it necessary that the memorandum of appeal should be accompanied by a copy of the decree appealed from. Otherwise such appeal cannot be entertained. 16 C.L.J. 116=17 Ind. Cas. 99.

——**Ss. 86, 51, 52**—Whether controlled by S. 5 of the Indian Councils Act (55 and 56, Vic., C. 14). *See* BOMBAY CIVIL COURTS ACT, S. 16. 10 Bom. L.R. 924=32 Bom. 634.

——**S. 87—High Court—Powers of.**

"High Court" mentioned in S. 87 does not mean merely the appellate jurisdiction of the Court, but includes the original jurisdiction also. According to this section, the High Court can grant Probate or Letters of Administration on the original side. Rule 740 of the Original Side Rules does not override the provisions of S. 87 of the Act. 37 Cal. 224=5 Ind. Cas. 1003.

——**S. 87—High Court—Original Side—Concurrent jurisdiction.**

Under S. 87 the High Court in the exercise of its original jurisdiction has concurrent jurisdiction with the District Courts for the purpose of exercising all the powers conferred by the Act. (1900) 5 C.W.N. 377-

——S. 88—Limitation—Cause of action accruing during administration—Failure of executor to sue within limitation—Beneficiary is barred.

Where a cause of action has accrued after the death of the testator but before administration is completed, the beneficiary will be barred if the executor fails to sue within the period prescribed by law ; for the estate is still the estate of the testator and not the estate of the beneficiary who may be a life-tenant under the will of the testator and consequently a title that may be acquired by a stranger by lapse of time will be a title acquired against the testator and not against the life-tenant. 83 Ind. Cas. 812=3 Pat. 880=5 P.L.T. 513=A.I.R. 1924 Pat. 721.

——S. 89—Applicability.

S. 89 of the Probate and Administration Act has no application to a criminal prosecution. (44 M. 417, Foll.) And therefore criminal prosecution under S. 498, I.P. Code, cannot abate merely on account of the death of the injured party, *i.e.*, the husband. 71 Ind. Cas. 77=4 Lah. 7=24 Cr. L.J. 29=A.I.R. 1924 Lah. 72.

——S. 89—Section 89 of the Probate and Administration Act has no application to a criminal prosecution. It is wrong to speak of an offence as personal. 59 Ind. Cas. 918=2 Lah. 27=59 P.L.R. 1921=22 Cr. L.J. 166=A.I.R. 1922 Lah. 227.

——S. 89—S. 89 has no reference to criminal prosecutions but to civil actions only. The right to institute criminal proceedings, subject to certain limitations contained in Ss. 195 and 199 of the Cr. P. Code is common to any person cognizant of the commission of the offence, and does not exist merely in favour of the person injuriously affected by the offence. The word " prosecute " in S. 89 implies no connection with criminal proceedings, but is used in the same sense as in Ss. 14 and 16 of the Limitation Act. 65 Ind. Cas. 549=44 Mad. 417=13 M.L.W. 379=1921 M.W.N. 227=30 M.L.T. 349=23 Cr. L.J. 117=A.I.R. 1921 Mad. 278=40 M.L.J. 351.

——S. 89—Damages for negligence.

In India the doctrine of *actio personalis moritur cum persona* does not form part of the law. Right to sue for damages for negligence survives against the representatives of the deceased wrongdoer. 31 Cal. 993, Foll. Remarks of *Sadasiva Aiyar, J.*, in A.I.R. 1921 Mad. 1 (F. B.), Approved; A.I.R. 1923 Bom. 408 and 4 Pat. L.J. 676, Diss. from. 100 Ind. Cas. 286=53 Cal. 987=A.I.R. 1927 Cal. 277.

——S. 89—Malicious prosecution—Right to sue for damages does not survive to the legal representative of the person wronged.

Section 89 of the Probate and Administration Act and Act XII of 1855 are designed to protect suits for wrongs done to the proprety of a deceased person, but do not extend that protection to compensation for personal injury, the right to which dies with the death of the person injured. The right to sue for legal expenses or other losses caused to a person due to a malicious prosecution instituted against him is a personal right and it does not survive to the legal representative of such person. 98 Ind. Cas. 590=48 All. 630=24 A.L.J. 796=A.I.R. 1926 All. 610.

——S. 89—The intention of the section is to express in a statutory form the maxim, *actio personalis moritur cum persona.* Accordingly an action for malicious prosecution does not survive beyond the life-time of the plaintiff, even so far as it relates to the expenses incurred by the deceased plaintiff in defending himself against prosecution. A.I.R. 1921 Mad. 1 (F.B.), Foll. 73 Ind. Cas. 365=25 Bom. L.R. 435=47 Bom. 716=A.I.R. 1923 Bom. 408.

——S. 89—If a defendant in a suit for malicious prosecution dies before judgment is given in the suit, the right to sue does not survive within the meaning of O. 22 R. 1, so as to prevent the abatement of the suit.

" Personal injuriries " are wrongs to the person which do not necessarily cause damage to the estate of the person wronged. 62 Ind. Cas. 260=44 Mad. 357=1921 M.W.N. 121=14 M.L.W. 200=A.I.R. 1921 Mad. 1=40 M.L.J. 173 (F.B.).

——S. 89—Cause of action—Malicious prosecution—No survival.

S. 89 of the Act excludes from its operation all causes of action in respect of personal injuriries not causing the death of the party, *e.g.*, a suit for damages for malicious prosecution. 4 Pat. L.J. 676=(1920) P.H.C.C. 62=52 Ind. Cas. 348.

——S. 89—Executor's powers—"Personal injury"—Suit for malicious prosecution—Abatement of suit, S. 361.

S. 89 governs suits for malicious prosecution. Such suits, on plaintiff's decease, survive to his legal representatives. The exceptions in S. 89 should be read strictly. " Personal injury not causing death to the party " refers only to physical injuries and does not include injury caused by malicious prosecution. (1904) 31 C. 993=8 C.W.N. 745.

——S. 89—Damages for malicious prosecution. *See* TORT. 8 C.W.N. 329=31 Cal. 406.

——S. 89—Other personal injuries.

'Other personal injuries' in the section refers to bodily injuries and also to injuries like defamation or malicious prosecution. Defamation may safely be included in the class of injuries not causing death.

The section divides personal injuries into two classes those causing death and those not causing death. The two personal injuries named defamation and assault are given as illustrations of a bodily injuries and of those which are not bodily injuries. Assault and defamation will fall among injuries that do not cause death ; the cause of action for damages for such injuries will not survive under the section. 20 M.L.T. 303=(1916) 2 M.W.N. 280=31 M.L.J. 772=38 Ind. Cas. 823.

——S. 89—Pre-emption—Right to continue suit.

Semble.—An administrator is not entitled to continue suit for pre-emption launched by the deceased. 41 Bom. 636=19 Bom. L.R. 549=42 Ind. Cas. 32.

——S. 89—Pre-emption, right of—Survival.

Under S. 89 the right of pre-emption survives only to executors and administrators. 36 Bom. 144=13 Bom. L.R. 1040=12 Ind. Cas. 720.

——S. 90.

Synopsis.

1. **Alienation with permission.**
2. **Alienation without permission.**
3. **Appeal.**
4. **Grant of permission to sell.**
5. **Powers and duties of executor.**
6. **Miscellaneous.**

1. Alienation with permission.

——S. 90—Leave to sell—Scope.

Where Court gives permission to the Administrator to sell property, that permission to sell does not *ipso facto* give permission to mortgage. 9 Bur. L.T. 236, Foll. 112 Ind. Cas. 261=6 Rang. 411=A.I.R. 1929 Rang. 5.

——S. 90—Where sanction of the Court was obtained to sell the properties for a certain amount to pay off the debts due from the estate but the administratrix mortgaged the properties for the amount as fixed for sale at a hight rate of interest, *viz.*, 15 per. cent., while

properties were really worth less than the mortgage amount,

Held, that permission of sale could not be utilized for mortgaging the properties and the administratrix could successfully plead want of sanction in a suit by the mortgagee to enforce the mortgage. 98 Ind. Cas. 915=51 Bom. 16=28 Bom. L.R. 1360=A.I.R. 1927 Bom. 49.

——S. 90—Sale and mortgage—Power to sell given to exectuor includes power to mortgage.

Where by a Will power is given to sell the property to pay off debts, that power includes the power to mortgage. By S. 90 of the Probate and Administration Act, the power of an executor to dispose of immovable property is subject to any restrictions which may be imposed by the Will. But the power of sale is not a restriction imposed by the Will and the power of mortgage so far from being inconsistent with it is included in it, unless there be some reason to be gathered from the terms of the Will itself why it should be excluded. 8 C.W.N. 362, Foll. 68 Ind. Cas. 856=45 Mad. 867=16 M.L.W. 670=1922 M.W.N. 729=1923 M.W.N. 14=A.I.R. 1923 Mad. 84=43 M.L.J. 551.

——S. 90—Powers of Administrator—Limits of such power—Order of sale does not include power to mortgage.

An Administrator cannot alienate without the permission of the Court, and he will be strictly bound by the terms thereof. A power of sales does not enable an Administrator to mortgage. 9 Bur. L.T. 236=34 Ind. Cas. 128.

——S. 90—" Previous permission "—Alienation with permission may be set aside on proof of fraud—Mortgage with leave—Suit on mortgage—Court can inquire into details.

He who relies upon a permission necessary under law for the validity of any transaction in his favour must discharge the burden strictly by proving that his case comes within the protection and complies with the requirements prescribed by law.

An alienation with permission under S. 90 does not operate as absolute alienation, so as to exclude all enquiries into the question whether the permission was obtained through fraud or misrepresentation, although no doubt such enquiry would not be permissible in the absence of distinct allegations of fraud.

The " previous permission " referred to in S. 90 which enables an administrator to mortgage the estate implies that there should be a sanction by the Court of all the essential elements of the mortgage transaction ; it follows that a mere bald sanction to mortgage is not sufficient. Therefore, non-disclosure, while obtaining permission, of full particulars or of material and essential elements of the transaction, or of the conditions to be incorporated in the intended mortgage, as also, of the circumstances leading to the intended transfer, would entitle the Court trying a mortgage suit based on such a mortgage even though executed with permission, to go behind such permission, and give relief not only against the stipulations for payment of interest and compound interest, but also against other stipulations and conditions which may affect the Court generally to take into consideration all such circumstances as may show that the transaction was not overboard but was one which actually operated to put the lender in a position to make the best of the embarrassing situation in which the administrator was placed or that it was unfair or unreasonable in some other way so as to justify interference with its terms. 28 C.L.J. 88, Rel. on. 98 Ind. Cas. 6=A.I.R. 1927 Nag. 57.

——S. 90—Fraud in obtaining sanction.

Permission of Court obtained by fraud or misrepresentation—Alienation being voidable suit to avoid it is not necessary—Invalidity of the transaction can be pleaded as defence in a suit. 98 Ind. Cas. 6=A.I.R. 1927 Nag. 57.

——S. 90—Sanction of District Judge—Fraud and misrepresentation of executor—Purchaser aware of but not party to the fraud.

Where the sanction of Dt. Judge to an alienation is tainted by fraud and misrepresentation of facts on an *ex parte* application, it is void and inoperative, and the purchasers are not entitled to maintain their purchases, though they were not parties to the fraud. 23 C.W.N. 401=51 Ind. Cas. 884.

——S. 90—Sanction to sell obtained by Hindu ladies in possession—Effect.

If a Hindu lady pretending to be administratrix, makes alienation with the sanction of the Dt. Judge under S. 90, the alienation does not precisely operate as a sale by the order of the Court in Administration proceedings. 20 C.W.N. 929=23 C.L.J. 606=36 Ind. Cas. 655.

——S. 90—Sale by executor under orders of Court —Subsequent mortgage by residuary legatee of the same property—Mortgage does not affect purchaser's title.

When the estate of the deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In fact the right of the residuary legatee or heir is only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration have been satisfied, and therefore a mortgage from the residuary legatee does not in any way cast a cloud on the title of a purchaser from the executors who alienated property during the course of administration under orders of Court. 32 Cal. 198 (P.C.), Foll. 88 Ind. Cas. 33=29 C.W.N. 539=A.I.R. 1925 Cal. 703.

——S. 90—Administrators—Powers of—Erroneous appointment—Acts done under.

Under section 90 of the Act an Administrator can validly execute a mortgage of the immoveable property vested in him but he can do this only with the previous sanction of the Probate Court. This implies a sanction by the Court to all the essential elements of the mortgage transaction. However he cannot stipulate to pay a high and unreasonable rate of interest. The interest stipulated in this case was 30 per cent. compound interest and it was held unreasonable by the Court. A mortgage granted by an Administrator who was erroneously appointed as such to satisfy a debt of the estate which executor himself was compellable to pay is binding on the estate. All acts done by an executor or administrator in the due and legal course of Administration are binding even though the Letters of Administration are afterwards revoked or the incumbent discharged from his trust. 19 C.W.N. 240=21 C.L.J. 88=27 Ind. Cas. 715.

2. Alienation without permission.

——S. 90—Powers under Letters of Administration.

Letters of Administration were issued under the Probate and Administration Act. But had the application for the letters properly described the deceased, it would have been necessary to issue the letters under the Succession Act. The Administrator mortgaged the property of the deceased without permission of the Court.

Held, that the Letters of Administration issued under the Probate and Administration Act must be regarded

as being under that Act and giving only the powers that they could give under the Act unless and until the powers under them were extended by the Letters being altered to Letters under the Succession Act. The mortgage, therefore, being without authority, would not bind the heirs. 112 Ind. Cas. 261=6 Rang. 411=A.I.R. 1929 Rang. 5.

——**S. 90**—A creditor of the deceased has an interest in all his estate, and is entitled to look to that estate to satisfy his claim. An administrator by disposing of property of the estate vested in him, without permission of the Court, cannot thus defeat the claims of the creditors of the deceased. 99 Ind. Cas. 482=28 Bom. L.R. 1262=A.I.R. 1927 Bom. 16.

——**S. 90—Alienation without leave—Administratrix mortgaging properties without Court's sanction—Beneficiaries applying to be made parties in mortgagee's suit—Court should join them.**

When the administratrix mortgages the properties without the sanction of the Court and when the mortgagee brought a suit on the mortgage against the administratrix the beneficiaries applied to be made parties to the suit on the ground that they would object to the mortgage as being voidable for want of Court's sanction, but the mortgagee objected to their being made parties and the Court refused to join them:

Held, that the Court had ample powers to joint the beneficiaries and it was its duty to do under the circumstances in spite of the mortgagee's unwillingness to join them, and it would be open to the administratrix to plead want of sanction for the mortgage. 98 Ind. Cas. 915=57 Bom. 16=28 Bom. L.R. 1360=A.I.R. 1927 Bom 49.

——**S. 90—Conveyance without sanction of Court is voidable only by person interested in property.**

Ordinarily an administrator ought to obtain the previous permission of the Court before conveying the property to a third party. But a disposal of the property by the administrator in contravention of the above rule is only voidable at the instance of any other person interested in the property. In other words, if any objection is to be made to the conveyance of trust property that objection should proceed either from the heirs of the deceased or the heirs of the beneficiaries recognized as such in the deed of declaration of trust. 91 Ind. Cas. 169=5 Pat. 80=7 P.L.T. 188=1925 P.H.C.C. 254=A.I.R. 1926 Pat. 130.

——**S. 90—Necessity of sanction.**

Under the Succession Act it is not necessary for the Administrator to obtain the previous sanction of the Court to the sale, but under S. 90 of the Probate and Administration Act, 1881, there are various restrictions on his power to sell or mortgage immovable property and sub-S. (3) renders the previous permission of the Court obligatory for the sale of immovable property, whilst S. 91 enacts that in the event of a failure to obtain such previous permission, the sale shall be voidable at the instance of any interested in the property. 79 Ind. Cas. 729=2 Rang. 4=A.I.R. 1924 Rang. 221.

——**S. 90—Alienation without sanction is voidable and plaintiff avoiding must restore benefit obtained.**

S. 90, no doubt, makes it obligatory upon the administratrix to obtain the sanction of the Court if a lease for more than five years is granted, but non-compliance with this provision does not invalidate the transaction which becomes merely voidable and not void. If the party prejudicially affected thereby seeks relief the Court will assist him only on equitable terms of reimbursement. 83 Ind. Cas. 319=28 C.W.N. 444=A.I.R. 1924 Cal. 636.

——**S. 90**—Sale by Administrator without leave is good until set aside. 74 Ind. Cas. 54=1 Bur. L.J. 133=A.I.R. 1923 Rang. 69.

——**S. 90 (4)—Heir obtaining Letters of Administration—Property vests as Administrator—Sale by Administrator without leave of Court, if voidable—Rights of bona fide purchaser for value.**

An heir of a deceased obtaining Letters of Administration, gets the estate vested in him as an Administrator and a sale by him as an administrator should be made with the leave of the Court and if not so made is liable to be set aside at the instance of a person interested in the estate, no exception being made in favour of a *bona fide* purchaser for value. A creditor of the estate of a deceased debtor is a 'person interested in the property' within S. 90 (4) and is entitled to oppose an unauthorised act of the Administrator. 7 L.B.R. 93=22 Ind. Cas. 925.

——**S. 90—Administrator, alienation by without leave, voidable.**

An alienation by an Administrator without leave of the Court, the leave being necessary under S. 90 of the Act, is not void, but merely voidable and the person setting aside such alienation must give up the advantage, he might have derived from the alienation. 13 C.L.J. 432=10 Ind. Cas. 268.

——**S. 90, Sub-S. (4)—Lease granted by administrator for more than 5 years, void or voidable.**

A lease for a term exceeding five years granted by an administrator is as between the lessor and lessee a good lease. 8 C.W.N. 54.

3. Appeal.

——**S. 90—Order for sale—Appeal.**

An order of the District Judge under S. 90 permitting the Administrator to sell property is analogous to a decree and is therefore appealable. 20 C.W.N. 28=33 Ind. Cas. 143.

——**S. 90**—Sanction to sell—Appeal. *See* S. 86. 5 C.W.N. 443=28 C. 149.

4. Grant of permission to sell.

——**S. 90—Power to grant permission for sale.**

Administration suit in Rangoon High Court—Preliminary decree passed—Administrator appointed by another Court can be permitted to sell property. 91 Ind. Cas. 432=23 M.L.W. 399=30 C.W.N. 769=6 L.R.P.C. 185=1925 M.W.N. 847=A.I.R. 1925 P.C. 261=50 M.L.J. 644 (P.C.).

——**S. 90—Property not with Administrator.**

Permission should not be given to sell immovable properties not in the possession of the administrator to some of which third parties claim an absolute title, and others of which are subject to ostensible encumbrances unless it is proved that other properties, not the subject of contention, were unavailable for sale. The Court ought also to satisfy itself that the sales are necessary and in the interests of the estate as a whole. 80 Ind. Cas. 746=2 Rang. 117=A.I.R. 1924 Rang. 237.

——**S. 90—Sanction to sell—Grant of.**

Permission to sell immovable property ought not to be granted to the Administrator without the fullest enquiry into the necessity for such a course and only when debts and other charges on the estate cannot be paid without selling the property. 11 Bur. L.T. 155=49 Ind. Cas. 302.

——**S. 90—Hindu widow—Permission to sell, powers of—Collateral attack—Permissibility—Grounds.**

There is no difference between the powers of an Administrator who happens also to be a Hindu widow and heiress of her husband and those of any other administrator under the Act. 9 C.L.R. 449, Foll. The validity of an order by Dt. Judge granting leave to an Administrator to sell property cannot be challenged

collaterally in land acquisition proceedings. 23 C.W.N. 652=52 Ind. Cas. 309.

5. Powers and Duties of Executor.

——S. 90—Vesting of title.

Title vests in executor from the moment of death and probate is not necessary for title to be vested in the executor. 8 Bom. 241, Foll. 70 Ind. Cas. 268= 24 Bom.L.R. 753=47 Bom. 231=A.I.R. 1922 Bom. 392.

——S. 90—Mahomedan Law.

Where executors have been appointed the right of the heirs is not to an aliquot two-thirds of all the testator's assets at his death. The debts and funeral expenses, etc., have first to be paid and then the estate realised, and it is only to two-thirds of such net assets that the heirs are entitled. Consequently until such two-thirds are ascertained the executor is *prima facie* entitled to exercise his powers of disposition under S. 90 of the Probate and Administration Act. 70 Ind. Cas. 268=24 Bom.L.R. 753=47 Bom. 231=A.I.R. 1922 Bom. 392.

——S. 90—Hindu widow as executrix—Conveyance reciting both capacities, must be taken to be, as an executrix.

Section 90 of the Probate and Administration Act appeals to all Hindu widows, and under that section a Hindu widow who is appointed as an executrix is entitled to sell as executrix the property left by her husband if no restriction is imposed on her powers of disposing of the property by the Will which appointed her executrix. In the case of a sale by a Hindu widow, who being the executrix of her husband's Will sells a part of her husband's estate where the deed does not expressly say in what particular capacity she sells, but merely recites all her capacities and conveys the whole property and all the title possessed by the widow in the property, it must be taken to be effected by the widow in her capacity of executrix of the her husband's Will. 64 Ind. Cas. 397=46 Bom. 162=23 Bom.L.R. 858= A.I.R. 1922 Bom. 179.

——S. 90—Executor—Mortgage in excess of power.

Where a will directs the executor to sell the property of the testator to pay debts, that is a restriction on the exercise of the power to mortgage the property for the payment of the debt. If the property is mortgaged by the executor, the mortgage is voidable, at the instance of any one interested in the estate. Similarly the powers of an administrator are also limited. 12 Bur.L.T. 109= 10 L.B.R. 1=51 Ind. Cas. 568.

——S. 90—Executorship—Continuance of, doubtful—Mortgage by executor.

Where under a will, the continuance of executorship is doubtful, a *bona fide* mortgage by the executor assented to by legatees binds the estate. 50 Ind. Cas. 479 (Cal.).

——S. 90—Power of Executor—Hindu Wills Act.

Under the Act, an executor under a Will has a statutory position and the estate of the testator vests in him. His position is not like that of a guardian of a minor or a *Shebait* or a widow succeeding to her husband's estate, but he is the legal representative of the testator for all purposes. An executor is personally liable for the payment of debts borrowed by him, though he is entitled to be indemnified out of the estate for such borrowings, if he shows that it was reasonably and properly made. This rule is applied to executors under Hindu Wills Act by the Calcutta High Court. In a suit for recovery from the estate, of money so borrowed, evidence of mismanagement on the part of executors should not be shut out, as the estate cannot be rendered liable without deciding the question of the propriety or impropriety of the executor's conduct. Such a suit should be decreed in the first instance against the executors personally subject to their right of indemnity against the estate. In such a suit, the executors cannot fully represent the estate, astheir personal interests as executors are opposed to those of the estate. In India a business left by an owner may vest in the executor who may pledge the estate to raise money necessary to carry on the business. 45 Cal. 538=21 C.W.N. 1043=41 Ind. Cas. 503.

——Ss. 90 and 90-A—Executor—Power of executor to settle claims—Right of legatee to question.

Executors acting *bona fide* can settle claims in respect of testator's estate and the legatees cannot dispute that power. 36 All. 217=12 A.L.J. 274=23 Ind. Cas. 143.

——S. 90—Executor—Power of sale.

An executor has the power to sell the estate for the purposes of administration and a *bona fide* purchaser from such executor is protected. 36 Mad. 575=12 M.L.T. 207=23 M.L.J. 306=(1912) M.W.N. 1112=17 Ind. Cas. 4.

——Ss. 90 and 90-A—Executor—Power to trade.

A mortgage of a testator's property by his trade trustee, directed by the will to carry on the testator's business is referable to the authority as trustee and not as executor. An executor carrying on the trade of his testators under a testamentary trust is personally liable to trade creditors and is entitled to use the trade assets of the testator. The introduction of a co-executor not named in the will, by the trustee to carry on the trade jointly is not a violation of the trust; but the trustee is personally liable to pay to the trade creditors. A trade trustee though personally liable for trade debts contracted in the course of business, can re-imburse himself out of the specific assets of the trade and the trade creditors have the same right. 34 Bom. 209=12 Bom.L.R. 1=5 Ind. Cas. 594.

——S. 90, Cl. (2)—Restrictions.

The restrictions imposed upon the powers of an executor may be either express or implied. So where a Will stipulated that the executors may pay off contract debts or grant leases, *held* that the executor was not entitled to grant a permanent lease. 1 Ind. Cas. 364 (Cal.).

——S. 90—Disposal of property—Power given by will to executor to sell testator's property—Power to mortgage if withheld thereby.

Where a will gave the executor power to sell the testator's property "to pay off the debts" incurred by him or if the property was a losing concern :—

Held, that there being no prohibition in the will against the executor mortgaging the property, he had power under S. 90 to mortgage such property. (1903) 8 C.W.N. 362.

——S. 90—Power to dispose.

The phrase 'power to dispose' includes any disposition by way of sale, mortgage, charge, exchange or lease, and might also include gift. (1906) 3 C.L.J. 260.

——S. 90—Executor—Duty to account for profits received as trustees of co-sharers.

The rendering of accounts under S. 90 of the Act as executors only does not exonerate him from his liability to render accounts showing how he has dealt with the property of his co-sharers, of which he is in possession as trustee. 29 C.L.J. 37=23 C.W.N. 658=49 Ind. Cas. 128.

——S. 90—Executor—Rights and liabilities—When becomes a trustee.

An executor is not an express trustee merely by virtue of the office in the absence of any trust imposed on him by terms of the Will. Mere assent to a legacy does not convert an executor into a trustee unless he has separated the fund and kept it apart. It does not transfer the liability from the estate of the deceased and fasten it on to that of the executor so as to make it a debt payable by the executor, or Administrator in the usual course of

administration. As soon as an Administrator has performed the duties imposed on him by the Act the administration must be deemed to be at an end. Subsequent acts and possession are attributable to him not as Administrator but as heir. 17 M.L.T. 61=27 Ind. Cas. 849.

6. Miscellaneous.

——S. 90—Setting aside sale—Limitation.

Suit to set aside sale by Administrator—Art. 91, Limitation Act, applies. 103 Ind. Cas. 264=5 Rang. 266=A.I.R. 1927 Rang. 186.

——S. 90, Cls. 3 and 4—Administrator agreeing to execute lease — Court's sanction refused—Effect. 14 C.W.N. 451=11 C.L.J. 346=5 Ind. Cas. 236.

——S. 90—Permission to administrator to alienate—Estate fully administered—Widow as executrix—Life estate—Maintenance.

S. 90 has no application where the estate has been fully administered, all the debts collected and all legacies paid. It cannot be said, where the widow is herself the administratrix, that the estate is charged with her maintenance and that therefore till her death the estate is not fully administered. 3 C.W.N. 635, foll. (1908) 9 C.L.J. 116=3 Ind. Cas. 287.

——S. 90—Probate to a person not an executor—Mortgage by such person—Probate afterwards revoked.

A probate given to a person who is not an executor under a will is *ab initio* void,and the doctrine that all acts of an executor or administrator before the revocation of a probate or letters of administration are valid does not apply to a mortgage by such a person. (1902) 6 C.W.N. 787.

——S. 90-A—Executors incurring liability without power in the will or directions from Court—Executors are personally liable and have no right of indemnity except from profits if any.

Where the assets of the testator consisted of a banking business and there was no power granted to the executors to carry on the business but the executors carried it on without directions from the Court and borrowed money to continue the business.

Held, the executors would be personally liable for debts and have no general right of indemnity out of the estate. If however assets have accrued to the businees and through it to the estate during the trading, the executors are entitled to be indemnified from the estate for what it had cost them to obtain such assets if they are not indebted to the estate, and the creditors could stand in their shoes to the extent of the executors' rights. Although mere delay in filing accounts does not destroy any right of indemnity that may exist, but in any case for such right to exist, the executors must show that they are not indebted to the estate. 69 Ind. Cas. 796=35 C.L.J. 46=A.I.R. 1921 Cal. 449.

——Ss. 91 and 102—Costs by whom payable.

Costs may be properly paid out of the estate of the litigation takes its origin from the testator or those interested in the residue or if there was sufficient ground to question the validity of the will or to put forward a charge of undue influence or fraud. But where the litigation was not due to any of these but due entirely to the opponents of the will entertaining a belief as to the justification of the litigation, then each party must bear his own costs. 9 C.L.J. 383=13 C.W.N. 557=1 Ind. Cas. 289.

——S. 91—Purchase by administrator at execution sale—Purchase by executor before appointment—Validity.

An executor cannot as a general rule, be allowed, either immediately or by means of a trustee to be a purchaser from himself of any part of the assets. Such a purchase is treated as a breach of trust without enquiry whether the transaction was beneficial or not. The position however, is somewhat different when the executor or administrator purchases from a legatee. Such a purchase may be a perfectly justifiable one, though, if challenged in proper time, a court of equity will enquire into it, ascertain the value that was paid by the trustee, and throw upon him the onus of proving that he gave full value and that all information was laid before the *cestui que trust* when the property was sold. The purchase at an execution sale of a legatee's interest by the administratrix *durant minoritate* was in these cases upheld as not made in contravention of S. 91. A sale is not to be avoided merely because when entered upon the purchaser had the power to become the trustee of the property purchased. It is immaterial whether the purchaser subsequently does, in fact, become the trustee or not. The true test to be applied in such case is : Has the purchaser used his portion in such a way as to render it inequitable that the sale should be upheld. (1909) 9 C.L.J. 383=13 C.W.N. 557=1 Ind. Cas. 289.

——S. 92—Renewal of barred debt—Competency of executor.

An executor is competent to renew a barred debt and there is no ground on which the cases of renewal of a barred debt can be distinguished from cases of payment. There is no reason for holding that the Probate and Administration Act should be read as superseding the previous law in virtue of its silence on a point of this importance. In the absence of any direction to the contrary in the will the pro-note executed by two out of three executors is valid under S. 92. 67 Ind. Cas. 104=1922 M.W.N. 278=16 M.L.W. 52=30 M.L.T. 344=A.I.R. 1922 Mad. 214=42 M.L.J. 559.

——S. 92—One acting for all.

When there are several executors, the powers of all may, in the absence of any direction to the contrary in the will, be exercised by any of them who has proved the will. 66 Ind. Cas. 882=34 C.L.J. 457=A.I.R. 1931 Cal. 292.

——S. 92—Joint executors—Suit for rent by one.

Where probate of a will was granted to two executors named therein and one of them sued for rent joining his co-executor as defendant,

Held that there was no flaw in the frame of the suit. 54 Ind. Cas. 755 (Cal.).

——S. 92—Executors two or more—Provision in will that majority of executors should act—Contract by some executors if binding on the estate.

S. 92 has no application where a will overrides it and provides that it is only the opinion of the majority of the executors appointed under it that should bind the estate. (34 M. 406 F.) A contract in such a case entered into by some of the executors only without reference to the others will not bind the estate of the deceased testator. 29 Ind. Cas. 505 (Mad.).

——S. 92—Co-executors—Compromise of claim of executor against estate—Validity of.

An executor cannot compromise the claim of his co-executor against the estate. Where on a petition for the grant of probate to an additional executor, the Court accepted a compromise between him and the other executor, by which the latter agreed to renounce his executorship on the former executing in his favour a mortgage for his alleged dues from the estate which in fact were not due.

Held, that the compromise could not be regarded as a *bona fide* one. The mere fact that the Court, without the facts being properly brought to its notice sanctioned the compromise, could not give it a higher validity than it possessed. 39 Mad. 365=28 M.L.J. 285=2 L.W. 241=28 Ind. Cas. 221.

——S. 92—Joint executors and decree-holders—Power of one to give full discharge.

The power of one of several executors to release a debt due to the deceased exists only when the debt due subsists as a debt due to the deceased and not when it has merged into decree in favour of all the executors. 1906 A.W.N. 16=3 A.L.J. 49=28 A. 252.

——S. 92—Will—Executor—Account from co-executor.

An executor who has not taken out probate is entitled to call upon his co-executor who has taken out probate, to give account of his management of the estate of the testator. (1903) 5 Bom.L.R. 131=27 Bom. 281.

——S. 97 (Chap. 7)—Executor—Administration of estate—Duties of executor.

The duties of an executor are to administer the estate of the deceased, only so far and so long as to enable him to carry out the terms of the will of which he is the executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatee under the will, the executor as such has no authority to manage the estate on his behalf. 31 Cal. 89, Foll. 28 C.L.J. 271=48 Ind. Cas. 295.

——S. 98—Scope of.

S. 98 of the Pro. and Ad. Act does not bar a person whose claim to an interest in the estate is denied from taking legal steps to enforce it. 4 Bur. (1902-03) II Prob. and Ad. 1 Expl. (1917) 3 U.B.R. 23=11 Bur.L.T. 229=42 Ind. Cas. 68.

——S. 98—Breach of trust.

A Criminal Court cannot take cognizance of an offence under S. 406 of the Penal Code against an administrator appointed under the Probate Act without the sanction of the High Court when such administrator has submitted his accounts to the Court and the mere fact that accounts have been filed in the Probate Court or even the fact that the accounts have been passed by the Court, does not absolve the administrator from his liability for any particular sums of money which may have been misappropriated by him. 60 Ind. Cas. 791=33 C.L.J. 252=22 Cr.L.J. 295=A.I.R. 1921 Cal. 431.

——S. 98—Account—Executor, duty of.

Though under a will the executors are not liable to render accounts, still the accounts of the estate must be exhibited to the Probate Court. 45 Ind. Cas. 336 (Cal.).

——S. 98 (1)—Accounts—Order directing an Executor to furnish annual accounts.

An order directing an executor to furnish accounts annually is not in accordance with S. 98 (1) of the Act. 44 Ind. Cas. 58 (Cal.).

——S. 98 (1) and (3)—Accounts by Executor—Court, powers of.

S. 98 (3) of the Act does not compel the Court to require an executor or administrator to exhibit an inventory or account but S. 98 (1) imposes the duty of doing this on the executor or administrator and the Court may require him to do it if he does not, but that is a matter of discretion. 9 Bur.L.T. 148=8 L.B.R. 422=35 Ind. Cas. 950.

——S. 98—Account by Executors and Administrators.

S. 98 of the Act requires one initial inventory and one final account and not yearly accounts. The Court is not bound to see to the correctness of the account if the requirements of S. 98 are *prima facie* satisfied. The legatee has a right to inspect accounts and if that is denied to him he can file an administration suit. 9 S.L.R. 134=32 Ind. Cas. 554.

——S. 98—Civil Procedure Code, S. 150.

S. 98 is clear and imposes on the grantee of the Probate the duty of furnishing the inventory to the Court which issued the Probate. S. 150, C.P. Code does not take away the jurisdiction of the Court which granted the probate. 31 Ind. Cas. 499 (Mad.).

——S. 98—Inventory—Essentials.

A full and true statement of all property in possession is essential for an inventory. 41 Cal. 556=40 I.A. 236=18 C.W.N. 153=19 C.L.J. 136=26 M.L.J. 56=15 M.L.T. 87=(1954) M.W.N 13=12 A.L.J. 69=16 Bom. L.R. 95=21 Ind. Cas. 975 (P.C.).

——S. 98—Account, liability of executor to — Death of executor—Suit for account.

In a suit under S. 98 for accounts special proof must be given to show that the executor was responsible for duties in excess of S. 98 and that such accounts had not been rendered. 7 Ind. Cas. 805 (Cal.).

——S. 98—Administration suit—Prayer.

In an administration suit against an administrator to compel him to account for the assets of the deceased and to carry out the duties of his office, removal of the administrator could be prayed for. The prayer should not be taken as a prayer for the revocation of the Letters of administration. Such a suit is triable by an ordinary Civil Court. 7 Ind. Cas. 804 (Cal.).

——S. 98—Inventory and account—District Judge, power of, to call for inventory or account—High Court, decision of, if binding on lower Court.

Under S. 98 the District Judge has no power to institute a judicial enquiry by an audit ofthe inventory and account at the expenses of the executor or administrator, nor can such an authority be implied from the provisions of the Code of Civil Procedure as to the appointment of a commission to examine the accounts. All that the District Judge has to do under S. 98 is to see that the inventory and account *prima facie* satisfy the requirements of the section, that is, that the inventory appears on inspection to be a full and true estimate of all the property, credits and debts, and that the account on inspection appears really to be a true one showing the assets and their disposal. To ascertain this the inventory and account should be passed under some examination by the judge's staff so as to detect manifest mistakes or errors; if such were detected the papers could not satisfy the section, and for this purpose the section empowers the judge to extend the time to the executor or administrator to amend the account. Where the testator enjoined on his executor to prepare accounts annually;

Held, that did not enlarge the Judge's power and empower him to exact an account annually although it would authorize persons interested to take action against the executor. S. 98 does not give a Judge power to call for a revised account, if an account has already been exhibited as required by the section and has been accepted as *prima facie* true, but if it appears, that the account is materially untrue the Judge may take action under its fourth sub-section. Where once an account has been filed and accepted shortly after the expiry of a year from the grant of probate:

Held, that the judge had no power to call for further account of subsequent years. (1904) S.C.W.N. 578=31 C. 628.

——S. 100—Suit by beneficiary—Cause of action accruing during administration—Failure of executor to sue within limitation—Beneficiary is barred.

Where a cause of action has accrued after the death of the testator but before administration is completed the beneficiary will be barred if the executor fails to sue within the period prescribed by law: for the estate is still the estate of the testator and not the estate of the

beneficiary who may be a life-tenant under the will of the testator and consequently a title that may be acquired by a stranger by lapse of time will be a title acquired against the testator and not against the life-tenant. 83 Ind. Cas. 512=3 Pat. 880=5 P.L.T. 513=A.I.R. 1924 Pat. 721.

——S. 102—Successful caveator if entitled to cost out of estate as of right.

A beneficiary who successfully resists an attempt by another beneficiary to prove a false will is not, as a matter of right, entitled to be paid his costs out of the estate. The costs are in the discretion of the court and may be directed to be paid out of the estate of the deceased in a suitable case. S. 102 does not justify a contrary inference. An executor cannot, as a general rule, be allowed, either immediately or by means of a trustee, to be a purchaser from himself of any part of the assets. Such a purchase is treated as a breach of trust. (1909) 13 C.W.N. 557=9 C.L.J. 383=1 Ind. Cas. 289.

——S. 104—Decree against estate of deceased executor.

S. 104 does not preclude the holder of the decree against the estate of the deceased person from applying for the execution of such decree. The section merely lays down a rule of procedure as to the equal and rateable payment of all the debts of an estate. 5 Bur.L.T. 288=6 L.B.R. 158=18 Ind. Cas. 510.

——Ss. 105, 108—Debts to be paid before legacies—Specific legacy, mortgage of—Charge.

When a person takes a legacy under a will she takes it subject to the debts due from the estate, but a mortgage of the property created by the legatee is not necessarily invalid even if there are debts due from the deceased. If the decree obtained by the creditor of the testator did not create a charge upon the property, the purchaser in execution of the decree cannot claim a valid charge upon the property as against the mortgagee of the legatee to whom the property was given as a specific legacy. (1905) 10 C.W.N. 38=2 C.L.J. 138.

——S. 112—Legatee's title is perfect only on executor's assent—Legatee can transfer for his interest before such assent, but subject to administration by executor.

As a protection to the executor, the law ordains that every legatee, whether general or specific, and whether of chattels, real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect ; before such assent, however, the legatee has an inchoate right to the legacy such as is transmissible to his own personal representatives in case of his death before it is paid or delivered. Though on the assent of the executor, the full title passes to the legatee, the assent creates no new title; it merely perfects the title acquired under the will, and hence if the legacy is void the assent avails nothing. The position cannot consequently be maintained that, till the executor has signified his assent, express or implied, the legatee has no interest whatever in the subject-matter of the legacy. Where the will creates a vested interest on the legatee in the subject-matter of the legacy (*C.f.* S. 106 of the Indian Succession Act), he has a transmissible interest, subject to the reservation that the legacy, whether in his hands or in the hands of his transferee, may be imperilled to the extent necessary for the due administration of the estate by the executor. (1891), 127 N.Y. 562, Foll. 71 Ind. Cas. 314=36 C.L.J. 21=50 Cal. 171=A.I.R. 1923 Cal. 21.

——S. 112—Interpretation of.

The strict interpretation of S. 112 would lead to the absurd result of a suit by a legatee being unsustainable unless the executor gives consent. 37 Bom. 211=14 Bom.L.R. 782=17 Ind. Cas. 17.

——S. 120—Legatee—Mesne profits—Interest.

The legatee of a specific legacy is entitled to mesne profits from the date of the testator's death. But the executor though guilty of delay in accounting is not liable to pay interest on arrears of mesne profits. 23 M.L.T. 353=7 L.W. 513=45 Ind. Cas. 664.

——S. 128—Interest.

Where a demonstrative legacy is partly a specific and partly a general legacy and is directed to be paid out of a certain specified property, it bears interest from one year after the testator's death even though the will makes no provision for interest, as the Probate and the Administration Act does not deal with interest on demonstrative legacies. 78 Ind. Cas. 274=A.I.R. 1925 Mad. 164.

——Ss. 130 and 134—Scope of—Moneys to be paid out of profits of land—Interest.

Ss. 130 and 134 of the Act relate to interest on annuities or legacies payable by the executor, and cannot apply to a sum directed to be paid out of the profits of the immoveable property which a legatee was entitled to as part of the properties obtained by him under a will and devolved upon his heirs. 54 Ind. Cas. 140 (Cal.).

——S. 146—Limitation.

Limitation for a suit against administrator and the surety for their liability to the estate according to the Commissioner's report runs not from the time that the alleged misappropriation by administrator took place but from the time when the Court confirmed the Commissioner's accounts and the shortage was ascertained. A.I.R. 1924 Rang. 68, Foll. 98 Ind. Cas. 459=4 Rang. 358=A.I.R. 1927 Rang. 28.

——Ss. 146 and 147—Administration suit—Two successive executors—Second executor, whether liable for his predecessor's accounts—Sale of property in order to pay off liabilities—Executor, whether liable for dereliction of duty—Appointing of debtor as executor's effect of—Costs.

Where an executor, on coming into possession of the estate of a testator finds it in a condition of considerable embarrassment and had to sell a portion of it in order to meet certain liabilities, his failure to raise money, on interest with a view to save the property from sale does not necessarily amount to a dereliction of duty, unless it is proved that damage has actually resulted to the estate from the sale. Where a testator appoints two persons as successive executors of his will, the second executor as such is not liable for the accounts of his predecessor or for his wrongful acts but it is incumbent upon him to call upon the representatives of his predecessor to render an account and respond in damages for *devastavit*, mismanagement or breach of duty whereby any property of the deceased testator is diverted from a due course of Administration. Where a debtor of a testator is appointed executor, the debt due from him is considered to have been paid to him by himself and he is accountable for the amount of his debt as assets. Directions given by a testator in respect of marriage expenses of his grandchildren are valid in law. In a suit for the construction of a will and for administration of the estate of a testator, the costs of all Courts must be paid out of the estate. 21 C.W.N. 280=32 Ind. Cas. 267.

——S. 146—Devastavit—Liability of co-executors.

A devastavit by one of two executors or administrators will not render liable his companion if he has not contributed to it. In taking accounts of an estate, the conduct of each of the executors must be examined and his special liability, if any, determined. 10 C.L.J. 503=3 Ind. Cas. 247.

——Ss. 146 and 147—Administrator—How to be recouped.

An administrator holding Letters of Administration can be relieved only by the order of the Court and can

recoup losses incurred by him personally by an order of reimbursement from the Court and he cannot sell the properties for that purpose. 1 Ind. Cas. 525 (Cal.).

——S. 147—Principle.

The principle on which section 147 is based is the a title gained by a stranger as against the executor good against the beneficiary for on no other view can the reglect of the executor be regarded as occasioning a lon to the estate. 83 Ind. Cas. 812=3 Pat. 880= 5 P.L.T. 513isg 1924= Pat. 721.

——S. 147—Mortgage—Omission to sue.

Where the executors under a will lent a sum out of the estate on the security of a mortgage, but did not take any steps to recover the mortgage money for six or seven years though they knew the embarrassed financial condition of the mortgagor,

Held that since they did not protect the interest of the *cestui que trust* they were liable personally for breach of trust. 23 Ind. Cas. 604 (Mad.).

Probate proceedings—Appointment of receiver to safeguard estate—Powers of Court.

Where in probate proceedings there is danger of the assets of the estate being secreted and otherwise dealt with by the parties in possession, to safeguard such an estate it would be just and proper that a person should be appointed receiver or administrator *pendente lite*. The Court can confer upon such a person all such powers as may be necessary for the realisation, management, protection and preservation of the property. (1950) 2 M.L.J. 650=A.I.R. 1951 Mad. 393.

Procedure. *See* PRACTICE.

Proceedings. *See* JUDICIAL PROCEEDINGS.

Process Fees, Witness Batta in Summons Cases. *See* CRIMINAL P.C., S. 204.

Procession.

See also (1) HIGHWAY.
(2) PENAL CODE, SS. 145 AND 153.
(3) POLICE ACT, SS. 30 AND 31.

——Right to take out along highway—Nature and extent of.

There is an inherent right in every community to take out a religious procession with its appropriate observances, along a highway. It does not depend on the proof of any custom or long established practice. The only limitation is that it should not interfere with the ordinary use of the street by the public and it must be subject to the lawful directions by the magistrates or local authorities. 1948 A.W.R. (C.C.) 17=A.I.R. 1948 Oudh 279=1948 O.A. (C.C.) 17.

Processual Law.

See (1) INTERPRETATION OF STATUTES.
(2) C.P. CODE.

Proclamation.

See (1) CIVIL P.C., O. 21, RR. 66 AND 67.
(2) CRIMINAL P.C., Ss. 87 AND 88.

Proclamation of sale.

See C.P. CODE, O. 21, RR. 66, 90.

Production of Documents.

See (1) C.P. CODE, O. 7, RR. 14 to 18; O. 11, RR. 12 TO 20; O. 13 AND O. 16.
(2) CR.P.CODE, S. 94.
(3) PENAL CODE, S. 175.

Professional Communication.

See EVIDENCE ACT, S. 126.

Professional Conduct.

See (1) LEGAL PRACTITIONER.
(2) LEGAL PRACTITIONERS ACT.

Professional Etiquette, Ethics and Misconduct.

See LEGAL PRACTITIONERS.

Professional Misconduct.

See (1) LEGAL PRACTITIONER.
(2) LEGAL PRACTITIONERS ACT, SS. 13 AND 14.

Profession tax.

See (1) MADRAS DISTRICT MUNICIPALITIES ACT, 1920, S. 93.
(2) MADRAS LOCAL BOARDS ACT, 1920, S. 228.

Profit a Prendre.

See EASEMENTS ACT, S. 84.

Prohibited Degrees.

See HINDU LAW—MARRIAGE.

PROJECTION.

See (1) EASEMENTS ACT.
(2) ENCROACHMENT.

PROMISE.

See CONTRACT ACT, S. 2 (*d*).

PROMISOR AND PROMISEE—

See CONTRACT ACT, S. 2.

PROMISSORY NOTE.

See also (1) EVIDENCE ACT, S. 91.
(2) NEGOTIABLE INSTRUMENTS ACT S. 4.
(3) STAMP ACT, S. 35.

Synopsis.

1. Alteration.
2. Assignment.
3. Consideration.
4. Contemporaneous advance of consideration.
5. Defect in.
6. Discharge.
7. Evidence.
8. Evidentiary value of invalid note.
9. Form and contents.
10. Liability under.
11. Loss of note.
12. Original cause of action.
13. Right to sue.
14. Suit on.
15. Miscellaneous.

1. Alteration.

——Alteration of.

Addition of two attesting witnesses made subsequent to the execution of an improperly stamped promissory note in order to convert it into bond and thereby opening up the possibility of suing upon it on payment of penalty is tantamount to material alteration which invalidates the instrument and destroys the right of action on it. A.I.R. 1930 Lah. 959=31 P.L.R. 930=130 Ind. Cas. 522.

——Alteration—Effect.

A material alteration invalidates a whole note and this is so even when there is no alteration after the note came into existence where the note was *ab initio* created with a forged signature. 26 M.L.J. 257=15 M.L.T. 204= (1914) M.W.N. 250=1 L.W. 243=23 Ind. Cas. 464.

——Alteration — Signature by executants at different places.

Anybody who signs a joint and several pronote beneath the signature of the original makers would also appear to be a maker and such signature is a material alteration

rendering the pronote void if made without the consent of the parties to the note at the time of such alteration unless it was made in order to carry the common intention of the parties. 4 Bur.L.T. 19=9 Ind. Cas. 463.

2. Assignment.

——Assignment.

A creditor by reciting in the assignment that the money due on the promissory note assigned should be paid at a place where the assignee presides, cannot give the assignee right to sue on the promissory note in Court of that place. 119 Ind. Cas. 295=A.I.R. 1929 Cal. 306.

——Assignment.

Where the promissory note has no indorsement of any payment, and there is nothing to show that the indorse is aware of any payments to the indorser, and he is a holder in due course, he is entitled to recover according to the apparent tenor of the instrument. If the instrument has been discharged, the remedy of the person paying is to sue his original payee to refund the amount which he had to pay over again. 103 Ind. Cas. 139=5 Bur.L.J. 241=A.I.R. 1927 Rang. 161.

——Assignment.

The assignment in writing of a promissory note is valid and if gives the assignee a right of suit upon the note, even apart from the Transfer of Property Act under the general law. 66 Ind. Cas. 501=11 L.B.R. 174=A.I.R. 1924 L.B. 92.

——Assignment.

An indorse of a pro-note can claim merely on the notes and cannot fall back on the original loan. 66 Ind. Cas. 584=11 L.B.R. 137=A.I.R. 1921 L.B. 44.

——Assignment—Payee dying leaving a widow—Joint family—Suit by surviving members.

Where a payee of a promissory note belonging to a joint family dies leaving a widow, the surviving members, cannot bring a suit on the note, if it was not taken for the benefit of the family. 26 M.L.J. 224=23 Ind. Cas. 612.

——Assignment—Endorsement.

A pronote was executed in favour of *A*, as agent of *B*. It was endorsed to plaintiff signed merely *A*. The plaintiff cannot sue unless it is shown that *A* was the beneficial owner of the pronote. 35 Mad. 362=24 M.L.J. 509=10 M.L.T. 328=(1911) 2 M.W.N. 340=12 Ind. Cas. 421.

——Assignment—Endorsement with notice—Failure of consideration.

Where a pronote was endorsed to one who knew that the consideration for it had failed and the endorser had no title to negotiate, there is no cause of action on the note against the maker thereof. 10 M.L.T. 79=(1911) 2 M.W.N. 47=12 Ind. Cas. 78.

——Assignment—No endorsement—Right of assignee to sue.

The assignee of a pronote can sue on the pronote though it was not formally endorsed in his favour as a negotiable instrument is negotiable otherwise than by endorsement. 31 M. 534, Appl. 9 M.L.T. 169=8 Ind. Cas. 881. But *see* 21 M.L.J. 422=8 M.L.T. 448=(1910) M.W.N. 733=8 Ind. Cas. 17.

——Assignment—Suit on, by real owner without endorsement—Death of drawee.

No suit by the karnavan of a tarwad on a promissory note executed in the name of a deceased female member, on the ground that the money advanced is tarwad property is maintainable without an endorsement, unless he sues in a representative capacity. 30 M. 88 (F.B.), Foll. (1910) M.W.N. 211=8 M.L.T. 85=6 Ind. Cas. 745.

——Assignment — Non-negotiable — Endorsement on, effect of—Deed—Construction.

Held, that an endorsement on a non-negotiable pronote in the following terms—"The amount due under the pro-note must be paid to....."—coupled with "on delivery of the note itself"—operated as a legal assignment. Where the direction to pay is endorsed upon the instrument itself and the same is handed over to the endorsee, the intention to transfer must be inferred.

Held also.—That a note in the following terms—"The amount I have borrowed from you is Rs. 800. I do hereby promise to pay on demand the said some of eight hundred rupees with interest at the rate of one per cent. a month. * * * acknowledge payment of the consideration", was not a negotiable instrument. (1906) 16 M.L.J. 554=30 M. 75=1 M.L.T. 329.

3. Consideration.

——Consideration—Discharged insolvent executing pro-note for debts contracted prior to insolvency—Claim, if can be enforced.

A claim based on a promissory note executed by an insolvent after his discharge in respect of debts contracted prior to his insolvency and not for any real or fresh consideration cannot be enforced. The fact that the person in whose favour the note has been executed has, subsequent to the discharge, given him meals and assisted him in getting an employment does not amount to real and fresh consideration. 163 Ind. Cas. 858=39 C.W.N. 563.

——Consideration—Agreement to stifle prosecution.

The mere possiblity of a talk of criminal proceedings at some stage or another will not make the transaction illegal. The Court must be satisfied that the pro-note was given in pursuance of an agreement to stifle a prosecution. A.I.R. 1937 Mad. 223=44 L.W. 572=1936 M.W.N. 1137=(1937) 1 M.L.J. 414=169 Ind. Cas. 435.

——Consideration—Mere promise to pay money without actual payment is no consideration.

Where defendant executed a pro-note as a security to cover an advance which the plaintiff was willing to pay on behalf of the defendant in connection with certain litigation, but in fact the plaintiff did not spend any money for such dispute,

Held, that there was no consideration for the pronote. 99 Ind. Cas. 753=A.I.R. 1927 Mad. 1146.

——Consideration.

Where execution of the pro-note is admitted by the executant and consideration is given for the promissory note, the *onus* is entirely on the person executing the note to establish fraud or some circumstance which would excuse him from paying the whole amount. 103 Ind. Cas. 133=5 Bur. L.J. 252=A.I.R. 1927 Rang. 188.

——Consideration.

In a suit on a promissory note, it is open to the defendant to plead that the note was not executed for cash or other consideration but was executed only as a security to cover the advances to be made by the payees and that they (the defendants) are liable only for such sums as may be found due on taking accounts between the parties. 84 Ind. Cas. 146=1924 M.W.N. 529=A.I.R. 1924 Mad. 850.

——Consideration—Onus is on defendant to disprove passing of consideration but may shift by reason of plaintiff's evidence.

Though it is undoubted that the *onus* does lie upon the defendant to prove that no consideration was given, nevertheless, if a plaintiff, when consideration was denied in the written statement, goes into the witness-box, and if the result of his examination is that he fails to establish the point which he set out to make, namely, that he gave the consideration and the Court is thus satisfied that he did not give the consideration which he alleges, the defendant can avail himself of that and has a right to decree. This in no way trenches upon the ordinary rule that the defendant must prove absence of

consideration if that is his case. 79 Ind. Cas. 464=67 Ind. Cas. 684=A.I.R. 1923 All. 214.

——Consideration.

The *onus* of proving that no consideration on a pro-note was paid is upon the debtor. A.I.R. 1923 Lah. 388.

——Consideration—Presumption as to passing of.

The presumption of law contained in the Negotiable Instruments Act that a promissory note was passed for consideration is not applicable to a criminal trial. 59 Ind. Cas. 198=22 Cr. L.J. 54=18 A.L.J. 1151.

——Consideration—Suit on—Decree where to be given.

When a promissory note is executed for money borrowed at the time of the execution of the note itself, the creditor cannot bring two separate suits or put forward two separate causes of action in the same suit on two independent heads of claim, one based on the borrowing of the money and the other on the note itself. He has only one cause of action on which a suit can be brought. 37 M.L.J. 369=53 Ind. Cas. 878. *See also* 33 M.L.J. 631=22 M.L.T. 391=6 L.W. 722=(1918) M.W.N. 110=43 Ind. Cas. 760.

——Consideration—Suit on.

Where a promissory note is executed for an existing antecedent debt, a suit on the note, failing an action on the debt would lie as also in the case where the advance of money and the execution of the note are simultaneous, though in the latter case it may be open to the parties to show that the debt was intended to be merged in the note executed for it. 40 Mad. 727=(1916) 2 M.W.N. 14=31 M.L.J. 138=4 L.W. 27=20 M.L.T. 172=35 Ind. Cas. 219.

——Consideration—Suit on—Failure of consideration, a plea—Specific consideration set up by plaintiff, found false—Effect on Suit—Onus.

Where in a suit on a promissory note the defendant admits execution but pleads want of consideration and the plaintiff then sets up a specific consideration both of which is found false, there should be a decree for the plaintiff inasmuch as the onus, where execution is admitted, is on the defendant to prove his case which he has not discharged. (*Sundara Iyer, J.*, Contra). Where the only consideration put forward by the plaintiff for the suit, a pro-note is found to be false, no question of onus arises; an admission by a party in his evidence unretracted and adhered to by him is as much binding on him as one in the pleadings or as his statement in the negotiable instrument itself. 10 M.L.T. 269=(1911) 2 M.W.N. 253=21 M.L.J. 1013=12 Ind. Cas. 250.

——Consideration—Forbearance to sue.

Where a promissory note is executed by 5 persons in respect of old dues by only 3 of them, a forbearance by the creditor to sue those three for the old dues may be a sufficient consideration for the note so far as the others are concerned. 4 Bur. L.T. 156=11 Ind. Cas. 773.

4. Contemporaneous advance of consideration.

——Contemporaneous advance of consideration.

Where there is no completed and independent cause of action before the promissory note is executed and a part of the money is advanced contemporaneously with the execution, the advance and the execution are one transaction and give rise to only one cause of action, namely, a cause of action the basis of which is the execution of the promissory note. A.I.R. 1935 Cal. 658=39 C.W.N. 1241=159 Ind. Cas. 511.

——Contemporaneous advance of consideration.

Where the promissory note as well as the loan are contemporaneous, there is really no question of a definite anterior liability apart from the note. A.I.R. 1935 Mad. 23=67 M.L.J. 595=1934 M.W.N. 1261=58 M. 261=42 L.W. 979=155 Ind. Cas. 184.

5. Defect in.

——Defect in—Note inadmissible—Suit on basis of receipt—If lies.

The plaintiff has to establish an undertaking by the defendant to repay the sum of money received by him and when such undertaking is contained only in a promissory note which is inadmissible in evidence no suit can be brought on the basis of the receipt, as the receipt, does not contain any promise to pay. 1933 All. 109, Foll. 7 J. & K.L.R. 43.

——Defect in—Effect.

Where the promissory note in suit is a renewal of an earlier pro-note and is found to be inadmissible in evidence as being insufficiently stamped, the prior promissory note cannot be said to have been merged in or wiped off by the later document. A.I.R. 1941 Mad. 364=62 L.W. 828=(1940) 2 M.L.J. 918=1941 M.W.N. 30.

——Defect in—Claim on separate contemporaneous agreement.

Where a promissory note evidencing debt is invalid, not being sufficiently stamped, the creditor can base his claim on the contemporaneous oral agreement between the parties and such agreement can be proved. A.I.R. 1940 Nag. 215=1940 N.L.J. 658=187 Ind. Cas. 367.

——Defect in—Admission of liability—Effect.

No decree can be passed on the basis of a pro-note which is inadmissible in evidence for want of cancellation of the stamps even when the defendant admits his liability on it. A.I.R. 1939 Lah. 31=41 P.L.R 356=182 Ind. Cas. 330.

——Defect in—Hand-note not duly stamped—Suit, if can be converted into one on original loan—Interest.

Where, in a suit on a hand-note, the hand-note is inadmissible in evidence for want of stamp, oral evidence can be given of the original loan and the suit can be converted into a suit on the original loan. But the hand-note being itself the only basis of the contract, cannot be used to determine the rate of interest payable on this loan. The result is that unless the plaintiff can invoke the aid of the Interest Act, he cannot get any relief by way of interest. Therefore, the claim for interest up to the date of the suit would be disallowed, but it would be allowed under the Interest Act after the filing of the plaint. A.I.R. 1937 Pat. 656=4 B.R. 163=172 Ind. Cas. 744.

——Defect in—Effect.

Plaintiff is not entitled to any decree in a suit on a hand-note which is the basis of the cause of action not existing independently of it and which is found to be tampered with. He is not even entitled to the amount admitted to be borrowed by the defendant. A.I.R. 1937 Pat. 572=18 P.L.T. 640=16 Pat. 527=4 B.R. 78=171 Ind. Cas. 881.

——Defect in—Note inadmissible in evidence—Suit on original consideration.

Where the consideration for a promissory note is contemporaneous with it and the note is the complete expression of the contract between the parties, if the note is inadmissible in evidence, a suit cannot be maintained on the consideration for the note. A.I.R. 1933 Mad. 71=37 L.W. 723=1932 M.W.N. 1260=140 Ind Cas. 193.

——Defect in—Evidentiary value of.

Where a pro-note is inadmissible in evidence being insufficiently stamped, and it has been executed in lieu of prior promissory note which has become barred, and no consideration in cash was paid at the execution of the pro-note in suit, a suit on the pro-note cannot be decreed although the executant may admit its genuineness. A.I.R. 1913 Oudh 18=9 O.W.N. 961=145 Ind. Cas. 926.

——**Defect in—Evidentiary value of—Necessity of proof of consideration.**

The plaintiff advanced Rs. 20,000 to defendant No. 1 in 1288. In 1291, she lent Rs. 5,000 to defendant No. 1 to pay off a portion of the old debt and took a pro-note for it. In a suit on the pro-note, it was found that the stamp on the pro-note was not duly cancelled and so the plaintiff sued in the alternative for the original consideration, that is, the consideration paid by her to defendant No. 1 in 1291 :

Held, that as the plaintiff's allegation was that money was paid in cash on the date of the execution of the document, and as that had not been proved, the suit must be dismissed. A.I.R. 1933 Rang. 161=145 Ind. Cas. 378 (2).

——**Defect in—Admission of execution and plea of discharge—Subsequent discovery that stamp on the note was not duly cancelled—Objection to admissibility at late stage—Evidence Act, S. 58—Stamp Act, Ss. 12, 36.**

Where, in a suit on a promissory note, the defendant admitted the execution of the note and pleaded discharge but at a later stage of the trial after the note had been admitted in evidence and marked as an exhibit, took an objection that as the promissory note had not been duly cancelled, it was inadmissible in evidence and that the plaintiff's suit was not maintainable :

Held, (i) that inasmuch as the defendant had admitted the execution of the promissory note, the question whether the note was admissible in evidence did not arise in view of the provisions of S. 58 of the Evidence Act ;

(ii) that as the promissory note had been admitted in evidence and marked as an exhibit, its admissibility could not be questioned at a subsequent stage in view of the provisions of S. 36 of the Stamp Act.

[The question whether the payee of a promissory note which is inadmissible in evidence is entitled to fall back on the original loan where the loan and the execution of the promissory note form part of the same transaction, discussed]. A.I.R. 1932 Mad. 693=63 M.L.J. 303= 1932 M.W.N. 793=36 L.W. 470=139 Ind. Cas. 486.

——**Defect in—Effect.**

A promissory note payable to a certain person or a bearer on demand is illegal and mere addition of the name of an individual as a payee would not render the same valid. A suit against the maker or the endorser is, therefore, not maintainable. A.I.R. 1931 Cal. 791= 58 C. 1453=35 C.W.N. 587=135 Ind. Cas. 288.

——**Defect in—Stamp—Insufficient — Execution admitted—Whether suit lies.**

A plaintiff having no cause of action apart from an insufficiently stamped pro-note cannot succeed at all, even though he does not sue on the note and the defendant admits execution thereof. 2 L.B.R. 333, Relied upon. 7 Bur.L.T. 95=7 L.B.R. 101=23 Ind. Cas. 975.

——**Defect in—Stamp—Want of—Effect.**

Nothing can be recovered on an unstamped pro-note which is inadmissible in evidence and which was passed on the settlement of accounts between principal and agent as no obligation is completely created. 35 Mad. 639=17 Ind. Cas. 721.

6. Discharge.

——Discharge.

A promise to do something in future can be a sufficient consideration for either a complete or partial discharge of an existing liability and the agreement by the promisor to pay the future instalments towards the chit fund can be taken to be as in accord and satisfaction to the extent of the amount which he has undertaken to pay and which the promisee has agreed to accept towards the partial discharge of the promissory note.

Where the agreement between promissor and promisee was that promisor should pay instalments of chit fund for promises and would get credit for such amount towards pro-note and later on the pro-note was endorsed before which all instalments except one were paid and the suit was brought by the endorsee:

Held, that by entering into a contract with the drawer that the money paid by him would actually be credited towards the promissory note in suit, defendant No. 2 had attached equities to the bill itself and thus provided for a method of partial discharge. He could not subsequently be permitted to say that the original transaction, towards which the payment was eventually made by the drawer in pursuance of the contract was wholly independent of the promissory note in suit and the plaintiff not being a holder in due course, would stand in the shoes of defendant No. 2 and must be liable to the same equities to which he, *i.e.*, defendant No. 2 would have been liable.

Held, also that as the undertaking by defendant No. 1 was carried out by paying all the instalments except one before the note was endorsed, the contract had not remained executory and by paying off the last instalment, he was entitled to get credit for the amount paid by him. A.I.R. 1938 Mad. 897= 178 Ind. Cas. 355.

——Discharge—Joint payee, if can discharge maker.

In the absence of fraud, intimidation or undue influence a joint payee of a promissory note cannot effectively discharge the maker from the liability thereunder so as to bar a claim against the maker by the other joint payees. A.I.R. 1937 Rang. 227 =1937 Rang. L.R. 1=170 Ind. Cas. 95 (F.B.).

——Discharge—One executant making payment and discharge by promisee—Co-executant's liability for balance.

Where one of the joint executants of a promissory note makes a payment and the promisee accepts it in discharge of his claim reserving his right to sue the co-executant for the balance, the transaction is subject to the right or equity of the co-executant suing his co-executant for contribution. A.I.R. 1937 Rang. 137=171 Ind. Cas. 622.

——Discharge—Conditional discharge by.

A promissory note given for reducing a liability only operates as a conditional discharge for the liability. A.I.R. 1930 Mad. 874=59 M.L.J. 513

——Discharge.

Where a pro-note was executed by defendant in favour of plaintiff's father but who before he died sent for the defendant, discharged his liability under the pro-note and directed him to apply the sum in his hands for the benefit of his (plaintiff's father's) infant children,

Held, that this would operate as a discharge of the note. 62 Ind. Cas. 210=33 C.L.J. 132=A.I.R. 1921 Cal. 480.

——Discharge — Consideration — Suit on—Payment of debt by, conditional discharge.

A bill of exchange or Hundi given for a debt, operates only as a conditional discharge of the debt. An endorsement on the pro-note on which the debt was due does not rebut the presumption of conditional discharge. (1911) 1 M.W.N. 318=21 M.L.J. 432=9 M.L.T. 482=10 Ind. Cas. 118.

7. Evidence.

——Evidence—Maker using two different inks—Explanation rebutted.

One is entitled to assume that normally in the due

execution of a promissory note, the maker does not use two different kinds of ink on the same occasion; but if an explanation is given as to why two different kinds of ink might have been used, the burden of proof is upon the party impeaching the document to prove that the explanation is false. A.I.R. 1937 Rang. 392=1937 Rang.L.R. 196=172 Ind. Cas. 601.

8. Evidentiary value of invalid pro-note.

——Evidentiary value of invalid pro-note.

The Stamp Act (XI of 1926) is not intended to validate insufficiently stamped promissory notes and such a pro-note is therefore inadmissible in evidence. 110 Ind. Cas. 747 (Cal.).

——Evidentiary value—Acknowledgment of liability.

When a person borrows a certain sum of money and executes a promissory note, he executes it for the consideration received by him and when it is executed in respect of a consideration already passed it is as acknowledgment of the liability to pay the amount mentioned in the note and the acknowlodgment can give rise to a cause of action if the pro-note fails as pro-note for any cause. 92 Ind. Cas. 626=1926 M.W.N. 141=23 M.L.W. 678=A.I.R. 1926 Mad. 452=50 M.L.J. 36.

——Evidentary value of invalid pro-note—Pro-note payable to bearer on demand is unenforceable but is admissible in evidence to prove acknowledgment of prior debts.

Though pro-notes if made payable to bearer on demand are not enforceable in law, if the real consideration for the hypothecation bonds is the defendant's indebtedness ascertained upon settlement of accounts of which the promissory notes are evidence the liability for the debts will remain even if the notes are unenforceable. But they are not inadmissible in evidence as acknowledgments like unregistered documents under S. 49 of the Indian Registration Act or unstamped documents under S. 34 of the Indian Stamp Act. 69 Ind. Cas. 939=45 Mad. 778=16 M.L.W. 705=1922 M.W.N. 460=A.I.R. 1922 Mad. 181=43 M.L.J. 695.

9. Form and contents.

——Form and contents—Contract for supply of goods—Money advanced on the contract to be deducted from the price of goods supplied—Notes in the form of promissory notes executed as further security for return of advance—Notes are not negotiable and cancellation of contract will not make them so.

The plaintiff entered into an agreement with the defendant for the supply of 1 00 000 tons of rubble coal. The defendant advanced one lakh of rupees against this agreement which was to be repaid by the deduction of one rupee per ton out of the price of the coal supplied. Three notes, appearing on their face to be promissory notes, were executed in further security of the loan. No interest was to be paid on these notes. As the Government took over the control of coal, the plaintiff was unable to supply the coal according to the contract and the promissory notes were renewed by three fresh promissory notes.

Held, that the notes were not negotiable at the inception and the cancellation of the contract subsequently would not make them negotiable. 113 Ind. Cas. 698=A.I.R. 1928 Pat. 568.

——Form and contents—Document containing condition to pay interest annually is not a pro-note.

Where, on failure of an undertaking to pay interest annually, embodied in the document, the payee could sue for any interest that had become due *held*, such a clause is repugnant to the essential character of commercial document negotiable by mere endorsement, and the document is not a pro-note. 68 Ind. Cas. 461=52 P.L.R. 1922=5 L.L.J. 148=A.I.R. 1923 Lah. 29.

——Form and contents.

A security promissory note does not lose its character of being a negotiable instrument by the fact that title deeds were deposited as collateral security. 71 Ind. Cas. 130=16 M.L.W. 936=1923 M.W.N. 57=A.I.R. 1923 Mad. 262.

——Form and contents.

It is a valid pro-note, though the amount is not mentioned in the body of the document if it is mentioned somewhere on the document. If the amount can be ascertained from the face of the paper, the form of expression is immaterial. 70 Ind. Cas. 323 =11 L.B.R. 439=1 Bur.L.J. 172=A.I.R. 1923 Rang. 97.

——Form and contents.

If a chit contains a promise to pay it is a promissory note if the transaction fall within the meaning of a promissory note under the Stamp Act. 34 Ind. Cas. 417 (Mad.).

——Form and contents—Construction—Negotiability.

An instrument may be a pro-note without being negotiable according to the mercantile usage. 9 S. L.R. 150=32 Ind. Cas. 582.

——Form and contents—Construction.

The question whether an instrument is a promissory note or not should be judged by the words used. A document promissing to pay on demand a sum for the price of cloth, is a promissory note. 36 Mad. 370=24 M.L.J. 513=10 M.L.T. 531=(1911) 2 M.W.N. 380=12 Ind. Cas. 542.

10. Liability under

——Liability under—Devaswom property—Suit on promissory note executed by Uralars of a devaswom—Debt borrowed for necessary purpose of the devaswom—Decree against assets of devaswom—If can be passed.

In a suit on a promissory note where beyond the description of the executants as Uralars and the statement that the debt had been borrowed for the purposes of the devaswom, there is neither all indication in the promissory note that the Uralars wanted to exclude their personal liability nor is there any promise to pay the debt out of the funds of the devaswom, no decree could be passed against the devaswom properties even though the debt might have been found to have been borrowed for a proper and necessary purpose of the devaswom. (1918) 35 M.L.J. 903; I.L.R. 41 Mad. 815 and (1916) 32 M.L.J. 259, foll. (1950) 2 M.L.J. 636=A.I.R. 1951 Mad. 423.

——Liability under.

Name of the person to be bound must appear though signed by an agent on behalf of the master. 88 Ind. Cas. 1025=41 C.L.J. 535=A.I.R. 1925 Cal. 1153.

——Liability under.

If the defendant shows that he executed a promissory note simply as a 'name lender', it means that that there was an agreement that the defendant is not liable for the money. 7 M.L.T. 85=20 M.L.J. 144 =5 Ind. Cas. 757.

——Liability under—Chetty agents.

Among Nattukottai Chetties it is the practice that generally promissory notes are executed by agents on

behalf of the firms without adding any qualifying words such as "for," 'per pro' or 'agent' to their signatures and to such signature should be deemed to be for the firm. 97 Ind. Cas. 981=1926 M.W.N. 671=A.I.R. 1926 Mad. 1106.

——Liability—Conditional execution.

A person signing a promissory note on the condition that another should join in the execution and be made jointly liable, is not liable, if the latter does not so join. 26 M.L.J. 257=15 M.L.T. 204=(1914) M.W.N. 250=1 L.W. 243=23 Ind. Cas. 464.

——Liability—Covenant—Breach.

A, as *B's* agent took in the name of a third party, a negotiable promissory note from *C*, *B's* debtor for the sum due. On settlement of accounts between *A* and *B* in May 1905 it was settled that *A* should deliver to *B* the said promissory note duly endorsed. *A* failed to carry out this covenant and *B* sued in December 1906 to recover from *A* the amount of the note. At the settlement of issues *A* consented to hand over the note. As *B* was unable to sue on the original note by *A's* default to handover the note in time it could not be said that *B* sustained no damage and the offer to perform the contract now could not affect *B's* right of action. *B* can recover from *A* the note debt. 35 Mad. 639=17 Ind. Cas. 721.

——Liability under—Director—Execution by Directors of a Company—Liability of the Company.

A promissory note ran as follows: "We promise to pay to.....or order the sum of.....value received" and it was signed by two Directors of the Company and below the signatures was given their description as Directors. Below these signatures was the signature of the Managing Agents. The pro-note also bore the seal of the Company.

Held, that the pro-note did not bind the Company. 31 C.W.N. 683=A.I.R. 1927 Cal. 612.

——Liability under—Executants — Description as Managing Director does not exclude his personal liability.

An executant's description as Managing Director in the body of the promissory note has not the effect of excluding his personal liability.

Where the executant, when he put his signature on the promissory note, signed his name without any qualification whatsoever and did not take any steps whatsoever to indicate that he was signing the document not in his personal capacity but for and on behalf of the Company and as their Managing Director,

Held, that he was personally liable for the amount of the promissory note. A.I.R. 1927 Cal. 612. 106 Ind. Cas. 848=46 C. L. J. 566=32 C. W. N. 125=A.I.R. 1928 Cal. 123.

——Liability—Executant — Non-disclosure of principal's name.

Executant is personally liable where he did not disclose principal's name at or before execution of a pro-note. 57 Ind. Cas. 45 (All.).

——Liability under—Executant.

A bill or a note constitutes only one debt though it may give rise to different remedies or causes of action. 26 Ind. Cas. 228 (P.C.), Foll. If a bill or a note is given for a contemporaneous debt, the bill merely suspends a remedy and does not discharge the debt. The maker of a promissory note does not cease to be definite merely because the word "Ullitoor" is added to his name; whether such addition binds the members of his family or not, the maker does not cease to be personally liable. 34 Ind. Cas. 417 (Mad.).

——Liability under—Executor.

It appears to be settled law that, upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally, and cannot be sued as an executor so as to get execution against the assets of the testator. 7 Ch. 123, Foll.

An exception to the above rule is recognised in case there is a necessity to borrow money for the purpose of the estate. 66 Ind. Cas. 116=9 O.L.J. 94=A.I.R. 1922 Oudh 20.

——Liability—Executor—Trustee executor or agent executing pro-note—Creditor's rights—Subrogation — Pleadings—Amendment.

In a suit on a promissory note executed by an executor for a debt borrowed by him *bona fide* in due course of administration of the estate the creditor cannot have any direct claim against the testator's estate and cannot have anything higher than a claim to be subrogated to the right of the executor to retain or receive amounts from the estate necessary to indemnify the executor against loss. This claim to be subrogated is, however of no value if the executor had no such right to retain or receive any amounts from the estate; in other words, if it could be shown that the executor has to account to the estate for a sum not less than that in respect of which he has the right to be indemnified.

Per *Sadasiva Iyer, J.*—The Court could not allow the creditor in his suit on the note a right of subrogation to the executors to indemnify against the estate, for he had not made the necessary allegations in his plaint. 33 M.L.J. 631=22 M.L.T. 391=(1918) M.W.N. 110=6 L.W. 722=43 Ind. Cas. 760.

——Liability—Executor — Personally liable — Charge on the estate.

When an executor executes a promissory note in his capacity as executor for purposes of the estate to which he is appointed executor, the creditor is not entitled to a decree charging the estate with the amount due under the note. The executor is personally liable on the note. 33 M.L.J. 259, Foll. 22 M.L.T. 380=6 L.W. 640=(1917) M.W.N. 744=43 Ind. Cas. 865.

——Liability—Executor—Personal liability.

For money lent to the executors, they are personally liable and judgment cannot be directed against the assets of the testator. 11 Bom. L.R. 250=2 Ind. Cas. 161.

——Liability — Extinguishment of—Execution of fresh promissory note.

A promissory note executed by a number of persons is extinguished as against all the executants by the holder accepting in lieu thereof of a fresh note from some of the executants of the old note, and a suit cannot be brought on the discharged note against those of the executants who have not joined in the second note. The case of a mortgage might stand on a different footing. 12 Bur. L.T. 65=10 L.B.R. 4=51 Ind. Cas. 577.

——Liability under—Guardian—Guardian executing pro-note and accepting personal responsibility — Pro-note enforceable against guardian.

It is open to the guardian to undertake to pay personally a debt due by the estate and there is no want of consideration if creditor agrees to accept the guardian's personal responsibility instead of having recourse against the estate.

A person executing a negotiable instrument will be personally liable unless there is a clear indication in the document that he does not intend to incur personal liability but limits the recourse of the payee or holder to the person whom or the estate which he represents as trustee, executor, guardian or agent. 91 Ind. Cas. 879=A.I.R. 1926 Mad. 447.

——Liability—Guardian — Minor—Personal liability.

A minor is not liable for a promissory note signed by his guardian. The guardian is liable in his private capacity. 2 Ind. Cas. 403 (All.).

——Liability—Head of Mutt—Suit on—Head of Mutt, executing—Whether personally liable.

The head of a Mutt is personally liable on promissory notes executed by him unless he has contracted himself out of such liability. 17 R. R. 345, Foll. 26 Ind. Cas. 356 (Mad.).

——Liability—Joint executants.

When two Chetty firms sign joint and several promissory notes, they are both jointly interested in the moneys borrowed. 8 Bur. L.T. 1=8 L.B.R. 168 =26 Ind. Cas. 253.

——Liability under—Joint family.

One of three brothers forming a joint Hindu family executed a promissory note in consideration of the amount due to the creditor in respect of joint business and the creditor sued all the three brothers not only upon the instrument but also upon the original consideration.

Held, that all the three brothers were liable. A. I. R. 1918 P.C. 146, Rel. on. 105 Ind. Cas. 421 =4 O.W.N. 999=A.I.R. 1927 Oudh 528.

——Liability—Joint family—Execution by manager—Liability of other members.

All the members of a joint Hindu family carrying on a joint trade are liable on a promissory note executed by the manager for a debt due by it to the promisee or assignee. 3 L.W. 463=33 Ind. Cas. 691.

——Liability under—Karta.

Where a promissory note is signed by the karta alone of a joint Hindu family he cannot be said to have signed on behalf of the other members of the family if their names does not appear in the pro-note. Such promissory note gives no cause of action against other members of the joint family than the karta himself, and hence no question under S. 91, Evidence Act, arises. Such a case is different from one where the pro-note is merely inadmissible for non-compliance with the provisions of the Stamp Act. 88 Ind. Cas. 1025=41 C.L.J. 535=A.I.R. 1925 Cal. 1163.

——Liability under—Partner.

A pro-note was headed "The Lahore Cotton Baling Press" and signed by one *G* alone. A suit was brought against *G* and *H* alleging that *H* was the partner and thus liable.

Held, that the form of the document showed that *H* was not liable. 111 Ind. Cas. 645=A.I.R. 1928 Lah. 722.

——Liability—Tarwad property—Execution by manager—Karnavan—Not signed as such—Liability of Tarwad.

In a suit based on a promissory note executed by a deceased *Karnavan* but not signed by him as such, a decree cannot be passed against the *Tarwad* property. (1914) M.W.N. 782=27 M.L.J. 595=26 Ind. Cas. 750.

——Liability under—Trustee.

A promissory note was executed by the Uralars of a devaswom promising to pay "in our capacity as Uralars of the devaswom to pay and that the amount that has been taken in cash is due to you from the devaswom."

Held, that the plaintiff was entitled not only to a personal decree against the Uralars but also against the devaswom provided that there was necessity to borrow on behalf of the devaswom. 92 Ind. Cas. 481=22 M.L.W. 749=1926 M.W.N. 36=A.I.R. 1926 Mad. 249=49 M.L.J. 717.

11. Loss of note.

——Loss of note—Necessity of satisfactory explanation — Right to rely upon relative and ancillary document, when arises.

Where a party institutes a suit on promissory note, he must produce that promissory note or give a satisfactory explanation as to why he is unable to produce it. If there is a satisfactory explanation of the absence of the promissory note, then no doubt in justice and in equity, he is entitled to rely upon a relative and ancillary document such as a receipt which formed part of the same document upon which both the promissory note and the receipt are inscribed. But where he is concealing the promissory note from the Court, withholding from the Court information which the Court is entitled to have, in a consideration of the dispute between the parties, he is not entitled to rely upon any such relative and ancillary document as the receipt which relates to the promissory note. A.I.R. 1934 All. 837=151 Ind. Cas. 123.

——Loss of note—Suit on lost promissory note—Loss of note not adequately explained—Defendant pleading satisfaction — Presumption against plaintiff — Other evidence supporting defendant—Dismissal of suit.

Where the plaintiff sued on a lost promissory note but did not satisfactorily explain the loss of the note and the defendant contended that the note contained an endorsement "excused" in lieu of his services to the promisee and the evidence showed that the defendant's version was more probable, *held*, that the non-production of the note was an important element to be taken into account, and that under the circumstances of the case the suit should be dismissed. 1930 M.W.N. 417.

——Loss of note—Filed with plaint—Missing from Court's Records—Suit if fails.

A plaintiff's suit on a promissory note cannot fail by reason of his inability to produce the original document before the Court owing to its having been stolen or mislaid from the Court's Records. 19 C.W.N. 860=31 Ind. Cas. 30.

12. Original cause of action.

——Original cause of action.

Suit on pro-note by *pardanashin* lady—Note found not genuine but amount found due on previous transaction;

Held, that plaintiff was entitled to fall back upon original loan. A.I.R. 1938 All. 504=1938 A.W.R. 517=1938 A.L.J. 773=I.L.R. (1938) All. 741= 177 Ind. Cas. 815.

——Original cause of action—Promissory note inadmissible for not being properly stamped—Suit on original consideration.

In a case of a loan and a promissory note, the latter being inadmissible in evidence being not properly stamped, a suit on the original consideration can be maintained. Whether the loan was anterior to or simultaneous with the promissory note is immaterial. A.I.R. 1938 Bom. 286=40 Bom. L.R. 174=175 Ind. Cas. 540.

——Original cause of action—Pro-note insufficiently stamped—Bar of S. 35, Stamp Act and S. 91, Evidence Act—Instrument given as col-

lateral security or conditional payment or not embodying all terms of contract.

Per *Full Bench, Stodart, J., contra.*—If the promissory note embodies all the terms of the contract and the instrument is improperly stamped, no suit on the debt will lie. Section 91, Evidence Act, and S. 35, Stamp Act bar the way. But if it does not embody all the terms of the contract, the true nature of the transaction can be proved and where an instrument has been given as collateral security or by way of conditional payment, a suit on the debt will lie. The fact that the execution of the promissory note is contemporaneous with the borrowing cannot exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. Whether a suit lies on the debt apart from the instrument, therefore, depends on the circumstances under which the instrument was executed. A.I.R. 1938 Mad. 785=1938 M.W.N. 722=(1938) 2 M. L. J. 189=48 L. W. 220=I.L.R. (1938) Mad. 933 =177 Ind. Cas. 236 (F.B.).

[Overrules A.I.R. 1926 Mad. 1148=98 Ind. Cas. 75.]

——Original cause of action—Hand-note inadmissible—Claim on original loan.

A persson is entitled to recover his claim on the original loan when the suit on the hand-note fails either because the payee is not mentioned or because the hand-note is not admissible in evidence provided that a proper case has been made out in the plaint or the plaint has been amended to state the facts necessary in support of the claim. A.I.P. 1938 Pat. 205=17 Pat. 268=4 B.R. 580=19 P.L.T. 579 =175 Ind. Cas. 354.

——Original cause of action—Loan independent of note—Loan completed before its execution —Note inadmissible.

Where the plaint makes it clear that the loan was independent of the hand-note and that, as a matter of fact, the taking of the loan was completed before the execution of the hand-note which was taken in support of the loan, if the pro-note is inadmissible, not being in accordance with law, it is open to the creditor to sue on the original consideration and the plaint need not be amended. A.I.R. 1937 Cal. 241 =41 C.W.N. 537=65 C.L.J. 151=170 Ind. Cas. 758.

——Original cause of action.

A creditor has a right to base his claim on promissory note, or in the alternative, on the original consideration. A.I.R. 1937 Oudh 65=1936 O.W. N. 1008=12 Luck. 472=165 Ind. Cas. 578 (2).

——Original cause of action—Note inadmissible —Suit, if lies.

An implied contract to re-pay money lent always arises from the fact that the money is lent, even though no express promise, either written or verbal, made to re-pay it. The fact that money has been lent, therefore, gives a cause of action to the plaintiff which is independent of the promissory note. As soon as the plaintiff in such a case proves that he paid to the defendant a sum of money by way of loan, he is entitled to get back the money lent with interest, though the promissory note cannot be introduced in evidence on the ground of insufficiency of the stamp. A.I.R. 1936 Cal. 170=62 C.L.J. 289=40 C.W.N. 473=166 Ind. Cas. 152.

——Original cause of action—Note inadmissible —Suit on cause of action independent of note.

If a promissory note is inadmissible in evidence on account of its being insufficiently stamped, the plaintiff is entitled to sue on a cause of action which is independent of the promissory note. It is not necessary that there should be an independent express contract prior to the execution of such a promissory note. A.I.R. 1936 Cal. 127=62 C.L. J. 545=40 C.W.N. 696=167 Ind. Cas. 441.

——Original cause of action—Distinction between note executed for antecedent debt and for contemporaneous loans—Theory of conditional payment—Evidence Act, S. 91.

Where a promissory note is given for an antecedent debt and the note turns out to be inadmissible in evidence, a suit can be brought on the original debt.

The better opinion with regard to contemporaneous loans and promissory notes is that where the promissory note is the consideration for the loan, the debt cannot be proved *aliunde* and this view is in accordance with S. 91, Evidence Act. Whether a promissory note is given as a conditional payment or evidences the contract itself depends on the facts but where the promissory note itself contains all the terms in the absence of any evidence to the contrary, it must be accepted as the contract and no contract *aliunde* can be proved. A great deal must depend upon what appears on the face of the document. A. I.R. 1936 Mad. 179=59 Mad. 268=1935 M.W.N. 855=43 L.W. 145=70 M.L.J. 267=161 Ind. Cas. 273 (F.B.).

——Original cause of action.

When a suit is based wholly on a contract consisting of an inadmissible promissory note or *hundi*, it must fail because the note cannot be produced and the claim cannot be proved *aliunde*. But where it is possible to find for a creditor a cause of action apart from the inadmissible security, it would be contrary to the elementary principles of justice to deprive the creditor of his money.

The suit was based on accounts and the *hundis*, though inadmissible were not even produced with the plaint. The account represented a series of loans between the parties and the *hundis* were mere subsidiary guarantees for these loans;

Held, that the creditor was entitled to recover the money which he lent to debtor and that his cause of action for its recovery was distinct from the inadmissible *hundis*. A.I.R. 1936 Pesh. 143.

——Original cause of action—Note and voucher executed at some time—Voucher giving all particulars of loan and signed by debtor—Pro-note insufficiently stamped—Suit, if lies—Amendment.

At the time the loan was made, two documents were executed, one being a promissory note and the other, a voucher. On the face of it, the voucher contained all the terms of the loan and was signed by the debtor. It was intended to be the record of transaction and the note was given as a collateral security. The note, however, was understamped. The claim in the plaint was based on the note alone. The plaintiff's prayer for amendment of the claim so as to introduce a claim on the loan was refused. On the date of the prayer, the claim was already time-barred:

Held, that there was a cause of action upon the loan independently of the promissory note and the creditor might prove and succeed upon it.

Held, also that the original prayer for amendment should be granted. (1936) 164 Ind. Cas. 773=39 C. W.N. 1235.

——Original cause of action—Suit in alternative, i.e., on note or on consideration.

In a suit on a promissory note, the plaintiff can put his case in an alternative form and sue for money on

basis of original consideration, but, if he does not base his case in the plaint on the original consideration, he is out of Court when the promissory note is inadmissible in evidence being insufficiently stamped.

Where a promissory note is given which is insufficiently stamped, the plaintiff is entitled to succeed only when his right to obtain relief is independent of the promissory note, that is to say, if the plaintiff's cause of action to recover the money had become complete before the execution of the promissory note, he would be entitled to sue and succeed on the original consideration if the promisspry note is rejected by the Court. A.I.R. 1935 Cal. 658=39 C.W.N. 1241=159 Ind. Cas.

——Original cause of action.

Where there is a loan independently of the note, the creditor is not debarred from suing on the original cause of action by the fact that the cause of action arose out of the same transaction in the course of which the promissory note was "executed." A.I.R. 1935 Cal. 102=38 C.W.N. 1146=60 C.L.J. 91=155 Ind. Cas. **1109.**

——Original cause of action—Invalidity of note—Payee's right to fall back on original consideration.

The correct rule based on true principle is that even where the loan is not antecedent to and independent of, the promissory note but is contemporaneous with it, the lender, when the note turns out to be invalid, can fall back upon the original contract, expressed or implied, arising from the loan.

Section 91; Evidence Act, merely provides that the cotract embodied in the bill shall be proved by the bill itself; but this does not mean or imply that the bill has either destroyed or superseded the original right and the said section does not stand in the way of the lender falling back on the original loan. A.I.R. 1935 Mad. 206=43 L.W. 48=160 Ind. Cas. 1069.

——Original cause of action.

Whether, when a bill or a note is found to be inadmissible in evidence, the payee can sue on the original consideration depends upon whether the cause of action with regard to the original consideration is one which is complete in itself and the debtor then gives a bill or note to the creditor for payment of the money at a future time. If this be so, then the plaintiff may disregard the promissory note if he chooses and sue upon the original debt. Where the original cause of action is a bill or note itself and does not exist independently of it, then the plaintiff cannot disregard the note and sue for the original consideration. A.I.R. 1934 Cal. 554=61 Cal. 433=38 C.W.N. 488=150 Ind. Cas. 982.

——Original cause of action—Pro-note not paid at maturity—Creditor, if can sue on original debt.

When a cause of action for money lent is once complete in itself, and the debtor then gives a promissory note to the creditor for payment of the money at a future time, the creditor, if the note is not paid at maturity, may always, as a rule; sue for the original consideration, provided that he has not endorsed or lost or parted with the note under such circumstances as to make the debtor liable upon it to some third person. A.I.R. 1934 Mad. 503=67 M.L.J. 30=40 L.W. 167=155 Ind. Cas. 164.

——Original cause of action—Note and loan simultaneous—Right to recover.

If the parties to a promissory note had no intention of reducing any contract to writing and regarded the note as a valuable chattel, then when the note turns out to be valueless, a claim for return of the money may be treated as a claim for return of the price paid for the note. Whatever the nature of the contract may be, the existence of the promissory note offers no obstacle to a suit based upon it, when there is no intention to reduce the terms of the contract to writing. But in cases where an intention to reduce the terms of the contract of loan to writing existed and the document, in addition to being a promissory note which can be treated as potential cash, forms a record of the contract, there is nothing to preclude the application of S. 91, Evidence Act. A.I.R. 1933 Nag. 57=29 N.L.R. 131=144 Ind. Cas. 745.

——Original cause of action—Inadmissible hand-note for payment of money at a future time—Parole evidence of transaction.

Where a cause of action for money is once complete in itself and the debtor then gives a hand-note to the creditor for payment of the money at a future time, if the hand-note is inadmissible in evidence, the creditor may sue for the original consideration in which parole evidence of the transaction may be adduced. A.I.R. 1933 Pat. 575=14 P.L.T. 651=12 Pat. 862=146 Ind. Cas. 471 (F.B.).

——Original cause of action—Technical defect in—Failure of suit—Suit, when can be based on original loan.

Where, on account of some technical defect in a hand-note, a suit on it fails and the plaintiff seeks to get a decree on the loan itself, no decree can be passed unless the original plaint contains a specific case to that effect or the plaint is amended accordingly. A.I.R. 1932 Pat. 324=13 P.L.T. 506=142 Ind. Cas. 163.

——Original cause of action—Proof of original contract—Admissibility.

If a debtor gives to his creditor a promissory-note in payment of the debt but the promissory-note turns out to be invalid for want of stamp, the creditor is entitled to enforce payment of the debt as if no such instrument had been taken by him.

Section 91, Evidence Act, does not preclude proof of the original debt in such a case. A.I.R. 1931 Nag. 113=27 N.L.R. 56=134 Ind. Cas. 283.

——Original cause of action—Pleadings.

Where, in a suit on a promissory-note, the note is not admissible in evidence as not being duly stamped, the plaintiff can recover on the original consideration if the plaint disclosed a cause of action on which the plaintiff can succeed independently of the pro-note. A.I.R. 1931 Rang. 139=9 Rang. 56=134 Ind. Cas. 737.

——Original cause of action—Unstamped note—Suit on original cause of action—Maintainability.

Where there is a loan independently of the promissory note the creditor is not debarred from suing on the original cause of action by the fact that the cause of action arose out of the same transaction in the course of which the promissory note was executed. 34 C.W.N. 554.

——Original cause of action—Debt can be proved independently of the pro-note.

Where a person has contracted a debt and has also executed a pro-note in favour of his creditor, the creditor can bring a suit for the money lent and evidenced by a pro-note and can prove the debt independently of the pro-note. S. 91 does not stand in his way. 119 Ind. Cas. 865=6 O.W.N. 649=A.I.R. 1929 Oudh 399.

——Original cause of action.

Where a transaction may be regarded as a loan in

respect of which the promissory note is passed as payment, if the promissory note is insufficiently stamped, the plaintiff can proceed with the suit on the loan 24 Bom. 360, Foll. 102 Ind. Cas. 138=29 Bom. L. R. 432=A.I.R. 1927 Bom. 437.

——Original cause of action.

Where a suit is brought on a promissory note and the plaintiff cannot have recourse to it as a piece of evidence, S. 91 is not a bar to the plaintiff succeeding in his suit if he can prove his claim by other evidence. 24 Bom. 360, Foll. 95 Ind. Cas. 847=28 Bom. L.R. 631=A.I.R. 1926 Bom. 357.

——Original cause of action.

Where the promissory note is not the original contract but is a mere collateral security or instrument by which payment of the original debt might be facilitated, in other words, the cause of action was complete before the promissory note is given and there is an independent admission of the loan quite apart from the promissory note,

Held, that even though the plaintiff is debarred from supporting his claim by the promissory note, he is competent to maintain his suit upon the original contract. 96 Ind. Cas. 445=7 Lah. 206=27 P. L. R. 738=A.I.R. 1926 Lah. 356.

——Original cause of action—Consideration a contemporaneous or antecedent debt—Pro-note operates only as suspension of remedy of the original debt—If pro-note becomes unenforceable, original remedy revives.

When a promissory note is taken for a contemporaneous debt, the balance of opinion is that the execution of the promissory note does not discharge the debt, but only suspends the creditor's ordinary remedy on the debt during the currency of the promissory note and that when the promissory note is taken for an antecedent debt, the promissory note operates only as a suspension of the ordinary remedy until it matures or is enforced. If then the promissory note is unenforceable in law, the ordinary remedy on the original debt is revived and is enforceable provided it is not barred by limitation. 24 Bom. 360; A.I.R. 1922 Mad. 181 and 36 All. 259, Foll. 98 Ind. Cas. 75=1925 M.W.N. 757=A.I.R. 1926 Mad. 1148.

——Original cause of action.

Where the loan transaction and the promissory note constitute one and the same transaction and were actually contemporaneous, and the suit was based upon the promissory note alone, and there was no suggestion that it was maintainable without the promissory note or that it was a case founded upon a claim merely for money lent, *held*, that if the pro-note cannot be proved, the suit fails. 9 M.L.T. 281, Foll. 95 Ind. Cas. 348=7 P.L.T. 589=1926 P.H.C.C. 158=A.I.R. 1926 Pat. 432.

——Original cause of action.

When a plaintiff sues on a promissory note simply and solely without adding an alternative cause of action based on the original loan, he should be allowed to succeed on such original cause of action after necessary amendment. 89 Ind. Cas. 425=4 Bur. L. J. 141=3 Rang. 183=A.I.R. 1925 Rang. 282 (F.B.).

——Original cause of action—Without alternative plea creditor cannot fall back on plea of money lent.

Where money is lent and at the same time a promissory note is given therefor the creditor can sue for the money due as on the original contract of loan. But where a suit is filed on a promissory note and the plaintiff fails to prove execution against one of the defendants he cannot in the same suit fall back on his cause of action as if it were a suit for money lent. There must be a plea to that effect. 84 Ind. Cas. 199=3 Bur. L.J. 127=A.I.R. 1925 Rang. 37.

——Original cause of action.

If a creditor has a cause of action for the recovery of money for which his debtor has executed a promissory note separate from, and independent of, the note, he can recover upon such cause, in case the note for any reason cannot be put in evidence. (34 All. 158, Foll). 74 Ind. Cas. 359=4 L.R.A. (Civ.) 377=A.I.R. 1923 All. 529.

——Original cause of action.

Though the promissory note sued upon is a forgery by reason of the alteration of figures in the note the plaintiff would succeed on proof of the actual loan by independent evidence. 68 Ind. Cas. 331=A.I.R. 1923 Cal. 318.

——Original cause of action—Suit on—Note found to be a forgery—Decree cannot be given on any previous oral agreement.

The plaintiff sued on a promissory note alleged to have been executed by the defendant in consideration of certain sums due. The defendants denied having executed the promissory note, but he was suspected to have substituted a forged promissory note for the one which he had written. The Finger Print Bureau at Allahabad were of the opinion that the finger printed on the document did not agree with those of the defendant. The trial Court held that the plaintiff is entitled to sue on the oral settlement made before the promissory note was given, and on the basis of that settlement it had given the plaintiff a decree for the full amount claimed. The plaintiff had nowhere stated that he wished to change the basis of his suit and fall back on the oral settlement, nor had he asked to be allowed to amend his plaint. The suit had been based throughout solely on the promissory note.

Held, when it has been found that the promissory note sued upon is a forgery, the claim must necessarily fail. 80 Ind. Cas. 266=A.I.R. 1923 Lah 628.

——Original cause of action—Effect on previous debt.

The execution of a promissory note in satisfaction of a debt does not necessarily mean that the original debt is extinguished but the note may operate as a substitute for that debt and the original debt is kept in abeyance pending the discharge or otherwise of the promissory note. It is, however, certainly open to parties to treat that original debt as discharged and substitute therefor the obligation under the promissory note. 72 Ind. Cas. 189=46 Mad. 415=17 M. L. W. 314=1923 M.W.N. 91=A.I.R. 1923 Mad. 317=44 M.L.J. 206.

——Original cause of action.

Where there was no intention on the part of both parties that the taking of the promissory notes was to be the absolute discharge of so much of the debt, and the notes fail and no third party is endangered the creditor is entitled to fall back on the original consideration. 76 Ind. Cas. 522=1 Rang. 121=A.I.R. 1923 Rang. 254.

——Original cause of action—Consideration—Suit on—Plaint alternative claim in—Procedure.

The holder of a promissory note executed for an existing liability can include in his plaint both claims in the alternative. If he sues on one cause of action and the right to sue thereon is not free from doubt, the Court should direct the plaint to be amended so

as to convert it into a suit on both causes of action or treat it as amended and decide the case finally. If in such suit the promissory note is not returned to the defendant, he is entitled to be indemnified against possible future liability thereunder. 59 Ind. Cas. 363=12 M.L.W. 147.

——Original cause of action.

Where the hand-note was executed and was sought to be used only with a view to bind the defendant in order to afford evidence of the loan having been given; it is open to the plaintiff to prove his case by other evidence if the hand-note be held to be inadmissible in evidence, for want of stamp. 60 Ind. Cas. 652=2 P.L.T. 184=A.I.R. 1921 Pat. 318.

——Original cause of action—Cause of action for money complete in itself — Debtor then giving note to creditor for payment in future—Creditor can sue for original consideration.

When a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration provided that he has not endorsed or lost or passed with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. 7 Cal. 256, Foll. 60 Ind. Cas. 385=2 P.L.T. 323=A.I.R. 1921 Pat. 317.

——Original cause of action—Consideration — Suit on—When decree to be given—Form of decree—Note not returned.

Where a promissory note has been executed for an existing liability, a plaint can comprise either or both the claims, *viz*., on the promissory note and on the existing liability. If a plaintiff sues on one of such causes of action and the right to sue thereon is not free from doubt, it is always open to the Court (and it is desirable) to direct the plaintiff to amend the plaint so as to convert it into a suit based on both causes of action or treat it as so amended and then to decide the suit once for all. 12 L. W. 147=59 Ind. Cas. 363.

——Original cause of action.

When a pro-note is not admissible in evidence, the holder can sue on the original consideration and if the debt is admitted by the defendant, the pro-note need not be proved. 13 S.L.R. 169=57 Ind. Cas. 386.

——Original cause of action.

If in a suit upon a hand note, alleged to have been executed after the adjustments of accounts between the parties, the hand-note is proved to be a forgery, the plaintiff is entitled to sue on the original consideration. 1 Pat. L.T. 203=55 Ind. Cas. 556.

——Original cause of action.

It is only where a promissory note is invalid owing to some inherent defect therein, that the party suing is entitled to fall back on an action for money had and received to his use. 18 A.L.J. 81=54 Ind. Cas. 424.

——Original cause of action.

Where money is lent and at the same time a promissory note is given for the loan, the creditor can sue for the money due as on the original contract if the pro-note cannot be proved. 10 L.B.R. 55=12 Bur.L.T. 137=54 Ind. Cas. 84 (F.B.).

——Original cause of action.

Even apart from the promissory note, the plaintiff had a cause of action on the settlement of account on which the note was based. The fact that there may be an unsettled account between the parties is insufficient to restrain a suit on that cause of action. 49 Ind. Cas. 191 (Mad.).

——Original cause of action.

When a plaintiff relies solely on a hundi, as the basis of his claim, he cannot be allowed, in appeal, to fall back upon the original transaction. When the consideration for the execution of a *hundi* forms part of the transaction relating to its execution the person in whose favour it is executed has no cause of action independently of the *hundi*. 40 P.W.R. 1917=63 P. R. 1917=38 Ind. Cas. 623.

——Original cause of action.

The dismissal of a suit on a promissory note does not bar a fresh suit on the original cause of action. 27 M.L.J. 728=1 L.W. 1070=27 Ind. Cas. 116.

——Original cause of action.

A suit on the original consideration of a promissory note is maintainable though a suit on the promissory note itself has been dismissed on the ground of material alteration. The causes of action in the two suits are distinct. 41 I.A. 142=18 C.W.N. 617 =26 Ind. Cas. 228 (P.C.).

——Original cause of action.

Where the cause of action is once complete and a negotiable instrument is given in respect thereof, a suit may be brought on the original consideration provided that plaintiff has not endorsed or lost or parted with the instrument. 7 A.L.J. 459=6 Ind. Cas. 126. *See also* 11 U.B.R. (1914) 13=24 Ind. Cas. 721.

——Original cause of action.

Where a promissory note was invalid for want of stamp, a suit can lie on the settlement of accounts and the oral agreement to pay, that preceded the note. 26 M.L.J. 19, Foll. 15 M.L.T. 243=23 Ind. Cas. 85.

——Original cause of action.

A promissory note, executed for a previous debt, is only a conditional satisfaction of the debt. If the note is endorsed to a third person, no suit can lie on the original debt. 35 Mad. 639=17 Ind. Cas. 721

——Original cause of action—Stamp—Not properly cancelled—Other evidence of loan.

Where in a suit upon a promissory note the note is inadmissible because the stamp on it is ineffectually cancelled, the plaintiff may rely upon other evidence regarding the loan. 23 Cal. 851; 24 Bom. 360; 28 Bom. 432; 6 Ind. Cas. 126, Approved. 34 All. 158 =9 A.L.J. 72=13 Ind. Cas. 138.

——Original cause of action.

Where a document which cannot be used in evidence is executed to prove a complete pre-existing right, a suit may be maintained on the original right unless a merger is proved. But when the document is executed as the evidence and record of that obligation, a suit to enforce it can lie only on the document itself. 21 M.L.J. 462=10 M.L.T. 55= 10 Ind. Cas. 177.

——Original cause of action—Consideration—Suit on—Defective stamp—Suit may be brought even when promissory note taken in the same transaction.

A plaintiff may rely on his cause of action for money lent, though he has at the time of the loan, accepted an unsufficiently stamped promissory note for the amount of the loan and his suit brought on

the said note has failed for defective stamp. 6 N.L. R. 125=8 Ind. Cas. 281.

13. Right to sue.

——Right to sue—Several payees—One of them alone, if can sue.

One of several payees of a negotiable instrument cannot sue alone without joining the other promisees either as plaintiffs or defendants. Where, out of the two persons entitled to sue on the promissory note, one alone brings a suit and the other is made a defendant after the period of limitation has expired, there is no properly constituted suit within the period of limitation and the suit is, therefore, barred by time. A.I.R. 1942 Oudh 202=1941 O.W.N. 1357=1942 A.W.R. (C.C.) 8=198 Ind. Cas. 98.

——Right to sue.

No one can maintain a suit on a promissory note except the holder thereof. The fact that the holder has been made a party and has admitted that he is only the plaintiff's benamidar makes no difference.

Semble: It may be that the suit can be proceeded with if it had been based on the consideration and not on the notes. 58 Cal. 752=53 C.L.J. 37=131 Ind. Cas. 570=A.I.R. 1931 Cal. 387=35 C.W.N. 53.

——Right to sue—Benami payee.

A person whose name does not appear in the promissory note cannot sue on it alleging that the payee under the promissory note was a benamidar for himself. A.I.R. 1926 All 70. Foll. 100 Ind. Cas. 10 =50 Mad. 548=25 M.L.W. 411=A.I.R. 1927 Mad. 219=51 M.L.J. 856

——Right to sue—Identity of payee.

If the promissory notes had been executed in favour of the plaintiff, an allegation that he was not the beneficial owner of the money would not afford a defence to the suit. But where the defendants urge that the notes were given not to the plaintiff but to a firm which happens to possess the same name as the plaintiff and is the property of his father, this raises a question not of benami, but of identity of the person to whom the note was given, and the plaintiff cannot succeed till the matter has been determined in his favour. 62 Ind. Cas. 210=33 C.L.J. 132=A.I.R. 1921 Cal. 430.

——Right to sue—Minor payee.

A promissory note was executed to "*A*, son of the senior paternal uncle and guardian of minor *B* after deducting a sum in respect of a pro-note executed in favour of guardian of *B*".

Held, that the real payee was the minor and not the guardian. 115 Ind. Cas. 830=29 M.L.W. 551=A.I.R. 1929 Mad. 284=56 M.L.J. 399.

——Right to sue—Note in favour of Government.

The members of a panchayat cannot sue on a promissory note in favour of the Sircar daulatmadar through a member of the panchayat. Only Government can authorize a suit on such a promissory note 100 Ind. Cas. 859=A.I.R. 1928 Lah. 33.

14. Suit on.

——Suit on—Place of cause of action.

Per *Wadia, J.*—The cause of action on a negotiable instrument generally arises wherever any one of the facts occurred. The place of the making of the promissory-note is an essential part of the cause of action. It may sometimes happen that a promissory-note is executed in one place but delivered to the promisee at another place and that money due thereunder is payable at a third place. In such a case, part of the cause of action arises at any one of these places, and a suit may be filed at any one of those places at the plaintiff's option. The place of payment is the place of performance of the promise contained in the promissory-notes. Such a place may be mentioned either expressly in the note or may be inferred by implication. It is for the Court to determine the place where, in the performance of the promise contained in the promissory-note, the money was expressly or impliedly payable by the defendant. A.I.R. 1942 Bom. 251=44 Bom.L.R. 495=I.L.R (1942) Bom. 620=203 Ind. Cas. 27.

——Suit on—Jurisdiction.

In a suit on a pro-note the defendant disputed the Court's jurisdiction to try the suit and filed a counter-claim in the nature of a separate suit for accounts but subsequently withdrew it. It was contended that by filing the counter claim, the defendant had submitted to the jurisdiction of the Court:

Held, Per *Wadia, J.*; that the counter-claim was as it were a separate suit and having been abandoned, no question of submitting to the jurisdiction of the Court in respect of the suit arose. A.I.R. 1942 Bom. 251=I.L.R. (1942) Bom. 620=44 Bom.L.R. 495=203 Ind. Cas. 27.

——Suit on.

A, *H* and *C* forming syndicate to operate mining rights called *B*—Syndicate registered limited liability company under name *M*—*H* financing company but dying—*G* appointed administrator to his estate—Statement of account prepared showing balance due by *A* to estate of *H*—Endowment on it by *A* that he would execute pro-note for balance on condition that as agreed, payment would not be demanded until *B's* deal is gone through—Copy of report of *G's* Office with letter to *A* to execute note sent to *A*—Report approved by *G* stating that *A* had agreed to execute pro-note on condition that money was not to be demanded till he receives next distribution from company *M*—Pro-note executed—Suit on—No distribution received till filing of suit—Oral evidence of *A* and *G* adduced dealing with circumstances, when pro-note executed—Subsequent letter sent by the respondent to the appellant requesting him to execute the pro-note and to sign the previous pro-note.

Held, that the letter was intended to embody the conditions under which the appellant was to execute the promissory-note and these conditions were substituted for the conditions contained in the endorsement which the appellant added to the statement of account. The appellant, by executing the promissory note on the basis of the letter accepted these conditions so proposed by the respondent. Accordingly, the complete transaction between the parties was embodied in these documents, namely, the promissory-note on the one hand containing the promise to pay and on the other hand the conditions embodied in the letter. The result was that the respondent was not entitled to demand payment of the promissory-note until the next distribution from *M* Ltd. As this had not yet taken place, the action based on the promissory-note was premature.

Held further, that the accompanying or collateral agreement which was the condition of the execution of the promissory-note was a written agreement and therefore, outside S. 92, Evidence Act. But even if the collateral agreement was an oral agreement so as to come within S. 92, it would fall within the third proviso of the section. A.I.R. 1938 P.C. 198

=32 S.L.R. 810=4 B.R. 719=48 L.W. 40 =1938 M.W.N. 769=1938 Rang.L.R. 417=(1938) 2 M.L.J. 469=19 P.L.T. 749=1938 O.W.N. 731 =40 Bom.L.R. 1075=175 Ind. Cas. 449 (P.C.).

——Suit on—Differences between Bank and G—Arbitration—G, held liable—G assigning promissory note executed in his favour to Bank, filing of award decree—Suit against G on basis of promissory note.

A Bank in liquidation had a claim for Rs. 5,000 odd against one *G*. Differences arose between them which were referred to arbitration. On December 4, 1929, an award was made, holding *G* liable as surety for the promissory-note of one *N* which he had assigned to the Bank in part satisfaction of his own liability. In addition to this, he was required to pay Rs. 2,800 by monthly instalments of Rs. 100 each. On December 6, 1929, he made a full adjustment of the award with the Bank. He re-affirmed his liability as surety for *N* and in discharge of his cash liability, he assigned to the Bank a promissory-note, dated November 24, 1929, for Rs. 1,900 that had been executed in his favour by one *D*. He also paid Rs. 720 cash and secured a remission for the balance. On June 2, 1930, the Bank applied to the proper Court to have the award filed and on August 23, 1930, judgment and decree followed in accordance with this award. On November 22, 1932, the present suit was instituted by the Bank against both *G* and *D* for recovery of Rs. 2976-9-0 on the basis of the promissory-note dated November 24, 1929:

Held, that the adjustment dated December 6, 1929, was not in any way affected by the fact that some time later, the award, of which a full adjustment had been made, was filed in Court and that this adjustment was quite valid and gave the Bank a right to sue on the promissory-note in suit. A.I.R. 1936 Lah. 319=37 P.L.R. 105=156 Ind. Cas. 158.

——Suit on—Suit against legal representative—No independent acknowledgment of debt by deceased—Duty of Court.

In a case where the plaintiff sues the legal representatives of a deceased person upon a promissory note, and there is no proof of any independent acknowledgment by the deceased of the existence of the debt, the Court should scrutinize the claim with the greatest care. In particular, where the plaintiff is not called and the Court has to depend on other evidence, the onus of proof on the plaintiff is not lightly discharged, and the validity and due execution of the promissory note must be proved with strictness. A. I. R. 1936 Rang. 399=164 Ind. Cas. 842.

——Suit on—Insufficiently stamped—Plaint returned and represented after limitation.

A suit on the basis of defectively stamped promissory note on the last day of limitation—The plaint was returned and re-presented after period of limitation—Suit is liable to be dismissed. 1935 M.W.N. 973.

——Suit on—Counter-claim—Two cases, if can be tried together—Stamp.

Where the defendants to a suit on a promissory note admit the execution of the note but put in a counter-claim that they had pledged certain gold with the plaintiff and pray for a decree for the excess of the value of the gold over the plaint amount, but they do not stamp the counter-claim, the suit must be decreed on the admission of execution of pronote, as the two transactions are separate. But if they stamp the counter-claim properly, the two cases can be tried together in one suit. The filing of stamp paper in the District Court cannot be regarded as an act validating their counter-claim in the trial Court but they will not be debarred from filing a regular suit on the counter-claim. A.I.R. 1935 Rang. 116=156 Ind. Cas. 425.

——Suit on—Money agreed to be paid and actually paid at Madras—Agreement and subsequent promissory note made outside Madras—Suit at Madras—Jurisdiction.

A letter was given which empowered the holder of that letter to go to the plaintiff's Madras firm and require the plaintiff's agent at Madras to pay at Madras to the order of the defendant. After this, the defendant executed a promissory note in favour of the plaintiff for the same amount, the promissory note containing a clause for interest. These transactions took place outside Madras. The payment, however, was made in Madras. The suit for recovery of money lent and interest thereon was filed at Madras:

Held, that since the payment was agreed to be made and in fact made at Madras, part of the cause of action had arisen at Madras and therefore the Madras Court had jurisdiction.

Held, further, that the suit having been based on the contract of loan and not on the promissory note, the plaintiff was only entitled to interest at a reasonable rate from the date of demand and not at the rate provided by the promissory note. A.I.R. 1934 Mad. 503=67 M.L.J. 30=40 L.W. 167=155 Ind. Cas. 164.

——Suit on—Nature of.

Where the cause of action stated in a plaint is a promissory note, a mere recital earlier in the plaint of the history of the promissory note cannot make it a suit on the original consideration. A.I.R. 1933 Mad. 710=1933 M.W.N. 121=38 L.W. 430=65 M.L.J. 350=56 Mad. 879=145 Ind. Cas. 716

——Suit on—Contemporaneous oral agreement.

In a suit on a promissory note payable on demand, it is not open to the defendant to prove a contemporaneous oral agreement by which plaintiff is not to present the promissory note for payment, although payable on demand, until he has discharged certain encumbrances on the property he has sold to a stranger. 25 Cal. 401, Foll. 63 Ind. Cas. 673=45 Bom. 1155=23 Bom. L.R. 488=A.I.R. 1921 Bom. 449.

(15) Miscellaneous.

——Miscellaneous—Bank note issued by bank—Note mutilated by accident—Note identifiable but its number missing—Bank was held liable.

The appellants were the Hongkong and Shanghai Banking Corporation carrying on the business of banking in Hongkong. In the course of their business they issued bank notes for the various sums; such notes were not legal currency, but owing to the high credit of the appellants they were used as if they were. The notes they issued were in the ordinary form of a bank note. The respondent was given by her husband two of such notes, each for five hundred dollars. She placed them in the pocket of some garment, and then having forgotten their hiding-place she washed, dried and starched the garment and was proceeding to iron it when she found a wad of paper in the pocket; this upon extraction proved to be the remains of the two bank-notes which, together with the coat, had been subjected to all the above processes. Considerable effort was made, with

the help of the bank, to restore these agglutinated fragments to their original shape and, as to one note, this met with complete success and the note was accordingly paid. The full restoration of the other was more difficult; with the utmost skill the number could not be recovered. Apart from this, a very considerable portion of the note was replaced and its most critical characteristics were made plain: the name of the bank, the amount of the note, the definite promise to pay the "Bearer" on demand at the appellants' office, and the signatures by the chief accountant and the chief manager, were all clearly and definitely evidenced. The bank, however, refused payment mainly upon the ground that the number was missing and the respondent accordingly brought an action against them upon the note.

Held, that when once honest accident is accepted as the cause of damage, the only remaining question is whether the extent of the damage is such as to prevent the note being sued upon, and it may be also whether the missing material parts can be supplied by verbal evidence; that to some extent this must depend upon verbal evidence as well as upon the pieces of the document, that the number is no part of the operative portion of a bill-of-exchange or promissory note and that the claim of respondent was therefore sustainable. 110 Ind. Cas. 127=28 M.L.W. 880 =A.I.R. 1928 P.C. 116=55 M.L.J. 627 (P.C.).

——Miscellaneous—Benami promissory note—Right of real creditor—Mode of adjustment.

Where a promissory note is executed in favour of one person in lieu of consideration advanced by another the promissor cannot pay money to the latter and be rid of his liability. But in a suit brought by the real creditor to which the debtor and the holder of the promissory note are parties a decree can be passed against the debtor for what is due from him with a clear proviso that payment shall be made by the debtor to the holder or to his credit and that it is made by deposit in Court or if money is recovered in execution shall be to the credit of the holder. 1930 A.L.J. 1509=A.I.R. 1931 All. 108.

——Miscellaneous.

The usual import of the words "on demand" in the promissory note is that the debt is due and payable immediately. 90 Ind. Cas. 378=A.I.R. 1926 Nag. 194

——Miscellaneous—Pledge of.

A pro-note can be the subject of a pledge. 46 Ind. Cas. 609 (L.B.).

——Miscellaneous—Interest, claim to — Oral evidence.

Where a pro-note is inadmissible in evidence, oral evidence is not admissible under S. 91 of the Act to prove the terms of the contract for payment of interest and therefore claim for interest under the document cannot be maintained, but the Court may allow damages in lieu of interest. 17 C.L.J. 399= 19 Ind. Cas. 840.

PROOF.

See (1) CRIMINAL TRIAL.
(2) EVIDENCE ACT, SS. 100—114.
(3) EVIDENCE.

PROPER PARTY.

See CIVIL P. C., O. 1, R. 10 AND O. 34, R. 1.

PROPERTY.

See HINDU LAW—JOINT FAMILY.
(1) ATTACHMENT. *See* CIVIL P. C., SS. 60 TO 64 AND 136, AND O. 21, RR. 41 TO 57.
(2) DISPUTE. *See* CR. P. C., S. 145.
(3) IMMOVABLE. *See* (1) REGISTRATION, S. 2 (6). (2) T. P. ACT, S. 3.
(4) TRANSFER. *See* T. P. ACT, S. 5.

PROPERTY, DEFINITION. *See* 1907 A.W.N. 97=4 A.L.J. 273=29 A. 385.

PROPERTY DISPUTES. *See* CR. P. CODE, S. 145.

PROPERTY IN LAND ACT (4 OF 1837), S. 1—Restrictions on acquisitions by Ruling Chiefs—Government circlar restricting purchase of immovable property in British India by Ruling Chiefs before it is enforced through law Courts must be shown to be binding on Courts.

It may be that for political, economic or other reasons the government desire to restrict the purchase of immovable property in British India by the Ruling Chiefs but before such a desire can be enforced through the law Courts of this country it must be shown that the circular issued by the Government is one that has the sanction of some law binding on the Courts. S. 86 of an enactment of 1833, 3 and 4 Williams 4, c. 85 and S. 1, Act 4 of 1837 passed by the Right Hon'ble the Governor-General of India in Council on 17th April 1837 have no application to such cases. 114 Ind. Cas. 62=10 Lah. 447=A.I.R. 1929 Lah. 1.

PROPRIETARY RIGHTS.

See (1) LANDLORD AND TENANT.
(2) LAND TENURES.
(3) LOCAL ACTS.

PROPRIETORS OF VILLAGE. *See* (1) COMMUNITY.
(2) CO-SHARERS.
(3) LANDLORD AND TENANT.
(4) LOCAL ACTS.

PROSECUTION—Duty of.

See (1) CRIMINAL P. C., SS. 208 AND 286.
(2) CRIMINAL TRIAL.
(3) EVIDENCE ACT, SS. 101 TO 104—CRIMINAL TRIAL AND S. 114.

PROSPECTUS. *See* COMPANIES ACT, SS. 92 TO 100.

PROSTITUTE. *See* (1) HINDU LAW—MAINTENANCE.
(2) PENAL CODE, SS. 366, 366-A AND 366-B.

PROSTITUTION. *See* PENAL CODE.

PROVIDENT FUND. *See* (1) C. P. CODE, S. 60.
(2) INCOME-TAX ACT, S. 7.
(3) MUTUAL BENEFIT FUND.
(4) PROVIDENT FUNDS ACT, 1925.
(5) TRUSTS ACT, SS. 81 AND 94.

——East Indian Railway Company Rules—R. 26 does not contemplate a dispute between Committee and a member—After retirement a member ceases to be as such.

Rule 26 establishes a condition precedent to a right of action in a case to which it applies and is not merely an independent collateral agreement to refer to arbitration.

The rule has no reference to a dispute between the Committee and a member.

The rules contemplate a complete severance of relations of a member from the date of his retirement, the member becoming thereafter an outsider, whose relations with the institution are in respect of a claim to interest governed by the Interest Act. 99 Ind. Cas. 507=1926 P.H.C.C. 344=8 P.L.T. 431=A. I. R. 1927 Pat. 93.

——State Railway Open Line Code, R. 30—"Discharged", meaning of.

The word "discharged" in R. 30 does not necessarily mean "dismissed." It is wide enough to include the case of a servant who has been permitted to retire or take his discharge. 82 Ind. Cas. 69=77 Ind. Cas. 1025=27 C.W.N. 472=50 Cal. 347=A.I.R. 1923 Cal. 585.

PROVIDENT FUNDS ACT (9 OF 1897).

——(9 of 1897 and 4 of 1903)—Attachment of Provident Fund—Calcutta Municipal Act, S. 73—Trustees of the fund—Suit—Application.

The Provident Fund established by the Corporation of Calcutta to which the provisions of the Provident Funds Act (9 of 1897) (and consequently amending Act 4 of 1903) were made applicable by the Local Government Notification, dated 8th July, 1902 is not liable to attachment. (1908) 12 C.W.N. 633=35 C. 641.

——S. 2 (4)—Attachment after payment.

The words "repayable on demand" in Sub-S. (4) clearly show that a compulsory deposit is only a deposit so long as it remains in the fund, and not after it has been paid over to the person to whose credit it had hitherto stood. So it is not exempt from attachment after it has been paid over to the person entitled. 44 Bom. 673, Diss. from. 92 Ind. Cas 673=1 Luck. 313=29 O.C. 278=3 O.W.N. 378=13 O.L.J. 425 =A.I.R. 1927 Oudh 22.

——S. 3 (b)—Intention and scope—Cl. (b) takes effect in absence of any special rule of a particular Fund—Special rule providing payment to the legal representative—Payment to uncle as de facto guardian was held not to be valid discharge.

The provision in Cl. (*b*) that the manager may pay the money to any person entitled to receive it, is a provision intended not to defeat the rules of any Fund; but to take effect only in those cases where the rules of a particular Fund do not tell the manager what person is the proper person to be paid. The intention of the Act was that particular funds might make simple and clear rules which they could easily administer and if the rules did not apply to any particular case, the officer or the manager should not necessarily at his peril find out the proper legal representative. But the intention of the Act has been defeated by the character of R. 19, itself which assumes the duty of finding out the proper legal representative.

Where the manager of the Povident Fund paid the ddposit money in the credit of the deceased's to his brother as a guardian of the deceased's son producing a certificate from an Honorary Magistrate that he was his nephew's guardian.

Held, that the paymant to the uncle is not a good discharge and the claim of the nephew should be decreed. 113 Ind. Cas. 166=55 Cal. 1231=32 C.W.N. 515=A.I.R. 1928 Cal. 743.

——S. 3 (1) (b)—"Representative" meaning.

The word "representative" in S. 3 (1) (*b*) is intended to mean, though it is not very happily expressed, the legal representative of the deceased. 115 Ind. Cas. 271=A.I.R. 1928 Cal. 542.

——S. 4—Compulsory deposit, what is—Compulsory deposits do not cease to be so on the depositor leaving service—Contributions in respect of deposits and increment accrued thereon are also compulsory deposits.

The fact that the deposits become repayable to the officer when he leaves the service does not remove them from the category of compulsory deposits. A compulsory deposit is a deposit which goes into the fund as a compulsory deposit and is at that date received and classified as such, and there is no ground for a different classification of such deposits or a different description being applied to them after the officer's death or retirement. As long as the deposits subsist in the fund so long at any rate, both as a matter of legal construction and in the common and ordinary way of speaking, they are properly and correctly described as compulsory deposits. In this respect no distinction exists between the deposits made by the depositor himself on the one hand and the contributions in respect of those deposits and the interest or increment accrued on them on the other.

Per *B. B. Ghose, J.*—The deposit does not become "payable on demand" by reason of the fact that it became payable under the rules on one of certain events happening afterwards.

Per *Richardson, J.*—If there be any doubt as to the meaning of the Act it is permissible to have regard to the state of things to which the Act was intended to apply the conditions in which it would operate and the class of persons which it was intended to benefit. 82 Ind. Cas. 69=77 Ind. Cas. 1025=27 C.W.N. 472=50 Cal. 347=A.I.R. 1923 Cal. 585.

——S. 4—Compulsory deposit, what is—Deposit by optional subscriber is a compulsory deposit within S. 2—Government cannot prescribe procedure for recovery of debts due by depositors.

A deposit by an optional subscriber within Rule 3 which is not capable of withdrawal except under Rules 10, 15 and 18 is a compulsory deposit within S. 2 of the Act as amended by Act (4 of 1903), the money being not payable on demand or at the option of the purchaser or the depositor. The Government has no power under the Provident Fund Act to prescribe by rules about the procedure which shall be followed for the recovery of debts due by depositors for which a decree has been obtained in the Civil Court.

A deposit by an optional subscriber within Rule 3 is a compulsory deposit within S. 2 and is exempt from attachment by Civil Court. 80 Ind. Cas. 424=3 Pat. 74=6 P.L.T. 129=A.I.R. 1924 Pat. 524.

——S. 4—Compulsory deposit—Railway servants—Provident Fund—C. P. Code, S. 268—Attachment.

The deposit which a railway servant makes towards the provident fund is a 'compulsory deposit' and it does not cease to be so when he leaves the service of the company. The deposit, when it was made, was not repayable on demand, and, therefore, at that time was a 'compulsory deposit,' and having once acquired that character with the attendant consequences it continues to retain it. The expression 'compulsory deposit' is not merely descriptive of the sum deposited, but is a term of art, which by virtue of legislative provision includes that which is not within its natural meaning; for it includes "contribution which may have been credited in respect of and any interest or increment which may have accrued on, such subscription or deposit under the rules of the fund." S. 2 (4). The compulsory deposits of the above description are not liable to be attached under S. 228, Cr. P.C. (1904) 6 Bom.L.R. 921=29 B. 259.

——S. 4—Official Assignee, vesting of Provident Fund in—Retrospective effect.

The Legislature in enacting S. 4 intended that all right and title of an Official Assignee to the deposits referred to in the section should be determined as

from the coming into operation of the Act even though the vesting order had been made before the Act and not that the operation of the section should be limited to cases where the vesting order was made after the coming into operation of the Act. (1902) 26 M. 440.

——S. 4—Provincial Insolvency Act, Ss. 16, 48—Disposal of, by insolvent—Whether fraudulent transfer.

Under S. 4, the Receiver or the creditor has no right to the provident fund of the insolvent and his disposal of it is not fraudulent and punishable under the Provincial Insolvency Act, S. 43. 44 Bom. 673=22 Bom. L.R. 322=56 Ind. Cas. 450.

——S. 4 (1)—Attachment of funds—Illegal—C. P. Code, S. 115.

Under S. 4 (1) of the Provident Fund Act money in such fund is protected, from attachment by creditors even after the death of the subscriber. If a Court attaches such property, it amounts to an usurpation of authority and the High Court will interfere in revision under S. 115, C. P. Code. 46 Cal. 962=24 C.W.N. 288=54 Ind. Cas. 439.

——S. 5—Limitation for suit.

A suit against the Calcutta Corporation for payment of money in the account of the Provident Fund of the deceased by his legal representative is not one in respect of any act purporting to be done by the Corporation under the Calcutta Municipal Act, and so the provisions of S. 538 as to limitation do not apply to such a suit. 113 Ind. Cas. 166=32 C.W.N. 515=55 Cal. 1231=A.I.R. 1928 Cal. 743.

PROVIDENT FUNDS ACT (19 OF 1925)—Applicability.

Act does not apply to Mutual Benefit Fund or to share capital in Co-operative Credit Societies. A. I. R. 1939 Mad. 485=1939 M.W.N. 280.

——Interpretation.

Where the sections of the Act do not specifically deal with a particular point and the rules deal with the very point under consideration the rules should be referred to. 116 Ind. Cas. 591=24 S.L.R. 1=A.I.R. 1929 Sind 158.

——Provident fund—Object of—Burma Contributory Provident Fund Rules, R. (5) (3).

One of the objects of the Provident Fund is that people should, in case of retirement, have something to live on, or in case of death, have something to leave. Where a subscriber has a family, he cannot leave his Provident Fund to any one outside the family and must leave it to one or more members of the family whether he likes them or not but if he has not a family, then the subscriber may have something on which to live when he retires; and if he dies before he is able to enjoy his retirement and if he has no family, then he has something to leave. If he has no family, he is not compelled to leave it to an individual or individuals. A.I.R. 1942 Rang. 64=1941 Rang. L.R. 712.

——Ss. 2, 3, 4 and 5—G. I. P. Railway Provident Fund Rules—Nomination of non-dependent—Validity.

The power of a subscriber to nominate any one he likes to receive the amount after his death is not curtailed by anything contained in the Act or in the Rules of the G.I.P. Railway Provident Fund. A person who is not a dependant may be validly nominated. I.L.R. (1946) Bom. 146=225 Ind. Cas. 372=48 Bom. L.R. 83=A.I.R. 1946 Bom. 304.

——Ss. 2, 4 and 5—Death of nominee before subscriber.

If a nominee of the provident fund subscriber dies previous to the death of the person entitled to the said fund it will be the first dependent of the subscriber and not the heir of the nominee that is entitled to the provident fund. 116 Ind. Cas. 591=24 S. L. R. 1=A.I.R. 1929 Sind 158.

——S. 2—"Dependent," who is.

Per *Stuart, C.J.*—Married sisters are not dependents within the meaning of S. 2 (c) and having married they cannot return to the status of unmarried sisters on widowhood so as to come within the meaning of the word 'dependent.' 122 Ind. Cas. 322=7 O.W.N. 324=A.I.R. 1930 Oudh 145 (F.B.).

——Ss. 2 (a) and 3 (1)—Cheque issued to subscriber in payment of provident fund money—Liability to attachment.

Under S. 2 (a) read with S. 3 (1) of the Provident Funds Act, 1925, the immunity of the Provident Fund money from attachment extends even after the happening of the specified contingency and up to the time it remains to the credit of the subscriber in the Provident Fund account. The immunity ceases as soon as the money ceases to stand credited in the Provident Fund account, (*i.e.*) goes out of the Fund and it is immaterial whether the money has actually reached the subscriber or is otherwise in the hands of the Railway company. If the Railway company has issued and delivered to the subscriber a cheque in payment of the Provident Fund money which has become payable to him on his retirement from their service, the money ceases to remain to his credit in the Provident Fund Ledger as a debit entry must have been made there so as to square up the account and is no longer "compulsory deposit" within the meaning of the Act and is therefore liable to be attached in execution of a decree against the subscriber. This is particularly so where the subscriber has endorsed the cheque in favour of another. I.L.R. (1945) 1 Cal. 277=A.I.R. 1949 Cal. 144.

——S. 2 (a)—"Compulsory deposit."

Moneys standing to the credit of an undischarged insolvent in the Government Provident Fund are compulsory deposits within meaning of S. 2 (a) of the Act. A.I.R. 1933 Rang. 148=11 Rang. 93=143 Ind. Cas. 771.

——S. 2 (c) does not confer any right upon dependant.

Section 2 (c) merely defines who is a dependant and does not purport to confer any right upon the dependant or make him or her a lawful representative. That is to be determined according to the ordinary law governing the parties, in the absence of a nomination by the subscriber. A.I.R. 1946 Bom. 304=48 Bom. L.R. 83.

——S. 2 (c)—"Child"—General Provident Funds (Bengal Services) Rules, R. 31—Word 'child', if includes adult child—Word 'child', interpretation.

The term 'child' used in S. 2 (c), Provident Funds Act, and in R. 31, General Provident Funds (Bengal Services) Rules, is not confined to sons and daughters blow the age of majority but also includes an adult child.

The sense in which the term "child" is used in a statute must depend on general considerations as to the subject-matter of the statute and its other provisions. A.I.R. 1940 Cal. 395=I.L.R. (1940) 1 Cal. 476=44 C.W.N. 407=190 Ind. Cas. 310.

——S. 2 (c)—"Provident fund."

The definition of the 'Provident Fund' in S. 2 (c) covers only funds organised by the employer for the

benefit of the employees. A.I.R. 1939 Mad. 485=1939 M.W.N. 280.

——S. 2 (d)—Scope.

Section 2 (d), Provident Funds Act, requires that the "fund" should be constituted by the authority of the Government. The mere fact that the Provident Fund Rules framed by a private body have been approved by the Government would not be sufficient to show that the fund was constituted by the Government in the absence of proof that the Government made any rules requiring the Board to maintain the provident fund. A.I.R. 1941 Lah. 168=198 Ind. Cas. 643.

——S. 2 (f) and (g)—Railway Administration, what is—Provident Fund of Tramway Co., whether Railway Provident Fund.

The Tramways Act deals with the construction of tramways in general. It is applicable to the whole of British India and was not enacted for the purposes of the construction of any particular tramway. An act of this nature cannot be called a "Special Act."

The Electric Supply and Traction Co., administering a tramway under a license granted to the promotors is not administering the tramway under contract with the Local Government. The license granted to the company under the Tramways Act is a unilateral act which cannot be regarded as a contract between the company and the Local Government. A license granted to a company on certain conditions does not create contractual relationship. Such a relationship can only be created by an agreement between two parties and where no such agreement is referred to in the "order" under the Tramways Act whereby the promotors of the company were granted a license, the company is not "Railway Administration" within the purview of S. 2 (f), Provident Funds Act (1925) and its provident fund is not a "Railway Provident Fund" within the meaning of S. 2 (g) thereof. A.I.R. 1937 Lah. 915 =175 Ind. Cas. 26.

——S. 3.

Synopsis.

1. Applicability and scope.
2. Dependant nominee—Rights and powers of.
3. Fund, if assets of the subscriber.
4. Liability to attachment.
5. Non-dependant nominee—Rights of.
6. Nomination of non-dependant—Legality.
7. Receiver in execution.
8. Vesting of fund in Official Assignee or Receiver.
9. Miscellaneous.

1. Applicability and scope.

——Ss. 3 and 5—Applicability and scope.

Section 3 does not say that the amount of the provident fund necessarily vests in a dependant or dependants in all cases. That section deals only with 'the protection of compulsory deposits in a Provident Fund' and not with the title to them. A.I.R. 1946 Bom. 304=48 Bom. L.R. 83.

——Ss. 3 and 5—Applicability and suope.

Sections 3 and 5 of the Act apply only to Government or Railway Provident Funds and to such Funds which, by virtue of S. 8, can be brought within the ambit of its provisions. A.I.R. 1939 Mad. 485=1939 M.W.N. 280.

——S. 3 (1)—Applicability and scope—Words 'incurred by the subscriber'—Scope and extent.

The words "incurred by the subscriber" in S. 3 (1), Provident Funds Act show that the prohibition is against realization of money in respect of any debt or liability that the subscriber himself incurred voluntarily, but not where the liability of the judgment-debtor to pay was imposed on him by Court's decree and which was not incurred by him voluntarily. A.I.R. 1938 Oudh 48=1937 O.W.N. 863=13 Luck. 466=170 Ind. Cas. 656.

——S. 3 (2)—Applicability and scope.

It is doubtful whether S. 3 (2) applies to a case where the nomination has been duly made and is subsisting. In such a case, the money is payable to the nominees as such, and is not payable to them as being dependents, although they may happen to be dependents. A.I.R. 1936 Oudh 32=1935 O.W.N. 1296=11 Luck. 611=159 Ind. Cas. 596 (F.B.).

——S. 3—Applicability and scope.

The Provident Funds Act is not intended to override the rights of the dependents of the subscriber or depositor to share the fund *inter se* in accordance with the personal law of the deceased except to the extent mentioned in S. 3, cl. (2), that is, to protect the fund from assignment by the subscriber and from attachment by creditors who have advanced money to him or to his dependents during his lifetime. Consequently, where the subscriber is a Muhammadan, a nominee of his, though as such has an absolute right to receive the money, does not thereby become the absolute owner thereof. A.I.R. 1935 Sind 73=159 Ind. Cas. 427.

——S. 3 (1)—Applicability and scope.

Sub-section (1) to S. 3 is intended to protect compulsory deposits, only so long as they remain deposited in the fund. 44 Bom. 673, not Foll. 112 Ind. Cas. 235=28 M.L.W. 484=A.I.R. 1928 Mad. 784 =55 M.L.J. 38.

2. Dependant nominee—Rights and powers of.

——Ss. 3 and 5—Subscriber nominating one of his dependants—Right of such nominee to provident find money to the exclusion of other dependants—Contributory Provident Fund Rules (Bengal), R. 5.

A dependant who is the sole nominee of a subscriber under the Contributory Provident Fund Rules (Bengal), and whose nomination is subsisting at the time of the death of the subscriber, has not only the absolute right to receive the provident fund money standing to the credit of the subscriber at the time of his death but acquires an absolute interest in that money to the exclusion of any other dependant who had not been nominated. 50 C.W.N. 872=231 Ind. Cas. 270=A.I.R. 1947 Cal. 176.

——Ss. 3 and 5—Dependant nominee—Rights and powers of—Wife nominated by subscriber—If entitled to absolute interest in money—Rules of the Contributory Provident Fund (Bengal), R. 25.

Under the Rules of the Contributory Provident Fund (Bengal), when a subscriber leaves a family, he may, if he so desires, make a nomination in favour of a particular member of the family, and the amounts standing to the credit of his Provident Fund at his death will become payable to the person whom he nominates 'in the proposition specified in the nomination'. [Rule 25 (1) (*a*)]. Where the subscriber's sole nominee is his wife, it follows that, under the rules, the Provident Fund money is payable to her under S. 3 (2) of the Provident Funds Act, the Provident Fund money vests in her, because she be-

sides being the person authorised to receive the money under the rules, is also a dependant of the subscriber. Further, she has not only the absolute right to receive the money but, in view of the provisions of S. 3 to which S. 5 of the Act is also subject she acquires an absolute interest in the money itself in her capacity as the only dependant to whom the money has been made payable under the terms of the nomination, to the exclusion of any other dependant who has not been nominated. I.L.R. (1947) 1 Cal. 160=A.I.R. 1947 Cal. 176=231 Ind. Cas. 270=50 C.W.N. 872.

——S. 3 (2)—Dependant nominee—Rights and powers of—Fund vesting in wife who is "dependant" as well as "nominee" under the Act—Exemption from attachment in execution of a decree obtained by a creditor against him.

The benefit under S. 3 (2) of the Provident Funds Act from attachment in execution of a decree will be available when the sum is paid to any person who would be a dependant within the meaning of S. 2 (*c*) of the Act whether such person becomes entitled to the sum by virtue of a nomination or by virtue of the general law or special rule as to dependants.

Accordingly a compulsory deposit in a railway provident fund standing to the credit of a depositor and payable to his wife under a nomination duly made by the depositor, is free from liability to be attached by a creditor in execution of a decree obtained against the wife for a debt incurred by her before the death of the depositor, though the wife is a "nominee," under S. 5 (1) of the Act as well as a "dependant" within the meaning of S. 2 (*c*). I. L.R. (1947) Mad. 851=60 L.W. 123=1947 M.W. N. 675=A.I.R. 1947 Mad. 317=(1947) 1 M.L.J. 167.

——Ss. 3 (2), 5—Dependant nominee—Rights and powers of—Provident Fund Rules of the B. B. and C. I. Railway Co., Rr. 6, 22 (1)—Depositor nominating dependent—Amount payable to depositor, if vests in dependant—Amount payable to depositor, if vests in dependent absolutely—Dependent, if can dispose of it by will.

Under S. 3 (2), Provident Funds Act read with Rr. 6 and 22 (1) of the B. B. and C. I. Railway Co.'s Provident Fund Rules, the amount made payable to a dependent of the depositor vests in him absolutely on the death of the depositor free from any debt or other liability incurred by the deceased or incurred by the dependent before the death of the subscriber or depositor, and it will be open to the dependent to dispose of the amount by will. A.I.R. 1937 All. 562=1937 A.W.R. 434=1937 A.L.J. 581 =168 Ind. Cas. 530.

——Ss. 3 (2), 5—Dependant nominee—Rights and powers of—Vesting of fund in nominee.

Under the Provident Funds Act the nominee of the subscriber is absolutely entitled to the amount standing in the fund to the credit of the deceased subscriber. Under S. 5, the nominee has the right to receive the amount absolutely and according to S. 3, the fund vests in the dependant and exempts it from any debt which the deceased himself may have contracted or which the dependent may have contracted before the death of the subscriber. Other heirs of the deceased subscriber have no claim over it. A.I.R. 1935 Bom. 234=37 Bom.L.R. 370=59 B. 475= 156 Ind. Cas. 630.

3. Fund, if assets of the subscriber.

——S. 3 and Provident Fund Rules (Ch. 13, 12—F. Y. D.—75

State Railway Establishment Code, Vol. I)—Provident fund of deceased is not his assets.

According to S. 3 (2), and Provident Fund Rules, the provident fund money due to a deceased subscriber, in the absence of any nomination by him, vests in the members of his family and cannot be said to form part of his assets. A.I.R. 1946 Oudh 73= 1945 O.W.N. 316.

——S. 3 (2)—Fund, if assets of the subscriber—Sum standing to credit of deceased subscriber vests in dependents and does not form assets of deceased—Receiver to receive fund cannot be appointed.

Under S. 3 (2), Provident Funds Act, the sum standing to the credit of the subscriber on his death vests in the dependents and so forms no part of the assets of the deceased subscriber. It follows that the Court has no jurisdiction to appoint a receiver to receive these funds or any part of them from the dependents. A.I.R. 1943 Nag. 333=1943 N.L.J. 510=I.L.R. (1944) Nag. 444=211 Ind. Cas. 210.

——Ss. 3, 4—Fund, if assets of the subscriber—Dependent murderer of subscriber—Property, whether vests in him.

Under S. 3, any sum standing to the credit of any subscriber at the time of his death and payable to any dependent of his, vests in such dependent, but if any express provision or principle of law prevents the vesting of the property in the dependent, then it must form part of the assets of the deceased.

The property of a deceaesd person could not devolve on his murderer. A.I.R. 1933 Nag. 173= 16 N.L.J. 86=29 N.L.R. 238=144 Ind. Cas. 322.

4. Liability to attachment.

——S. 3—Railway Provident Fund—Attachability Objection to attachment if can be raised by garnishee. (1950) 1 M.L.J. 186=A.I.R. 1950 Mad. 402.

——S. 3 (1)—Liability to attachment—Attachment of provident fund money when paid to subscriber.

The provident fund money of a subscriber is liable to attachment as soon as it is paid over to the subscriber.

After his retirement, a railway servant filled in the necessary form asking for payment of the money due to him on his account in the Provident Fund. The railway authorities requested the Reserve Bank to send a cheque to Messrs. Thomas Cook and Sons, Calcutta. The subscriber's decree-holder obtained an order on Messrs. Thomas Cook and Sons attaching the money. Messrs. Thomas Cook and Sons, in the meantime, had returned the cheque to the railway authorities alleging that the subscriber had no account with them and was unknown to him. The money was then held by the railway authorities in a suspense account. The decree-holder applied in execution for its attachment.

Held, that for determining whether the money had been paid to the subscriber, the test to apply was whether the railway had obtained a valid discharge. The railway authorities were discharged, if, in asking the Reserve Bank to send the cheque to Messrs. Thomas Cook and Sons, they were acting in accordance with the instructions given by the subscriber. A.I.R. 1942 Cal. 292=74 C.L.J. 524=201 Ind. Cas. 17.

——S. 3—Liability to attachment—Death in Company's service—Contribution to Company's provident fund, if liable for defraying debts.

The rules of the Provident Fund are such that the employee's contributions to the Provident Fund are

not liable to attachment to defray his debts any more than the contribution of the association itself in which he was employed.

Where, therefore, an employee of certain Company dies while still in service, his contribution cannot be attached in defraying his debts. A.I.R. 1938 Mad. 234=46 L.W. 904=1938 M.W.N. 55=I. L. R. (1938) Mad. 335=176 Ind. Cas. 713.

——S. 3—Liability to attachment—Provident Fund maintained by private College—College aided by Govt.—College adopting Govt. Rules—Decree for Provident Fund obtained by ex-Principal—If can be attached.

An ex-Principal of a private aided College obtained a decree for Provident Fund, deposited by him in Provident Fund maintained by the College. The authorities had instituted a suit for damages against him for his malfeasance during his tenure and prayed for attachment of decree obtained by him:

Held, that since the College was an aided College and had adopted rules framed by Government for Provident Fund in aided Colleges, the Fund in question was a Fund constituted under the authority of the Government from the date of the adoption of the rules. The entire amount of the Fund became consolidated into one Fund. Consequently, the decree obtained by the ex-Principal was not liable to attachment. A.I.R. 1937 Pat. 22=17 P.L.T. 731=3 B.R. 181=15 Pat. 779=166 Ind. Cas. 499.

——S. 3—Liability to attachment.

The decree-holder as a nominee of the depositor cannot attach the Provident Fund in execution of the decree passed in his favour. The effect of the nomination, if any, is that he becomes the owner of the Fund, in the eye of the law and by attaching it, he is not attaching the property of his judgment-debtor, but his own property. A.I.R. 1934 Lah. 153=36 Cr. L.J. 217=36 P.L.R. 145=150 Ind. Cas. 213.

——S. 3 (1)—Deposit—Liability to attachment.

A deposit in a Provident Fund remains a deposit only so long as it remains in the Fund and once it is paid to the depositor, it ceases to be exempt from attachment or the claims of the Official Assignee under S. 3, Provident Funds Act. A.I.R. 1931 Mad. 797=34 L.W. 117=61 M.L.J. 354=134 Ind. Cas. 179.

——S. 3 (1)—Liability to attachment—Compulsory deposit made in General Provident Fund is not attachable even after contributor's retirement.

Compulsory deposit made in the General Provident Fund is not liable to attachment even after the retirement of the contributor from service. R. 10, General Provident Fund Rules, is merely a rule of procedure directing the Accounts Officer how to proceed on receipt of a notice of attachment. It does not legalize a notice of attachment and consequently does not have the intention of making the deposit attachable after retirement. A.I.R. 1924 Pat. 524; A.I.R. 1924 All. 68, Foll. 117 Ind. Cas. 622= 1929 A.L.J. 670=51 All. 845=A.I.R. 1929 All. 417.

5. Non-dependant nominee—Rights of.

——Ss. 3, 4 and 5—Non-dependant nominee—Rights of—G. I. P. Railway Provident Fund Rules—Nomination by contributor of any person other than dependent is valid—Nominee though not dependent takes absolute interest in fund.

Under the Provident Funds Act read with the Provident Fund Rules of the G. I. P. Railway there can be a valid nomination by a contributor of any person other than a dependent although there was a dependant of the contributor in existence. And as the rules do not prohibit nomination in favour of one who is not a dependent, the nominee though not a dependent takes an absolute interest in the fund and need not hand it over to the dependent. A. I. R. 1946 Bom. 304=48 Bom. L.R. 83=225 Ind. Cas. 372=I.L.R. (1946) Bom. 146.

——S. 3 (2)—Non-dependant nominee—Rights of—No rules framed—Nominee is preferred to dependant.

To claim the benefit of S. 3 (2), it is necessary to show that under the Provident Funds Rules, the amount standing to the credit of the deceased in the Provident Fund is payable to the dependent of the subscriber. Section 3 (2) does not apply where there are no such rules.

Where the subscriber nominated a person as his nominee in accordance with the form prescribed by the Rules and the form purported to confer upon the nominee the right to receive the Provident Fund money standing to his credit at the time of his death and the case does not come within S. 3 (2), *prima facie* the nominee is entitled to preference over the dependent. A.I.R. 1945 Cal. 384=79 C.L.J. 152.

6. Nomination of non-dependant—Legality.

——Ss. 3, 4—Nomination of non-dependant—Legality.

There is nothing in S. 3 (2) which necessarily implies that there can be no valid nomination by a contributor of a non-dependent if there is a dependent in existence. On the contrary, S. 4 clearly implies that a nomination may be made in favour of a non-dependent. A.I.R. 1945 Bom. 43=I.L.R. (1944) Bom. 716=46 Bom. L.R. 720=218 Ind. Cas. 133.

——Ss. 3 (2), 4—Nomination of non-dependant—Legality—Nominee under declaration of subscriber—If should be a dependent.

There is no provision in the Provident Funds Act, which says that only a dependent may be lawfully nominated. On the contrary, S. 4, Provident Funds Act, clearly implies that a nomination may be made in favour of a person other than a dependent. A. I. R. 1939 Mad. 489=49 L.W. 496=1939 M.W.N. 321=(1939) 1 M.L.J. 620=184 Ind. Cas. 812.

7. Receiver in execution.

——S. 3—Provident fund money—Appointment of Receiver in execution—Permissibility.

A Receiver can be appointed by way of equitable execution in respect of money standing to the credit of a subscriber to a provident fund. S. 3 of the Provident Funds Act precludes only attachment of the provident fund money under a decree or order of a Court. The word "attachment" has a well-known and well-defined meaning, and its content should not be enlarged by speculation as to the object of the Act or the intention of the Legislature. Where a statute expressly prohibits attachment, equitable execution is permissible in a suitable case. The Court has, however, a discretion. The terms on which the Receiver will be appointed depend on the facts of each case. 54 C.W.N. 254, overruled. 54 C. W. N. 840=A.I.R. 1951 Cal. 25.

——S. 3 (1) and C. P. Code, S. 60 (k)—Receiver in execution—Provident fund money—

Appointment of Receiver to avoid bar under—Permissibility.

A Court should refuse to direct the appointment of a Receiver where the only object of such appointment is to avoid the bar created by S. 60 (k), C. P. Code, and S. 3 (1) of the Provident Funds Act. The appointment of a Receiver in execution proceedings has been described as a form of equitable relief which is granted on the ground that there is no effective remedy by execution at law. Surely, it is an improper use of that equitable remedy to employ it to avoid a very definite bar created by statute law to achieving the very object for which the Receiver is appointed. 54 C.W.N. 254=A.I.R. 1950 Cal. 212.

——S. 3—Receiver in execution—Provident fund money—Appointment of Receiver over—Permissibility.

A Receiver can be appointed in execution over Provident Fund money in a suitable case. A.I.R. 1933 Bom. 350, Not Foll. 54 C.W.N. 251.

——S. 3 (2)—Receiver in execution—Provident Fund amount standing to credit of deceased judgment-debtor—Appointment of Receiver in execution—Permissibility.

Under S. 3 (2) of the Provident Funds Act, the amount standing to the credit of a subscriber in the Provident Funds account vests on his death in the dependants and ceases to be a part of the assets of the deceased subscriber, and as such is not liable to be attached in execution nor a Receiver in execution can be appointed of that fund. 85 C.L.J. 112.

8. Vesting of fund in Official Assignee or Receiver.

——S. 3—Vesting of fund in Official Assignee or Receiver—Protection under—Money paid to insolvent—Protection, if ceases.

Protection contemplated by S. 3 extends only to a compulsory deposit. Once the money ceases to retain that character, the protection comes to an end. Once the provident fund money is paid to the insolvent, it falls within the category of property acquired by him after adjudication and vests in the Official Receiver. A.I.R. 1946 Oudh 11=1945 O.W.N. (C.C.) 284.

——S. 3 (1)—Vesting of fund in Official Assignee or Receiver—Deposit—Protection—Official Assignee, if can claim it.

An Official Assignee has a claim to money deposited to the credit of an undischarged insolvent in the Provident Fund of a District Council, unless and until protection of S. 3 (1) of the Provident Funds Act has been extended to such fund by the Local Government. A.I.R. 1938 Rang. 245=39 Cr. L.J. 754=176 Ind. Cas. 460.

——S. 3—Vesting of fund in Official Assignee or Receiver.

The Official Assignee is not entitled to an anticipatory order under S. 33, Presidency Towns Insolvency Act from the Insolvency Court directing the insolvent to hand over the money to the Official Assignee directly he receives it. A. I. R. 1936 Mad. 855=44 L.W. 286=71 M.L.J. 415 =167 Ind. Cas. 155.

——S. 3—Vesting of fund in Official Receiver.

As long as a compulsory deposit is in the hands of the Government or the institution which keeps and manages the fund, it is exempt from attachment under any decree, and neither does it vest in the Official Assignee nor in a Receiver appointed under Chap. 20, Civil P. C. But after the amount standing to the credit of a subscriber is paid to him and comes into his hands, it ceases to retain its character of a compulsory deposit, and it becomes his property, with which he can deal in any manner he likes, and liable therefore, to be attached in execution of decrees against him or against which his creditors can proceed: and, for the same reason, it must vest in the Receiver, if he is adjudicated an insolvent, either before or after such acquisition of it by him. A.I.R. 1935 Bom. 396=33 Bom. L.R. 494=59 B. 517= 159 Ind. Cas. 141.

——Ss. 3 and 2 (a)—Vesting of fund in Official Assignee or Receiver—Compulsory deposit—Money to credit of undischarged insolvent.

Money standing to the credit of an undischarged insolvent in the Government Provident Fund are compulsory deposits within the meaning of S. 2 (a). The Official Assignee is not entitled to call upon him to place the money at his disposal for the benefit of the creditors. Refusal by the insolvent to assist the Official Assignee in the matter does not constitute contempt of Court. A.I.R. 1933 Rang. 148=11 R. 93=143 Ind. Cas. 771.

9. Miscellaneous.

——S. 3—Provident fund money—Claim of heirs of nominee—Locus standi of latter to apply for succession certificate—Succession Act, S. 372.

Under S. 3 of the Provident Funds Act, the amount standing to the credit of a subscriber at the time of his death can vest only in his dependant and not in the nominee. It would therefore follow that upon the death of the nominee, whether before or after the death of the subscriber, the right of the nominee to receive the amount cannot pass to his personal heirs. Where the nominee dies before the subscriber dies, the nomination in his favour actually becomes null and void and in such circumstances, the personal heirs of the nominee have no *locus standi* at all to apply for a succession certificate for the purpose of claiming the provident fund amount in preference to a dependent of the deceased subscriber. 1950 N.L.J. 401=A.I.R. 1950 Nag. 244.

——Ss. 3 (2) and 4 (1)—Miscellaneous—Question as to whom the payment is to be made—Vesting of the amount is the deciding factor.

The question as to whether a provident fund amount has to be paid to the nominee or dependant depends upon the particular rules governing the Provident Fund in question. Vesting of the amount in question is the deciding factor. I.L.R. (1948) Nag. 357=1948 N.L.J. 254=A.I.R. 1949 Nag. 85.

——S. 3 (1) and (2)—Miscellaneous—Property in insurance policy held to be property of the deceased and could be proceeded against by creditors.

V, a Government employee was subscribing to the general provident fund. He took out a life-policy in an insurance company in which he nominated his wife *L* as the beneficiary. Subsequently, he was not able to pay the premium. He drew money from provident fund for paying the premium and mortgaged the insurance policy to the provident fund in respect of the amount drawn. *L* predeceased him and he married *A* as his second wife. *V* died without constituting *A* as beneficiary. The policy was assigned to *A* as heir of *V*. The insurance company deposited the amount in the Court and a creditor attached the amount as belonging to *V*. It was contended by *A* that the insurance amount represented the provident fund of the deceased and could not be attached:

Held, that as *A* was not nominated as the beneficiary of *V* after *L's* death, the property in policy was in *V* and on his death, it was assigned to *A* as she happened to be his heir and therefore, was entitled to the property of her husband *V*. The amount paid by the insurance company was the amount of the deceased and as such, was asset of the deceased in the hands of *A*.

Under the terms of the Provident Funds Act the amount was not an amount which was exempt from being proceeded against in respect of the debts of the deceased as the amount was not standing to the credit of the deceased subscriber in the fund at the time of his decease. The account officer had no right to draw the amount himself from the company. He had to assign the amount to the person entitled as the asset of the deceased. Consequently, it could not partake of the character of the provident fund. A.I.R. 1945 Mad. 267=(1945) 1 M.L.J. 433.

——S. 3—Miscellaneous—Railway employee agreeing to transfer Provident Fund when he would receive them and creating equitable assignment—Validity.

An employee of a railway company cannot, by agreeing to transfer the Provident Fund held by the railway, when they would be received by the employee, create an equitable assignment. A.I.R. 1939 Rang. 97=181 Ind. Cas. 78.

——Ss. 3 (1), 5 (1)—Miscellaneous—Declaration of nominee, whether assignment—Nomination in consideraton of loan—Validity.

Where a person has made a declaration that certain person will be entitled on his death to receive a payment of his deposit in the institution, the declaration which is tantamount to a nomination is quite a different thing from an assignment or a charge which is void under S. 3 (2). The declaration, on the face of it, is to take effect only in the event of the subscriber's death and it is in the nature of a bequest taking effect only in the event of the death of the subscriber before the same becomes payable, whereas an assignment takes effect whenever the fund becomes due even if the subscriber be alive. It will be incorrect to read the words "subject to the provisions of this Act" in S. 5 (1) as rendering a nomination which purports to confer upon the nominee the right to receive the sums standing to the credit of a subscriber in the fund on the death of the subscriber invalid as contravening the prohibition against assignment or charge under S. 3 (1), merely because the nomination has been made in consideration of a loan and not on account of mere love and affection. It is inconceivable that a nomination valid in all other respects is valid when made without consideration or in consideration of mere love and affection but is invalid when it is made for consideration. A. I. R. 1935 Rang. 449=160 Ind. Cas. 327.

——S. 3 (2)—Miscellaneous—Conditions for payment to nominee—Railway Company cannot insist upon nominee taking out letters of administration.

Where a nominee is duly declared by the deceased employee in the railway service to be his nominee with regard to provident fund, the employer company cannot insist upon his taking out letters of administration. The only thing they can insist upon is the proof of identity. 123 Ind. Cas. 646=33 C. W. N. 1148=A.I.R. 1930 Cal. 252.

——S. 3 (2)—Miscellaneous—Private provident fund—Company is not trustee for dependent or nominee—Such amount is not exempt from Court-fees in application for letters of administration.

A sum of money in a private provident fund cannot be deemed to vest in the nominee of the widow or the children of the depositor. No doubt there is a fiduciary relationship between the depositor and the private company which has created the provident fund, but such a company cannot be deemed to be trustee or the dependent or the nominee of the depositor. Such a nominee or dependent can only take by succession to the estate of the deceased, and such a deposit is, therefore, not exempt from paying the Court-fee when application is made for Letters of Administration to the estate of the deceased subscriber or depositor. 116 Ind. Cas. 467=6 Rang. 558=A.I.R. 1928 Rang. 312.

——Ss. 4 and 5—G. I. P. Ry. Provident Fund Rules, R. 25—Nomination—Subsequent marriage of member—Nomination does not subsist and widow is entitled to fund—R. 25 is not ultra vires.

Section 5 only deals with and can only deal with nominations which are valid and subsisting nominations under S. 4. It is only with regard to the nominees under valid and subsisting nominations that S. 5 declares the rights.

On the marriage or remarriage of a member (who is not a Hindu, Muhammadan or Buddhist) according to G. I. P. Ry. Provident Fund Rules, R. 25 (b) (1), the declaration of nomination does not subsist and hence on his death the widow becomes entitled to the fund and not the nominee. Rule 25 is not *ultra vires* the Act. A.I.R. 1946 Bom. 138=47 Bom. L.R. 906.

——S. 4—Effect of.

Provident Funds Act must override the Provident Fund Rules if it is inconsistent with them. Hence, S. 4 which expressly makes the claims of the nominee conditional upon the absence of dependents as defined by the Act negatives the provisions of Appendix D to the General Provident Fund (Bengal Services) Rules. A.I.R. 1940 Cal. 395=I.L.R. (1940) 1 Cal. 476=44 C.W.N. 407=190 Ind. Cas. 310.

——Ss. 4, 2—Depositor nominating a lady—Lady alleging to be widow of depositor claiming deposit—Lady not legally married—Whether has preference over son of deceased depositor.

Where the rules relating to a Provident Fund do not lay down that a declaration should be made in favour of dependents only, nor do they put any restriction with regard to persons in whose favour declaration may be made by the depositors, and the depositor makes a declaration nominating a lady as the person entitled to the deposit in the event of his death and the lady alleges that she is the widow of the depositor and claims the deposit on his death, she is entitled to it in preference to the son of the depositor, even where it is found that she was not legally married to the depositor and consequently, is not a dependent within the meaning of S. 2. A. I. R. 1939 Mad. 489=1939 M.W.N. 321=49 L. W. 496=(1939) 1 M.L.J. 620=184 Ind. Cas. 812.

——Ss. 4, 5 (2)—Rights of nominee.

The effect of S. 4 is that in a competition between two persons it is the nominee who holds a certificate, who is entitled to the money. Where, therefore, a widow holds a succession certificate in respect of assets of her deceased husband but subsequently, a nominee of her husband obtains a succession certificate for the Provident Fund amount, the latter is entitled to the money and the former's certi-

ficate is no bar. A.I.R. 1935 Cal. 271=62 Cal. 272=39 C.W.N. 117=155 Ind. Cas. 749.

——S. 4 (1) (a)—Liability to attachment.

Where the amount deposited by a person in a Provident Fund has been paid over after his death to his son under S. 4 (1) (a) of the Provident Funds Act, 1925, it cannot be deemed to be assets of the depositor in the hands of his son and is not, therefore, liable to be attached for the debts of the deceased. A.I.R. 1934 Mad. 173=1933 M.W.N. 1473=39 L.W. 186=57 Mad. 440=66 M.L.J. 207 =148 Ind. Cas. 491.

——S. 4 (1) (c) (ii)—Claimant, when to produce succession certificate.

A claimant for Provident Fund of a deceased person other than a nominee or dependent where sum claimed is more than Rs. 5,000 can obtain the amount only on production of probate, letters of administration or succession certificate. A.I.R. 1933 Sind 101=26 S.L.R. 429=142 Ind. Cas. 359.

——S. 4—Employee—Test.

The test of whether any individual person is an employee of the authority for the purposes of the Provident Funds Act is rather whether the authority admits that person to membership of the Provident Fund constituted by it than the particular nature of his employment or his precise legal relationship with the employer. A.I.R. 1931 Pat. 451=12 P.L.T. 384=10 Pat. 315=133 Ind. Cas. 360.

——S. 5—Nominee predeceasing the subscriber —Whether nomination still effective as to vest moneys in the heirs of the nominee—Subscriber also dying prior to amendment of S. 5 in 1946 —Right if affected.

Where a person who was a subscriber to a Government Provident Fund, died before the amendment of S. 5 of the Provident Funds Act in 1946 and his nominee, his wife, had also predeceased him, on the question whether his nominee's heir was entitled to a succession certificate.

Held, that since the nomination was never revoked at any time, the result was under the section the nominee became entitled absolutely to the money deposited in the Fund. In the revised rules of 1935 there was no rule to the effect that a predeceased nominee's nomination became null and void as a result of the new rules. (1944) 1 M.L.J. 198 and 71 M.L.J. 790: 59 Mad. 855, foll.

The amendment made to S. 5 of the Provident Funds Act in 1946 will not affect the heirs of the nominee as it has no retrospective effect. 62 L. W. 793=A.I.R. 1950 Mad. 210=(1949) 2 M. L. J. 635.

——Ss. 5 (1) and 3 (2)—Right conferred upon nominee—Nominee, if entitled to exclusive ownership of sum received.

The Provident Funds Act confers on the nominee, even when the nominee is a dependent, nothing more than the right to receive the amount. It does not confer on the nominee the full rights of an owner, and does not touch the rights of those entitled to the sum as heirs or legatees, under the law applicable to the case. The words of S. 5 (1) of the Act which enact that the nomination "shall be deemed to confer such right (to receive) absolutely" and "notwithstanding anything contained in any law for the time being in force, or any deposition, whether testamentary or otherwise" by the subscriber, do not have the effect of conferring on the nominee not only the right to receive the sum, but also a title to the exclusive ownership thereof. These words constitute a protective provision, having the effect of protecting the specified right conferred, *viz.*, the right to receive the sum, and of making it indefeasible by enacting that no one shall be in a position to challenge the right of the nominee to receive the sum, even though he may be able to show that he had a better or superior title to the sum, under the law or by reason of a disposition made by the subscriber. These words, according to their plain grammatical meaning, do not affect the rights or titles of either the nominee or of others, except in so far as they prevent any one, other than the nominee, from claiming a prior, or superior right to receive the payment. Such competition is rendered unsustainable. But the right to receive is subject to the rights of others under the law or arising out of any disposition made by the subscriber. Where a nomination has once been duly made, the Act is not concerned with the question, who is ultimately entitled to the sum, but only designates the person to whom the payment has to be made. Such a question must be answered by taking into consideration not only the nomination but also all other relevant facts, and by applying not only the Provident Funds Act but all other relevant law applicable to the case.

The words of S. 3 (2), which enact that the sum payable to the nominee when a dependant, shall vest in the dependant on the death of the subscriber, do not connote anything more than that in law the legal right to immediate possession of and dominion over the property shall pass from the trustees of the fund to the nominee, and do not mean that the full rights of ownership, including the right to the beneficial enjoyment of the property, shall pass to the nominee. The nominee becomes entitled to possession of the sum without having to obtain letters of administration or a succession certificate. Of course, if the dependent nominee happens to be the only heir or legatee, and is therefore also entitled to the beneficial rights in the sum, the entire rights of ownership would vest in him. When this is the case, the dependent's rights are conferred on him, not only by the Provident Funds Act, but by the entire law applicable to the case. 18 S.L.R. 311, 1935 Sind 73 and 1937 All. 562, foll. 57 M. 440, 59 B. 475 and 11 Luck. 611, not foll. A.I.R. 1949 Sind 38.

——S. 5 (1)—Applicability.

Section 5 (1) applies to nominees who are dependents as well as nominees who are not. A.I.R. 1944 Mad. 370=57 L.W. 147=1944 M.W.N. 159.

——S. 5 (1)—Deceased nominating certain person to receive amount to his credit in Provident Fund—Such sum, forms part of estate of deceased.

Where a deceased has nominated certain person as a person to whom the sum standing to his credit in the Railway Provident Fund should be paid, that sum does not form part of the estate of the deceased and it cannot be disposed of by the deceased in his will. A.I.R. 1939 Cal. 642=187 Ind. Cas. 886.

——S. 5—Provident Fund—Successor.

The money standing to the credit of a deceased *Sunni* Muhammadan, in the Provident Fund at the time of his death are part of his estate and subject to the personal law of succession of the deceased as a *Sunni* Muhammadan; provident moneys are the property of a deceased employee, and pass on his death to his heirs whoever be nominated by him for the purpose of receiving the moneys from the Fund and for giving a full and sufficient quittance to the

Fund. A.I.R. 1929 Sind 107=I.L.R. (1939) Kar. 432=181 Ind. Cas. 770.

——S. 5—Applicability to funds of private company.

Section 5 deals with Government and Railway Funds. To the Fund of a private company, the Act does not apply. A.I.R. 1939 Sind 107=I.L.R. (1939) Kar. 432=181 Ind. Cas. 770.

——S. 5—Effect of.

Quaere.—Whether, if a Fund be a Fund to which S. 5 of the Act applies, the personal law of succes sion of the employee is ousted in favour of the no mine? A.I.R. 1939 Sind 107=I.L.R. (1939) Kar. 432=181 Ind. Cas. 770.

——S. 5 (2)—Amount standing in Fund in name of depositor — Whether vests in nominee at time of nomination — Court-fee.

The sums in the Provident Fund to the credit of a subscriber or depositor remain his property till his death and the nominee takes by succession under the Provident Funds Act. The right of a nominee during the life of the subscriber cannot be regarded as anything more than a purely contingent right and to hold that under such circumstances, a title to receive the sum absolutely vests in the nominee at the time of the nomination is clearly to act contrary to a well-established legal principle, and to use the word "vests" in a sense distinctly contrary to its accepted meaning. So the nominee is not entitled to get a succession certificate in respect of the amount without payment of the court-fee payable under Art. 12, Sch. 1, Court-fees Act. A.I.R. 1939 Sind 52 =I.L.R. (1939) Kar. 359=180 Ind. Cas. 642.

——S. 5—Nominee's right to will.

Depositor nominating dependent—Amount payable to depositor vests in him absolutely free from any debt or liability incurred by the deceased—Dependent can dispose of it by will. A.I.R. 1937 All. 562= 1937 A.W.R. 434=1937 A.L.J. 581=168 Ind. Cas. 530.

——S. 5—Railway Provident Fund—Nomination, effect of—Right of nominee's heirs.

Where the Rules of a Railway Provident Fund provided that "any nomination in the prescribed declaration form which purports to confer upon any person the right to receive . . . . . such sum on the death of the depositor shall be deemed to confer such right absolutely until such nomination is varied or expressly cancelled by the depositor":

Held, that the effect of the nomination was not merely to entitle the nominee if he was alive at the death of the subscriber to draw out the money, but it conferred on the nominee a vested right in the money which passed to the heir of the nominee at his death. A.I.R. 1936 Mad. 477=43 L.W. 604= 1936 M.W.N. 541=59 M. 855=71 M.L.J. 790= 162 Ind. Cas. 956.

——S. 5—'Any law', meaning of—Heirs under personal law, rights of.

The words "notwithstanding anything contained in any law for the time being in force" in S. 5 have the effect of validating the wills notwithstanding anything contained in the personal law of the depositor. The words "any law" are very wide and certainly include the personal law of the depositor. The word "absolutely" means that the recipient is to be deemed to be entitled to receive the money free from any charge or attachment or liability enforceable by other heirs or by creditors. It implies that the recipient is to take a beneficial interest in the sum which he receives and not that the nominee is only entitled to realise the money on behalf of the whole body of heirs.

Section 5, sub-S. (1) has conferred upon a depositor a right to give the Provident Fund money as he thinks best, notwithstanding the provision of his personal law. A.I.R. 1936 Oudh 32=1935 O.W.N. 1296=11 Luck. 611=159 Ind. Cas. 596 (F.B.).

——Ss. 5, 3 (2)—Depositor making declarations that money should go to sons half and half—Legatees, if entitled to appropriate money bequeathed.

An employee of a Railway and a depositor in the Provident Fund maintained for the employees of the Railway, made a declaration in the form printed as Appendix A to the Rules governing the Provincial Fund, by executing two forms, in one of which he declared that in the event of his death, his son *A* should be entitled to receive payment of half of his deposit in the Provident Fund and he appointed *A* "to be the executor of this my will so far as regards such deposit" and in the other he declared his son *B* to be entitled to receive payment of half of his deposit in the Provident Fund and appointed *A* to be the executor of this will also. As *A* was named as executor of both the wills, the Provident Fund Deposit was paid to him. One of the widows of the deceased depositor sued for her share of the deposit to which she alleged she was entitled under the Muhammadan Law:

Held, per Full Bench, (*Zia-ul-Hasan J.*, Contra) that the two documents must be regarded as will expressing the intention of the declarer that in the event of his death, the nominees are to take the Provident Fund deposit half and half each and in the absence of any words to the contrary, the wills must be construed as giving a beneficial interest to the legatees in the Provident Fund money and that on the language of the will, it would be impossible to hold that the declarant intended that the legatees should not be entitled to appropriate the money, but that they should merely realise the money on behalf of the other heirs and should be liable to pay the other heirs their legal shares under the Muhammadan Law. A.I.R. 1936 Oudh 32=1935 O.W.N. 1296=11 Luck. 611=159 Ind. Cas. 596 (F.B.).

——S. 5—Rights of nominee.

Where a widow holds a succession certificate in respect of assets of her deceased husband but subsequently a nominee of her husband obtains a succession certificate for the provident fund amount, the latter is entitled to the money, and the former's certificate is no bar. A.I.R. 1935 Cal. 271=39 C. W.N. 117=62 C. 272=155 Ind. Cas. 749.

——Ss. 5 and 3—Declaration of nominee, whether assignment—Nomination with consideration—Validity.

Where a person has made a declaration that certain person will be entitled on his death to receive a payment of his deposit in certain institution, the declaration which is tantamount to a nomination is quite a different thing from an assignment or a charge which is void under S. 3 (2) of the Act. It is incorrect to read the words, "subject to the provisions of this Act" in S. 5 (1) as rendering a nomination which purports to confer upon the nominee the right to receive the sums standing to the credit of a subscriber invalid as contravening the prohibition against assignment or charge under S. 3 (1) merely because the nomination has been made in consideration of a loan and not on account of mere love or affection. A.I.R. 1935 Rang. 449=160 Ind. Cas. 327.

——S. 5—Nominee—Right to receive amount—Grant of probate to third party—Effect.

The provisions of the Provident Funds Act relating to the right of nominees to receive the Provident Fund are not to be read as though they were controlled by or subject to any other law for the time being in force, or subject to any disposition whether testamentary or otherwise by the subscriber or depositor. Unless the nomination is cancelled by the subscriber or varied by a nomination in favour of another person, the nominee, on the death of the subscriber, must be regarded as having had conferred on him or her an absolute right to receive the Provident Fund. He is entitled on the death of the subscriber, notwithstanding anything in the Succession Certificate Act, 1889, or the Bombay Regulation 8 of 1827, to the grant of a certificate entitling him or her to receive payment under that Act or under that Regulation and such certeificate is not to be deemed to be invalidated or superseded by the grant of probate or letters of administration to any other person. A.I.R. 1932 Sind 115=139 Ind. Cas. 775.

——S. 5—Nomination and will—General Provident Fund—Declaration specifying person entitled to fund after subscriber's death amounts to will.

M signed a declaration form of the General Provident Fund constituting *B*, his minor nephew. as his nominee for receiving the amount to his credit. Heirs of *M* brought a suit against *B* for recovery of their share of the amount under Hindu Law.

Held, that the form of declaration amounted both to a declaration of nominee and a will. *B* was expressly constituted the nominee as the sole legatee in respect of the fund and suit by heirs of *M* did not lie. A.I.R. 1930 Lah. 437.

——S. 5—Nomination—Nature of.

A nomination of a person to receive Provident Fund money from a Corporation is not a will, a gift or a trust in favour of the nominee—Fund forms part of his undisposed of estate. A.I.R. 1924 Sind 57, Foll. 108 Ind. Cas. 894=A.I.R. 1928 Lah. 773.

——S. 5—Right to payment.

A person who said he was the uncle of the deceased, an employee in the Calcutta Corporation, appeared before the Corporation with some kind of certificate stamped by an Honorary Magistrate and professing to bear the seal of the Court of which that individual was an Honorary Magistrate, and with this certificate he succeeded in getting payment of the Provident Fund of the deceased from the Corporation of Calcutta. The son of the deceased sued the Corporation for the sum but it was pleaded that the sum was already paid to a deceased's representative.

Held, that the person to whom the payment was made was not the representative and the Corporation had no business under the rules to pay anybody other than the legal representatives, executors or administrators of the deceased under R. 19 framed under the Provident Fund Act. 115 Ind. Cas. 271=A.I.R. 1928 Cal. 542.

——S. 5—Validity of nomination.

The effect of S. 5 is that a nomination is valid in spite of any prohibition in the personal law of the person making the nomination and this holds good even if the nomination was made before the passing of the Act of 1925 and no fresh nomination was made after the Act was passed. 115 Ind. Cas. 909 =6 Rang. 682=A.I.R. 1929 Rang. 54.

——S. 6—Scope.

S. 6 (*b*), Provident Funds Act, in enacting that a dismissal from employment for any reasons specified in this behalf in the Rules shall entail a forfeiture of the Employer's contribution to the provident fund necessarily implies that all dismissals shall not entail a forfeiture but only some dismissal would. Section 6 (*b*), therefore, casts a burden upon the constituting authority of the fund to particularize the dismissal which would entail forfeiture so as to distinguish it from the other dismissal which would not lead to that result. Section 6 (*b*) also contemplates that the reason should be specified in the rules so that the employee should know during his employment and at the time when the fund comes into existence the risk of the liability of forfeiture which he runs in committing acts which entail forfeiture so as not to commit them and it is not left to the constituting authority of the Fund to determine the reasons of forfeiture subsequently when according to its opinion some act is committed by the subscriber or depositor which should entail forfeiture. A.I.R. 1946 All. 234=1945 A.L.J. 325=I.L.R. (1946) All. 21 (F.B.).

——S. 7—'Good faith'—Knowledge of claim by nominee—Payment to another without inquiry.

In spite of the somewhat liberal definition of 'good faith' in the General Clauses Act, payments made in contravention of the Provident Funds Act are by no means protected under all circumstances and the definition contained in the General Clauses Act, certainly does not entitle a trustee or the holder of a fund to pay anybody and everybody without proper enquiry. Where a Railway Company which holds in deposit the Provident Fund of its deceased employee pays it to his widow, knowing full well that one of the surviving nominees mentioned by the deceased is putting forward a claim to the fund and also having knowledge of proceedings taken by such nominee in Court and having stated quite definitely that they would hold the money until the issues raised in those proceedings had been properly determined by a competent Court, the payment made by it to the widow is not in good faith. Consequently, the company is not entitled to the indemnity or protection afforded by S. 7, Provident Funds Act. A.I.R. 1937 Cal. 314=41 C.W.N. 524=65 C.L.J. 259=171 Ind. Cas. 597.

——S. 7—Good faith, what is.

Even if the payment is made without due care and caution, still if it is made "honestly" it will be payment "in good faith." 109 Ind. Cas. 696=A.I.R. 1928 Mad. 484.

——S. 8—Scope.

Quaere.—Whether Local Government or Governor-General in Council can, under S. 8, extend provisions of Act to a Mutual Benefit Fund or to share capital in Co-operative Credit Society? A.I.R. 1939 Mad. 485=1939 M.W.N. 280.

PROVIDENT FUND RULES. *See also* PROVIDENT FUNDS ACT.

——Provident Fund Rules (Rule 1334, State Railway Establishment Code, Vol. I)—Declaration of nomination on appointment but before actually subscribing to fund not valid.

The rules require that the nomination of the person entitled to receive the provident fund should be made by a person who is a subscriber to the fund. Therefore, a declaration of nomination made by a person on his appointment as a railway servant but before he began to subscribe to the fund is not valid. A.I.R. 1946 Oudh 73=1945 Oudh W.N. 316= 1945 All. W.R. C.C. 245.

——General Provident Fund (Madras) Rules, R. 2 (1) (c)—Wife living separately—No proof of her unchastity—She is still member of family.

The proviso to Rule 2 (1) (c) (i) does not imply that a wife ceases to be a member of the family when she is living separately from her husband and is not entitled to claim maintenance in a separate residence. She is still a member of his family when she has the right to return to her husband and demand to be maintained in his house unless she lives an unchaste life during separation in which case she forfeits her right to maintenance and cannot be called a member of the husband's family.

Where the wife of a person lived separately from her husband as a result of some quarrel and the person nominated the children of his cousin as persons entitled to receive the money standing to his credit in the General Provident Fund and he died leaving a will under which he purported to leave his provident monies to his cousin's children:

Held, that in the absence of the proof of his wife's unchastity she still remained the member of his family within the meaning of R. 2 (1) (c). The nomination was invalid and he had no right to dispose of his Provident Fund money by a will. 1946 M.W.N. 615=59 L.W. 529=(1946) 2 M.L.J. 248=A.I.R. 1947 Mad. 96.

——G. I. P. Rly. Provident Fund Rules, R. 25—Validity of.

Rule 25 is not *ultra vires* of the Provident Funds Act.

Hence, where a subscriber, who is not a Hindu, Muhammadan, Buddhist or a person exempt from operation of the Succession Act, makes a nomination to the G. I. P. Rly. Provident Fund, the nomination ceases to subsist under R. 25, when the subscriber subsequently contracts a marriage and on his death, the fund becomes payable, not to the nominee, but to the widow. A.I.R. 1946 Bom. 138=47 Bom. L.R. 906.

——Government rules—Hindu wife obtaining decree for separate maintenance from husband, whether judicially separated from husband.

Main purpose of the Provident Fund Rules is to preserve for the members of the depositor's family, the right to receive his provident fund, and the framers of the rules did not intend to exclude a Hindu wife who had obtained a decree for separate maintenance. The status of such a Hindu wife is not, in any real sense, equivalent to the status of a wife judicially separated under the Divorce Act, and there is no reason why a Hindu wife who has been placed in the unfortunate position of having to sue for separate maintenance owing to her husband's conduct should, for any purpose, be considered as outside the list of these who are entitled to benefit under the rules. A.I.R. 1940 Mad. 590=51 L.W. 575=(1940) 1 M.L.J. 715=1940 M.W.N. 490=193 Ind. Cas. 329.

——Rules under R. 10—Attachment.

Money standing to the credit of a retired employee is attachable. A.I.R. 1922 Cal. 196.

——Rules under R. 10—Assignment to illegitimate child.

Where a person assigned the whole of his Provident Fund in favour of an illegitimate son in the presence of the widow and two daughters, *held*, that the assignment was *ultra vires* and that the Fund must be divided between the widow and the daughters in accordance with R. 10 (2). 64 Ind. Cas. 62=13 Bur. L.T. 212.

PROVIDENT INSURANCE SOCIETIES ACT (5 OF 1912)—Act as a whole, is unsatisfactory.

Taken as a whole the Provident Insurance Societies Act, 1912, is a thoroughly weak and unsatisfactory enactment. (1936) 164 Ind. Cas. 897=39 C.W.N. 274.

——Incorporation.

An insurance company incorporated under the Companies Act with a share capital divided into shares is not a provident insurance society under Act 5 of 1912. 40 Cal. 570=21 Ind. Cas. 258.

——Ss. 2 and 21—Insurance Company—Registration under the Act, if necessary.

An Insurance society whether it is already a corporate company or whether its share-capital is divided into shares or not, cannot carry on the business of Life Insurance until it is registered under the Provident Insurance Societies Act. 40 Cal. 570, Expl. 42 Cal. 300=18 C.W.N. 1182=16 Cr. L.J. 149=27 Ind. Cas. 213.

——Ss. 17 (7), 18—Notice, nature of.

It is quite clear from the text of Ss. 17 and 18 Provident Insurance Societies Act, that the giving of the notices mentioned in S. 17, sub-S. (7) is mandatory whereas the issuing of the subsequent notices laid down in S. 18 is merely permissive. (1936) 164 Ind. Cas. 897=39 C.W.N. 274.

——S. 22—Revenue account and balance-sheet of company filed with Registrar—Containing false statements — Offence.

Where the revenue account and the balance-sheet of an insurance company signed by the directors, secretary, accountant and the auditor of the company and filed with the Registrar of Provident Insurance Societies as required by S. 14 are found to contain false statements, such of the persons as were aware of the true facts would be guilty under S. 22 though they might have the best of intention. A.I.R. 1940 Mad. 682=41 Cr. L.J. 956=1940 M.W.N. 385=190 Ind. Cas. 628.

——S. 24—Duty of Judges — Rules to be framed under—Judges, if should undertake task.

Where rules are to be framed under a particular section of a statute, it is constitutionally axiomatic that the Judge should not be asked to undertake such a task, for it is more than likely that when the rules are brought forward, they may, at some future date, have to interpret them. (1936) 164 Ind. Cas. 897=39 C.W.N. 274.

PROVINCIAL DEBT LAWS (TEMPORARY VALIDATION) ORDINANCE (11 OF 1945)—Validity of Ordinance.

The validity of the Provincial Debt Laws (Temporary Validation) Ordinance is not open to question on the ground of its retrospective character. The Ordiance is valid. A.I.R. 1946 (F.C.) 1=50 Cal W. N. 9=(1946) 9 F.L.J. 55=223 Ind. Cas. 594 (F.C.).

——S. 2—S. 2 (a)—Effect of—Provisions of Madras Agriculturists' Relief Act relating to debts arising out of promissory notes are valid and operative—Madras Agriculturists' Relief Act (4 of 1938).

The effect of S. 2 (a), Provincial Debt Laws (Temporary Validation) Ordinance, is that while the Ordinance remains in force, the provisions of the Madras Agriculturists' Relief Act relating to debts arising out of promissory-notes must be treated as valid and operative. Consequently the debtors who owe money to the creditors under promissory notes can claim relief under that Act. A.I.R. 1946 (F.C.) 1=50 C.W.N. 9=(1946) 9 F.L.J. 55=223 Ind. Cas. 594 (F.C.).

PROVINCIAL DECREE.

See C. P. CODE, S. 2.

Comparative Table of the Corresponding Sections of the Provincial Insolvency Acts III of 1907 and V of 1920.

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Provincial Insolvency Act, (III of 1907).

——"Proceeding" explained—The stranger to bankruptcy if can be made to pay.

Per Walsh, J.—Wherever the word "proceedings" occurs in the Insolvency Act, a proceeding in a court is intended. The Act does not provide for a court calling upon a stranger to bankruptcy to show cause why a certain sum, which may or may not be due from him should not be paid by him. 39 All. 267=15 A.L.J. 253=37 Ind. Cas. 830.

——C.P. Code (1882), Ss. 344, 360—Distinction.

Under the Code the conduct of the petitioner as regards his creditors and property had to be taken into account before he was adjudged insolvent while under this Act the conduct is material only at the time of the order of discharge and the adjudication follows as a matter of course on the filing of the petition. 12 C.L.J. 400=15 C.W.N. 213=7 Ind. Cas. 394.

——Jurisdiction of Civil Court.

Though the District Collector may act under the C.P.C. relating to insolvent judgment debtors when the debts are under the Public Demands Recovery Act, the Civil Court has still a jurisdiction where the debts are enforceable under that Act. 14 C.W.N. 143=2 Ind. Cas. 856.

——Adjudication under earlier law—Subsequent proceedings—Whether governed by the New Act.

Where a firm was declared insolvent before the Act of 1907 all subsequent proceedings could not be regarded as orders under the old enactment. The new Act will govern all such subsequent proceedings. 21 P.W.R. 1916=33 Ind. Cas. 995.

——Retrospective effect.

The Act does not affect cases already instituted or pending at the time the Act came into force. Hence when a composition deed was filed before the New Act came into force the courts should pass final orders according to old law though the old law was repealed later on by the new Act. 12 P.R. 1910=162 P.L.R. 1910=5 Ind. Cas. 806.

——Retrospective effect.

The Act does not govern cases already instituted or pending at the time the Act came into forcce. 11 P.R. 1910=24 P.W.R. 1910=163 P.L.R 1910=5 Ind. Cas. 804.

——Insolvency Acts, English—Old cases on how far good guides in construing Indian Insolvency Act.

The cases on Old English Insolvency Acts are not reliable guides in construing the Indian Insolvency Act. 4 Bom.L.R. 647=26 B. 765.

——S. 2—Adjudication by Receiver—If property vests in him.

Where an Official Receiver makes an order of adjudication under S. 52 (1) (a) of the Act the insolvent's estate does not thereupon vest in him under S. 18 of the Act; it only does so in pursuance of an order of the Court and in exercising the deligated powers, the Official Receiver is not a Court within S. 2 (1) of the Act. 59 Ind. Cas. 507=43 Mad. 869=12 M.L.W. 262=1920 M.W.N. 537=39 M.L.J. 438.

——Ss. 2, Sub. S. 1, Cl. (g), 4, 46, 16 (6), 13, 18—High Court, if may grant interim protection and appoint Receiver pending appeal—Inherent jurisdiction—Civil Procedure Code (Act V of 1908), S. 151.

Where an appeal has been preferred against an order refusing the appellant's application to be declared an insolvent, the High Court, has power in the exercise of its inherent jurisdiction as a court of appeal, to make an ad interim order for protection of the appellant and for the appointment of a Receiver of his assets during the pendency of the appeal. As there appeared to be substantial points in controversy in the case, which required consideration, the High Court granted ad interim protection pending appeal to the appellant and also appointed a Receiver of his assets. 11 C.L.J. 435=14 C.W.N. 586=6 Ind. Cas. 95.

——Ss. 16, 46, 45—Appeal—Stay of proceedings—'Ad interim' protection—Receiver.

During the pendency of an appeal under the Provincial Insolvency Act, the court of appeal, in

exercise of its inherent power, is competent to make an ad interim order for protection of the applicant for insolvency and also to appoint an ad interim Receiver to take charge of the assets. 6 Ind. Cas. 95=14 C.W.N. 586=11 C.L.J. 435.

[Cases under the repealed Ss. 344—360, C.P.C., of 1882, which were confined to the insolvency of judgment debtors do not find place here.—Ed.]

—S.36——C.P.C. (Old Code, S. 351—Insolvency, declaration of—Unfair preference—Act of bad faith)—"Payment"—Assignments of actionable claims are "dispositions of property", within the meaning of S. 351, C.P.C. (Old Code).

If a man on the eve of bankruptcy makes a payment to a particular credit for the presumption immediately arises that he makes that payment with the dominant view of giving a preference to that creditor over his other creditors. There is no need for any evidence that the view was expressed in so many words by the bankrupt. It is a presumption which would arise from the transaction.

It is sufficient to constitute an unfair preference if the preference is the substantial effectual or dominant view of the debtor, though not the sole view.

A preference might be an unfair preference even though the payment might never have been made but for the desire to prefer in the sense that the desire was the dominant view of the debtor.

Held also: that in the circumstances of the case there was no unfair preference. 18 M.L.J. 189= 2 M.L.T. 57.

Provincial Insolvency Act (V of 1920).

——Construction of Act.

The provisions of the Provincial Insolvency Act must be construed strictly inasmuch as the status of the subject is sought to be affected thereby. A.I.R. 1939 Cal. 313=69 C.L.J. 84=I.L.R. (1939) 1 Cal. 425=182 Ind.Cas. 701.

——Interpretation of Act.

The Provincial Insolvency Act is an Act to consolidate and amend the law relating to insolvency in British India and it must be presumed that the Indian Legislature in passing this Act was aware of the exceptions made by the Courts in England to the English Bankruptcy Act, on which the Indian enactment is based. If it was the intention of the Legislature to allow exceptions to the rule as laid down in the Act, there would have been provsions to this effect in the Act itself. It would be contrary to the intention of the Legislature to introduce exceptions to the clear terms of the Act. A.I.R. 1934 All. 521= 56 A. 1041=1934 A. L. J. 676=3 A.W.R. 481=149 Ind. Cas. 935 (2).

——Interpretation.

The correct method of interpretation is to interpret the Act as it stands without referring to the Companion Acts. 50 Bom. 110=32 Bom. L.R. 1362=A.I.R. 1931 Bom. 50.

——Interpretation.

Per King, J.—Though there is nothing in the Act corresponding to S. 52 (2) (b), Presi. Towns Insol. Act, the rulings based on S. 52 (2) (b) can be applied to Prov. Insolvency Act. A.I.R. 1931 All. 162=1931 A.L.J. 122=53 A. 239=135 Ind. Cas. 119. (F.B.).

——Object of Insolvency Laws.

The Insolvency Laws are devised for the protection of distressed debtors and not for the purpose of enabling reckless or imprudent persons to incur with relative impunity obligations which they know they cannot perform. A.I.R, 1936 Rang. 412=165 Ind. Cas. 384.

——Object of Insolvency Law.

The Law of Insolvency should be administered broadly with special consideration, not for the particular protection of the insolvent where an act of insolvency has been clearly committed, but for the general protection of the creditors and the trading public. A.I.R. 1933 Rang. 363=12 R. 64=149 Ind. Cas. 723.

——Scheme of Act and that of Punjab Laws Act, distinction between.

The effect of an application of insolvency under the provisions of the Punjab Laws Act is that only the property in the Punjab can be attached and sold by the Court and only the debts of those creditors can be satisfied out of sale proceeds who have proved their debts. Those creditors who have not proved their debts do not get anything out of the sale proceeds and they are not debarred from pursuing the ordinary remedy that may be open to them against the debtor and further, the debtor has to pay in full all the debts proved in the insolvency, even out of the property which he may acquire after the order of discharge. The scheme of the Act, therefore, is substantially different from the scheme of the present Pro. Insol. Act under which the entire property of the insolvent after in order of adjudication has been passed, vests in the Court or the Receiver, and all the creditors must, in order to get rateable share out of the assets of the insolvent, prove their debts. After an order of adjudication, no creditor is entitled to maintain independent proceedings for the realization of his debt. A.I.R. 1936 Lah. 407=38 P.L.R. 1099=164 Ind. Cas. 846.

——Scope.

The Provincial Insolvency Act is a complete Code. 1930 M.W.N. 651.

——Retrospective effect.

The provisions of the new Act, which have substantially altered the pre-existing law, cannot be given retrospective operation so as to take away the right enjoyed by the debtor under the Act of 1907, if the latter was in force when the application was made. A.I.R. 1928 Cal. 221.

——Stay of execution proceedings—Insolvent's right to have execution proceedings stayed—If affected by New Act.

The right of an insolvent adjudicated as such under Act III of 1907 to have execution proceedings against him stayed, unless the Insolvency Court gives leave to prosecute them, is a substantive right and is not abrogated by Act V of 1920, and so an order for his arrest without leave of the Insolvency Court is without jurisdiction. A.I.R. 1923 Mad 487; A. I. R. 1924 Mad 368, Foll. 93 Ind. Cas. 3=1926 M.W.N. 281=A.I.R. 1926 Mad. 510=50 M.L.J. 237.

——Petition under Old Act—Subsequent proceedings—By what law governed.

There is no authority for holding that in spite of the passing of the Act V of 1920, all proceedings on petitions filed under Act A III of 1907 should continue to be dealt with under the provisions of the old Act. 79 Ind. Cas. 408=18 M.L.W. 836=1923 M.W.N. 840=A.I.R. 1924 Mad. 368.

——Rules under Old Act—Applicability.

As no rules have been framed under the New Act V of 1920. the Old rules under the Act, 1907, hold good where they are not inconsistent with the New Act. 93 Ind. Cas. 903=A.I.R. 1926 Lah. 360.

——Applicability of S. 4, Limitation Act, and S. 10, General Clauses Act.

By reason of the express terms of S. 29 (2) (a), Limitation Act, S. 4, Limitation Act applies to applications made under the Prov. Insol. Act. Even assuming that S. 29 (2) (a), Limitation Act does not apply, S. 10, General Clauses Act applies. Section 4, Limitation Act and S. 10, General Clauses Act, embody the well known principle actus curiae neminem gravabit (The Act of the Court shall prejudice no man). The circumstance that the Court was closed on the last day of limitation cannot destroy or impair the right of the applicant to file his application on the day the Court re-opens. A.I.R. 1938 Nag. 454=I.L.R. (1939) Nag. 377=178 Ind. Cas. 479.

——Limitation—Applicability of S. 5, Limitation Act.

S. 5 of the Indian Limitation Act did not apply to petitions made under Act III of 1907. But under the New Insolvency Act, S. 5 has been specifically declared to be applicable. 90 Ind. Cas. 254=26 P.L.R. 501=7 L.L.J. 201=A.I.R. 1925 Lah. 436.

——Insolvency, meaning of.

In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration. The justification for such proceeding by a creditor generally consists in an act of bankruptcy by the debtor, the conditions of which are defined and prescribed by the statute law. In a normal community, it is certain that these conditions will require revision from time to time by the Legislature; as also the classes in the community to which the bankruptcy laws are to apply may require re-consideration from time to time. A.I.R. 1937 P. C. 95=168 Ind. Cas. 64 (P. C.)

——Foreign Court—Meaning.

The definition of the term "foreign Court" as contained in the Code is not applicable to all other enactments. In Provincial Insolvency Act there is nothing as regards the definition of the term and though for the purpose of sending processes or of execution, provision is made in the Code, it is only for those purposes alone. 123 Ind. Cas. 20=30 M.L.W. 531=A.I.R. 1929 Mad. 900=57 M.L.J. 393.

——Inherent power of Insolvency Court—If can be invoked by the Official Receiver to rectify his errors—Sale held by the Receiver—If can be set aside.

The Official Receiver can invoke the inherent jurisdiction of the Insolvency Court to rectify any error or mistake committed by him and the Court has ample power to prevent in injury to the estate resulting from any act or decision of the Receiver.

Where the Official Receiver wrongly notified in the proclamation of sale that the property was subject to an encumbrance of Rs 7,000, while the encumbrance was only Rs. 3,500, and the only bidder purchased the property for Rs. 255; it is open to the Official Receiver on discovering his mistake to move the Court for setting aside the auction sale and thereby recitify the error committed by him. 1950 M.W.N. 47 (2)=A.I.R.1950 Mad. 311=(1950) 1 M.L.J. 15.

——Powers of Official Receiver—Order of Court to sell properties of insolvent subject to encumbrances—Right of Official Receiver to sell free from encumbrances.

The Official Receiver has, under the Provincial Insolvency Act, an unquestionable legal right to sell all properties of the insolvent and is not bound to go by the administrative advice tendered to him by the Insolvency Court though he undoubtedly stands in danger of being removed from the office or being sued by the parties for damages, for such failure. 1949 M W. N. 347=62 L. W. 391=A.I.R. 1949 Mad. 834=(1949) 1 M. L. J. 660.

——Adjudication on condition of payment—Legality of order.

There is no provision in the Act empowering the Court at the time of adjudicating a person an insolvent to pass an order requiring him to pay certain amount into Court in payment of his debts. 126 Ind. Cas. 529=A.I.R. 1930 Rang. 236.

——S. 2 (1) (a)—Creditor, hat is.

Where the sole proprietor of a firm sells his business bona fide to another firm, he becomes a creditor of the other firm. No general or special notice is required to the other creditors who were creditors before the sale. A.I.R. 1936 Lah. 760=38 P.L.R. 627=162 Ind.Cas. 618.

——S. 2(1)(a)—Creditor—Endorsee on collection whether a creditor—Cochin Insolvency Regulation (VII of 1908).

An endorsee for collection is not a creditor within the meaning of the Cochin Insolvency Regulation and he is, therefore, not competent to prove in insolvency. Such an endorsee's position is not in any way improved by the circumstance that he has also obtained a decree as endorsee, all that is involved in obtaining such a decree being only that the form of the debt undergoes a change. (1933) 142 Ind. Cas. 802 (Cochin).

——S. 2 (1) (a)—'Debtor', meaning of.

Under Hindu Law, the heirs even if they be sons, grandsons or great grandsons are not personally liable for the debts of the deceased. They are not 'debtors' entitled to present a petition in insolvency under Ss. 7 and 10. I.L.R. (1938) 1 Cal. 132=66 C.L.J. 346=41 C.W.N. 1288.

——S. 2 (1) (d)—"Property"—Test.

The definition of "property" in S. 2 (1),(d), Provincial Insolvency Act, is modelled on S. 60 (1), C. P. Code. Unless the insolvent has got a present disposing power, which he may exercise for his own benefit over a property, it will not be considered to be one coming within this definition. A. I. R. 1950 Cal. 487.

——S. 2 (1) (d)—"For his own benefit," meaning of.

A power that can only be exercised for the joint benefit of the bankrupt and another is not a power that can be exercised for his own benefit within S. 2 (d). A.I.R. 1942 Cal. 533=46 C.W.N. 808= I.L.R. (1942) 2 Cal. 413=76 C. L. J. 333=203 Ind. Cas. 154.

——S. 2 (1) (d)—Property—Power of karta to dispose of co-parcenary property.

Since the father's power to dispose of his son's property is not property within the meaning of Ss. 2 (d) and 28, Pro. Insol. Act, the right of a manager who is not the father of the other co-parceners, to sell family assets to discharge debts which are payable out of the joint estate cannot be property within the meaning of Ss. 2 (d) and 28 and hence, cannot vest in the Official Receiver on the insolvency of the manager. A.I.R. 1942 Mad. 682=55 L.W. 618=(1942) 2 M. L.J. 457 =1942 M.W.N. 654=I.L.R. (1943) Mad. 83=203 Ind. Cas. 507 (F. B).

[Overrules (1) A.I.R. 1929 Mad. 166=52 Mad. 246=114 Ind. Cas. 345.]

——S. 2 (1) (d)—Property—Karta's power to dispose of minor co-parcener's share.

The disposing power exercisable by the manager of a joint family business is not other than a power which he may exercise for his own benefit and, therefore, on the insolvency of the joint family firm and of the manager the manager's power of disposal over the joint family property including a minor's share to satisfy debts of the business is a property which vests in the Official Receiver under S. 28. A.I.R. 1940 Sind 141=I.L.R. (1940) Kar. 375=190 Ind. Cas. 293.

——S. 2 (1) (d)—Power of Hindu father to sell son's share—Such power, if property.

The definition of the word "property" in S. 2 (1) (d) is not exhaustive but was inserted only to emphasize the fact that certain kinds of property, which, in ordinary parlance, may not be regarded as the property of the insolvent, are to be treated as "property" for the purpose of the Insolvency Act. The word 'property' is comprehensive enough to include the right which the father has of bringing to sale his son's interest to pay his own legitimate debts, and such power is 'property' within S. 2 (1)(d). A.I.R. 1937 Pat. 185=18 P.L.T. 1=16 Pat. 60=3 B. R. 329=167 Ind. Cas. 765 (F. B.).

——S. 2 (1) (d)—'Property' meaning of.

Per Allsop, J.—The Legislature, by enacting S. 2, intended merely to make it clear that certain rights or interests, which might ordinarily not be included within the term "property" would be so included if the insolvent had a disposing power in respect of them which he might exercise for his own benefit. A.I.R. 1934 Oudh 1=10 O.W.N. 1233=9 Luck. 304=147 Ind. Cas. 642 (F.B.).

——Ss. 2 (1) (d), 37, 67—Hindu joint family—Father's insolvency—Receiver's power to sell son's share—Residue, right to.

The right of a Hindu father to sell the joint family property including the undivided shares of his sons is property within the meaning of S. 2 (1) (d) of the Act which vests in the Receiver of the estate in insolvency. The Receiver can, therefore, sell the sons' share to satisfy the debts of the father. If, however, after satisfying father's creditors, there is a residue, the sons are entitled to receive it. A.I.R. 1931 Bom. 50=32 Bom. L.R. 1362=55 B. 110=129 Ind. Cas. 153.

——S. 2 (1) (d)—Father insolvent—Power over son's interest, if vests.

The insolvent's property includes also in the case of a Hindu father his disposing power over his sons' undivided interest. 128 Ind. Cas. 404=A.I.R. 1930 Nag. 215.

——S. 2 (1) (d)—Father inslovent—Sons' shares if vest in Receiver.

Where in the case of a Hindu Joint family the father is adjudged an insolvent, even the sons' shares vest in the Official Receiver and he can dispose of the same to pay the debts of the father unless they are incurred for immoral purpose; and the pious obligation of the sons will prevent them from contending that their shares are not liable to be sold. A.I.R. 1925 Patna 127; A.I.R. 1924 P.C. 50 (P.C.); A.I.R. 1923 Lah. 1 (F.B.), Foll. 98 Ind. Cas. 364=5 Pat. 476=1926 P.H.C.C. 321=8 P.L.T. 278=A.I.R. 1926 Pat. 438.

——S. 2 (1) (d)—Father insolvent—Shares of sons if vest in Receiver.

Property over which a person has a disposing power which he may exercise for his own benefit includes ancestral property which may be sold for the satisfaction of antecedent debts.

One L acquired considerable properties, movable and immovable, and died leaving a son J, who had four sons, two of whom were minors, and two of whom had two sons who were minors. J and his two major sons embarked on business which proved unsuccessful and heavy debts having been incurred they were adjudged insolvents. When the Receiver was selling the joint family property objection was raised by the minors that this is not property within the meaning of Section 2 (d) of the Insolvency Act:

Held, that the objection was not open. 7 Bom. 438; 26 Mad. 214 and 44 All. 316 Foll. A.I.R. 1924 Patna 259, Overruled. 85 Ind. Cas. 88=3 Pat. 857=6 P.L.T. 824=A.I.R. 1925 Pat. 127.

——S. 2 (1) (d)—Father insolvent—Shares of sons if vest in Receiver—Rights of sons.

Where in the case of a Hindu joint family the father is adjudicated an insolvent not only the father's share in the joint family property but also the shares of his undivided sons vest in the Official Receiver. But a son can bring a suit for partition of his share against the Receiver or against such persons as claim under him on the ground of the father's debts being illegal or immoral. 85 Ind. Cas. 439=20 M.L.W. 946=A.I.R. 1925 Mad. 249=47 M.L.J. 749.

——S. 2 (1) (d)—If vests in Receiver.

Joint family property is not "property" within the meaning of S. 2 (1) (d) which vests in the Court or in a Receiver under S. 28 on the making of an order of adjudication. 39 All. 437; 41 I.A. 126, Foll. 77 Ind. Cas. 589=2 Pat. 724=A.I.R. 1924 Pat. 259.

——S. 2 (1) (d)—Insolvent's undivided share—If vests in Receiver.

The insolvent's undivided share in the property of the joint family of which he is a member is 'property' within the meaning of the Insolvency Act and therefore the Receiver can sue for partition of the share of the insolvent vested in him. 74 Ind. Cas. 301=10 O.L.J. 31=26 O.C. 384=A.I.R. 1923 Oudh 154.

——S. 2 (1) (d)—Father insolvent—Son's interest if vests in Receiver.

Under the Mitakshara Law a father has the right to dispose of his son's interest in ancestral immovable estate for the payment of his own debts not contracted for immoral purposes and such interest therefore is "property" within the meaning of the section and vests in the Official Receiver on the adjudication of the father. 158 P.R. 1919, Foll. 75 Ind. Cas. 497=16 S.L.R. 226 =A.I.R. 1923 Sind 20.

——Ss. 2 (1) (d), 28, 56—(1907), 2 (e), 16 and 18—Vesting of property—Father of joint Hindu family adjudicated insolvent—Son's share if vests in Official Receiver.

If the father in a joint Mitakshara family is adjudicated an insolvent he has a right to dispose of his son's interest in ancestral immovable estate for the payment of his own debts not contracted for immoral purposes. The son's share in the joint family property is 'property' within the Insolvency Act and vests in the Receiver on the making of the order of adjudiction. The plaintiff need not establish that the debts of the father had been incurred for legal necessity but the onus is upon the defendant to show that the debts had been incurred for immoral purposes. 15 P.R. 1918 Foll. 158 P.R. 1919=54 Ind. Cas. 931.

——Ss. 2 (1) (d), 21—(1907), Ss. 2 and 13—"Property"—Undivided share—Receiver.

An insolvent's undivided share in the joint family property is not "property" as defined in S. 2 in respect of which a Receiver can be appointed. 5 O.L.J. 665=48 Ind. Cas. 526.

——S. 2 (1) (d)—Property, what is.

Per Dunkley, J.—A right of suit is 'property' within the meanig of that term as defined in S. 2 (1) (d) of the Act. A.I.R. 1937 Rang. 165=169 Ind. Cas. 856.

——S. 2 (1) (d).—'Property' right to sue for breach of contract.

Where a mortgagee, having contracted to make certain payments on behalf of the mortgagor, failed to perform them and on the mortgagor becoming insolvent, the Receiver sold the equity of redemption to a third party:

Held, that the definition of 'property' in S. 2 (1) (d) does not include the right to sue for breach of contract and hence that right remained with the insolvent mortgagor and did not pass to the Receiver. A.I.R. 1937 All. 317=1937 A.L.J. 304=1937 A.W.R. 241=168 Ind. Cas. 683.

——S. 2 (1) (d)—Claim for breach of contract—T.P. Act, S. 6 (e)—Damages for breach of contract due prior to insolvency and not paid to insolvent—If vests in Official Receiver.

A claim for breach of contract which has become due to the insolvent before his adjudication and has not been rendered to him vests in the Official Receiver. Under the English Law of Insolvency, the word "property" is inclusive of claims in the nature of damages which have accrued due prior to the date of insolvency except such of them as arise from bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputation. 80 Ind. Cas. 141=19 S.L.R. 286=A.I.R. 1925 Sind 159.

——S. 2 (1) (d)—'Property', meaning of—Trust property in the hands of an insolvent—Whether part of his estate.

Trust property in the hands of an insolvent cannot be treated as part of his estate. It is not open to the Court to direct the Receiver in insolvency to deal with assets other than those belonging to the persons who have been adjudicated insolvents. A.I.R. 1934 Lah. 683=148 Ind. Cas. 550.

——S. 2 (1) (d)—Partner's right to sue—If 'property'.

The term 'property' includes any property over which any person has disposing power which he

may exercise for his own benefit. Thus a partner's right to sue for accounts of dissolved partnership is a movable property. 79 Ind. Cas. 384=A.I.R. 1925 Sind 72.

——S. 2 (1) (e)—Secured creditor — Decree-holder under compromise which prohibited alienation of stock-in-trade of the judgment debtor—Charge if created in favour of decree-holder.

Where a compromise on which a decree was passed contained a prohibition against alienation of the stock-in-trade of the judgment-debtor followed by a clause providing the penalty in case of alienation, namely, immediate execution of the decree, on a question whether the decree-holder under such a decree was a secured creditor within the meaning of S. 2 of the Provincial Insolvency Act:

Held, the stock-in-trade was not expressly made liable for the payment of the decretal amount and the compromise fell short of actually creating a charge on the stock in-trade and that hence the decree-holder could not be declared a secured creditor. 1949 A.W.R. 182=A. I. R. 1949 A. 539=1949 A.L. J. 84.

——S. 2 (1) (e)—Secured creditor, meaning of.

The existence of an attachment in favour of a creditor does not constitute that creditor a secured creditor; but an attachment means this: that the property in respect of which it is made is not free, at any rate, to this extent, that it cannot be made the subject of a private sale. A.I.R. 1937 Cal. 517=41 C.W N. 1079=I.L.R. (1937) 2 Cal. 675=66 C.L.J. 315=172 Ind. Cas. 914.

——S. 2 (1) (e)—'Secured creditor', meaning of.

The word 'holding' used in the definition of the term 'secured creditor' as given in cl. (e), sub-s, (1) of S. 2 is in the present tense and thus necessarily connotes the idea of a mortgage, charge or lien which exists and excludes that of the mortgage, charge or lien which is to come into existence at some future time. A.I.R. 1937 Lah. 494=173 Ind. Cas. 1000.

——S. 2 (1)(e)—'Secured creditor', meaning of.

Where a person to whom the goods of a shop had been mortgaged by way of security for a loan sued for the money and obtained a decree which directed that the defendant had a right to sell the goods of the shop which had been attached, but in case of misappropriation, the plaintiff would be entitled to recover his decree amount at once:

Held, that though the decree was not very clearly worded, the decree-holder was a secured creditor. A. I.R. 1932 All 550=137 Ind. Cas. 208 (2).

——S. 2 (1) (e)—Secured creditor—Mortgagee decree-holder.

A mortgagee who has obtained a decree on his mortgage does not thereby cease to be a secured creditor and is not precluded from making an application under Ss. 7 and 9 of the Provincial Insolvency Act. A.I R. 1931 All. 224=1931 A.L.J. 102=129 Ind. Cas. 557.

——S. 2 (1) (e)—Deposit of money for custody and lent out on security of ornaments only—If depositor is a secured creditor.

J handed over his spare money to a bank and received a note-book in which it was stated that the money was for safe custody. As a matter of agreement and practice, however, J used to secure borrowers who would agree to pledge ornaments by way of security with the money deposited. The borrower was taken by J to the manager of the bank or he would go to the manager of the bank with a note from J. No money of J used to be lent out by the bank without any security of ornaments. Similarly when a man came to redeem his ornaments he would either take J to the bank or take a note of his to the manager of the bank and on payment the ornaments would be released:

Held, that J was a secured creditor of the Bank. 100 Ind. Cas. 62=49 All. 376=25 A.L.J. 320=A.I.R. 1927 All. 598.

——S. 2 (1) (e) — Secured creditor—Receiver mentioning a person as secured creditor in his report—Effect.

Tee mere fact that the Receiver mentioned a certain person as secured creditor in a report submitted by him to the Court which was never approved by the Court, either expressly or by implication, does not mean that the Court approved of the Receiver's report thst the person was a secured creditor. 109 Ind. Cas. 373=A.I.R. 1923 Lah. 738.

——S. 2 (1) (f) — Joint family property—Partition—Applicability of S. 53.

Having regard to the definition of the expression "transfer of property" contained in S. 2 (f), there can be no real doubt that a partition of joint family property amounts to "transfer of property" which falls within the mischief contemplated by S. 53 of the Act. 123 Ind. Cas. 286=31 P.L.R. 245=A.I.R. 1930 Lah. 645.

——S. 3—Jurisdiction — Debts in insolvency exceeding Rs. 5,000—One of debts doubtful—Jurisdiction of District Judge and Deputy Commissioner.

Where the debts in the insolvency exceeded the the sum of Rs. 5,000. the insolvency proceedings should proceed before the District Judge and not before the Deputy Commissioner and the mere fact that Rs. 1,800 was a doubtful debt, made no difference when this was one of the debts which had to be taken into consideration in administering the insolvent's estate and this debt of Rs. 1,800 together with the debts included in the schedule would amount to a sum over Rs. 5,000. A.I.R. 1939 Pat. 73=19 P.L.T. 843=5 B.R. 36=177 Ind. Cas. 890.

——Ss. 3, 5 — Insolvency Court, if Civil Court.

Under the Insolvency Act it is the Court of the District Judge which is the primary insolvency

Court though provision is made for a Subordinate Judge to be made such a Court. The mere fact that there is a special Act for insolvency does not mean that the insolvency Court is not a civil Court. All that the Insolvency Act does in this respect is to determine the civil Court which shall hear insolvency petitions. A. I. R. 1937 Lah. 861=39 P.L.R. 756=170 Ind. Cas. 33.

——S. 3 (1)—Scope of—Whether excludes civil jurisdiction of High Court—Existing jurisdiction, when can be taken away by Legislature.

Section 3 (1) merely enacts that the ordinary jurisdiction in insolvency shall be in the District Courts. It does not exclude the extraordinary civil jurisdiction of the High Court.

Before the Provincial Insolvency Court came into existence, the High Court of Judicature at Lahore did have jurisdiction to transfer proceedings in the Insolvency Court to itself for disposal and no existing jurisdiction in a High Court can be taken away by the Legislature without the use of express terms or by praying-in-aid a necessary implication. There certainly is no deprivation of the High Court of its jurisdiction in express terms in S. 3 of the Provincial Insolvency Act, and there cannot be any necessary implication that the jurisdiction in the High Court has been taken away by the terms of the said section. A.I.R. 1936 Lah. 608=38 P.L.R. 235 and 1013=17 L. 582=160 Ind. Cas. 972.

——S. 3—Jurisdiction of Subordinate Courts—Condition precedent.

From the words of S. 3, it is clear that the Act does not invest a Subordinate Court with jurisdiction to try any insolvency matter which originates outside the local limits of its jurisdiction. Under S. 3 of the Act, the District Court is the only Court having jurisdiction to deal with creditor's petition in the absence of any notification, of the Local Government investing Subordinate Courts with jurisdiction over such class of cases. In a case in which there is no such notification, the District Judge's order transferring a petition to the Sub-Court for disposal is, therefore, ultra vires. A.I.R. 1937 Mad. 444=1937 M.W.N. 203=45 L.W. 313=I.L.L. (1937) Mad. 565=(1937) 1 M.L.J. 654=171 Ind. Cas. 405.

——S. 3—Jurisdiction of Subordinate Courts—Notification No. 37 by Governor in Council—Construction.

The expression "value not exceeding fifteen thousand rupees", in Notification No. 37 issued by the Governor in Council, under S. 3 (1), Provincial Insolvency Act, refers to a case "in which the debts of the insolvent do not amount to over fifteen thousand rupees," and in the absence of any more acceptable interpretation, the view of the Governor in Council should be accepted as to the meaning of the expression "value not exceeding fifteen thousand rupees." The effect of accepting this construction of notification is that the Court may or may not possess jurisdiction to hear an insolvency proceeding at any particular time according to the amount of the debts of the insolvent that at that particular time may appear to be outstanding and not according to the amount of debts as they appear in the petition. A.I.R. 1936 Rang. 223=14 R. 280=162 Ind. Cas. 1001 (S.B.).

——S. 3—Absence of notification—Transfer of creditor's petition to Sub Court having no jurisdiction—Order if ultra vires.

Under S. 3 of the Provincial Insolvency Act the District Court is the only Court having jurisdiction to deal with creditor's petitions in the absence of any notification of the Local Government investing Subordinate Court with jurisdiction over this classes of cases. In a case in which there was no such notification:

Held, that the District Judge's order transferring a petition to the Sub-Court for disposal was ultra vires. 75 Ind. Cas. 876=18 M.L.W. 685=1923 M.W.N. 754=A.I.R. 1924 Mad. 398=45 M.L.J. 689.

——S. 3—Notification under Old Act—Validity under New Act.

Under Section 24 of the General Clauses Act a notification issued under Section 3 would remain in force even under the New Act of 1920 as the section is re-enacted in the New Act. 80 Ind. Cas. 858=A.I.R. 1925 Cal. 335.

——S. 3—Object and construction.

The object of the proviso to S. 3 (1) is to enable the Local Government, by conferring jurisdiction upon Subordinate Courts to relieve the District Court of the work arising under the Act. And in considering the section and the notification by Government the Court should give effect to that presumed object rather than put upon the words of the section a narrower construction. And in cases of doubt it is entitled to have recourse to the argument from convenience interpreting a statute. 104 Ind. Cas. 780=51 Bom 809=29 Bom. L.R. 947=A.I.R. 1927 Bom. 460.

——S. 3—(1907), S. 3 (1)—Small Causes Court—Jurisdiction—Conferred after issue of notice but before final disposal—Effect.

A disposal of an insolvency petition by a judge of Small Causes, who had no jurisdiction to try it at the time of the petition but on whom jurisdiction was conferred before final disposal, is right, when the petition was addressed to the District Judge but presented to the Judge of Small Causes. 6 A.L.J. 483=2 Ind. Cas. 223.

——S. 4.

Synopsis.

1. Appeal
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1. Appeal.

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——Ss. 4 and 75 — Whether formal order should be prepared in insolvency proceedings is matter governed not by S. 75 but by Civil P. C.—Order by District Court is case within S. 75—Hence order under S. 4 passed by District Court is miscellaneous case within O. 43, R. 3, Civil P. C., and formal order should be prepared—Rules 336 to 338, Oudh Civil Rules are not proper guide for construing expression "miscellaneous case"—Order under S. 4—Appeal—Copy of formal order not filed along with memorandum of appeal within limitation—Appeal must be rejected — Civil P.C., O. 43, R. 3 (Oudh).

Whether a formal order should or should not be prepared in insolvency proceedings is a matter governed not by the provisions of S. 75, Provincial Insolvency Act but by the Code of Civil Procedure which applies to insolvency proceedings. It is clear from the language of the proviso to sub-s. (1) of S. 75 that every decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinote to a District Court constitutes a 'case.' Accordingly it would be illogical to hold that such a decision or order arrived at by the District Court could not be a case. Hence an order passed under S. 4 Provincial Insolvency Act, by a District court constitutes a miscellaneous case and a formal order should be prepared under O. 43, R. 3, Civil P. C., Rules 336, 337 and 338, Oudh Civil Rules, are framed only for the purposes of classification of records and cannot be a proper guide for the determination of the proper construction to be put upon the expression 'miscellaneous case' as used in O. 43, R. 3.

Consequently, where an order passed under S. 4, Provincial Insolvency Act, by the District Court is appealed against but no copy, of the formal order is filed along with the memorandum of appeal within the period of limitation, the memorandum of appeal must be rejected. A. I. R. 1946 Oudh 242=1946 O. W. N. 117=1946 All. W. R. C. C. 89=223 Ind. Cas. 238.

——Ss. 4 and 75 —Appeal.

A decision of insolvency under S. 4 is subject to appeal under S. 75 and cannot thus be said to be final. A. I. R. 1939 Lah. 87=41 P. L. R. 302=183 Ind. Cas. 63.

——S. 4—Appeal—Order releasing property in favour of objector.

Where the Official Receiver takes possession of the property as one belonging to insolvent and a certain person takes objection under S. 68 on the ground that the property belongs to him and not to insolvent, and the Insolvency Court frames issues, records evidence and then disposes of the objection in favour of the person objecting and releases tho property, an appeal lies against the order releasing the property as the Court must be deemed to have investigated the claim of the objector under S. 4. A.I.R. 1937 Lah. 757=40 P. L. R. 465=175 Ind. Cas. 853.

——Ss. 4 and 73.

The dismissal of a claim under S. 4 really tantamounts to a decision under S.4 and entitles the claimant to an appeal under S. 75 read with Sch. 1. A. I. R. 1934 Cal. 122=58 C. L. J. 118=149 Ind. Cas. 677.

——Ss. 4 and 75—Report by Receiver as to fictitious alienations by the insolvent—Whether Court must consider the question—Order for sale of saleable interest of insolvent—Competency of revision.

During the course of insolvency proceedings, the Receiver reported to the Court that certains properties were fictitiously alienated by the insolvent. The Court refused to consider the question and ordered that the saleable interests of the insolvent be sold. The auction-purchaser afterwards applied to the Court to consider his title to the property and restore possession of it to him.

Held, that as appeal by leave of Court was competent under S. 75, petition for revision could not be entertained. A. I. R. 1933 Lah. 611=146 Ind. Cas. 545 (1).

——Ss. 4, 75—Sale of insolvent's holding—Sale held invalid by Revenue Court—Petition for refund of sale price dismissed—Appeal—Revision.

Where the insolvency Court held that a holding was saleable and it was, accordingly, sold to the purchaser, but the sale was subsequently held to be invalid by a Revenue Court at the instance of the land-lords and the purchaser claimed refund of the sale price:

Held, that the purchaser was not challenging the correctness of the decision of the Revenue Court but his claim was purely based on the ground of equity and as no question of title triable under S. 4 was involved, no appeal lay from the order dismissing the petition for refund.

Held also, on the fact that there was no adequate ground for revision and the appeal could not be treated as a revision petition. A. I. R. 1933 Lah. 628=34 P. L. R. 183=145 Ind. Cas. 337.

——S. 4—Receiver put in possession wrongly—Duty of Court of Appeal against order.

The Receiver is an officer of the Court and as soon as the Court finds that he has wrongly been given possession and ought not to remain in possession, the Court should direct him to deliver possession to the proper person. If the Insolvency Court, owing to a mistaken view of the law, does not pass such an order,

the person aggrieved may appeal and the Appellate Court should pass the order and appeal should not be dismissed merely because insolvent delays in asking to be put in possession. 121 Ind. Cas. 54=12 N. L. J. 117=26 N.L.R. 46=A.I.R. 1929 Nag. 338.

——S. 4—Claim by purchaser of insolvent's house —Order disallowing claim—If appealable.

The order of a District Judge, passed summarily and without making adequate enquiry in the matter, dismissing the claim of the purchaser of an insolvent's house for the recovery of the purchase money is highly unsatisfactory and as it disposes of a question of title it falls under S. 4, Provincial Insolvency Act of 1920 and is appealable under Cl. (2), S. 75 of that Act, and the creditors are not necessary parties to the appeal. 24 C.W.N. 401, Foll. 107 Ind. Cas. 400=A I.R. 1928 Lah. 423.

——S. 4—Second appeal.

Where, after an adjudication of a person as an insolvent by a Subordinate Judge, the adjudication is set aside by the District Judge in an appeal, no second appeal lies in the High Court from the order setting aside the adjudication. A.I.R. 1942 Bom. 159=I.L.R. (1942) Bom. 175=44 Bom. L.R. 132=201 Ind. Cas. 188.

——S. 4—Second appeal.

The decision of questions under S. 4 does not involve a decision of dismissing a debtor's petition under S. 25. Consequently, the decision of the question whether the debtor has a right to present the petition for insolvency comes under S. 25 and is subject to only one appeal and a second appeal against that decision is incompetent under S. 75. A.I.R. 1942 Oudh 80=1941 A. W. R. C. C. 347=1941 O.W.N. 1218=196 Ind. Cas. 881.

——Ss. 4, 75 (1)—Second appeal.

Where the District Judge has relied on S. 4 and purported to decide the case under that section, a second appeal lies under S. 75 (1). A.I.R. 1935 Nag. 246=31 N.L.R. 36 Sup.=161 Ind. Cas. 981.

——Ss. 4, 53, 75—Second appeal—Application by Official Receiver to set aside mortgage by insolvent as being fraudulent and fictitious—Dismissal of—Dismissal of appeal against order—Second appeal.

Where the Official Receiver filed an application to set aside a mortgage effected by the insolvent on the ground that the transaction was fictitious and intended to defraud the creditors and the application and an appeal from it were both dismissed:

Held, that S. 53 applied and not S. 4 and hence no second appeal lay and that there were no grounds for treating the appeal as a petition for revision. A.I.R. 1933 Lah. 634=34 P.L.R. 960=146 Ind. Cas. 490.

——S. 4—Second appeal—Appeal against order granting conditional discharge—Second appeal—Maintainability.

An insolvent applied for his discharge. The application was opposed by the creditors and the Official Receiver. An order granting conditional discharge was made. The insolvent appealed without impleading the Official Receiver as a party. The appellate Court modified the conditions. Both the insolvent and the creditors preferred second appeals.

Held, (i) that the order appealed against was not one covered by S. 4 and consequently, no second appeal lay. A.I.R. 1931 Lah. 647=132 Ind. Cas. 526.

——S 4—Order extending time for discharge— Second appeal.

Order under S. 27 extending time during which to apply for discharge is not one that can be taken to be under S. 4. Proviso of S. 75 (2) will not apply to such an order and second appeal will not therefore lie the order being under Sch. I. 114 Ind. Cas. 847=29 M.L.W. 60=52 Mad. 337=A.I.R. 1929 Mad. 43=55 M. L. J. 837.

——S. 4—Declaratory suit under O. 21, R. 63, C. P. Code in respect of insolvent's property—Decision if subject to second appeal.

A suit for declaration that certain property of insolvent is liable to attachment and execution of decree against him is a matter within S. 4 of the Act and a second appeal from a decision therein is competent. 78 Ind. Cas. 140=A.I.R. 1924 Nag. 361.

——S. 4 and S. 75—Order of District Judge under S. 4—Appeal to High Court under S. 75—Appeal to Privy Council—Maintainability.

The District Court annulled a payment which had been made to a person by the insolvent within three months of the application for insolvency and the appeal by him to the High Court having been dismissed, he applied to be added in the schedule of creditors. The High Court directed that he be added as a creditor. On appeal to the Privy Council by the Receiver of the estate of the insolvent the creditor raised a preliminary objection to the competency of the appeal, maintaining that under S. 54 (2) of the Provincial Insolvency Act, the decision of the District Court was final, subject only to a limited right of appeal to the High Court under S. 75 (2), any right of further appeal being thereby excluded:

Held, that the objection was not maintainable and that when such a right of appeal was given to one of the ordinary Courts of the country, the procedure, orders and decrees of that Court would be governed by the ordinary rules of the Civil P. C. A.I R. 1934 P. C. 81=11 O.W.N. 418=39 L.W. 418=38 C.W.N. 449 =1934 A. L.J 358=66 M. L J. 404=36 Bom. L.R. 427=12 R. 194=1934 M.W.N. 284=61 C. L. J. 55= 61 I.A. 158=37 P.L.R. 279=3 A.W.R. 471 (2)=148 Ind. Cas. 1 (P.C.).

2. Applicability and scope.

——S. 4—Applicability to case of debts due to one creditor by another.

Sub section (2) of S. 4 shows that a decision under that section is binding only as against the debtor and the debtor's estate on the one hand and all claimants against him or it on the other. It cannot apply to a matter which arises between two creditors **inter se** and not between either of them and the insolvent and since S. 39, which deals with the effect of a scheme which has been assented to by the requisite number and value of the creditors, states that such a scheme shall be binding on all the creditors, but only so far as it relates to any debt to them from the debtor and provable under the Act, that section cannot possibly cover the case of debts due to one creditor by another, A.I.R. 1942 Mad. 345=1942 M.W.N. 140=45 L.W. 172=(1942) 1 M. L. J. 316=203 Ind. Cas. 574.

——S. 4—Scope.

Section 4 comprises adjudication of those questions, which arise in bankruptcy and not outside bankruptcy in other words, it covers questions such as disputes between debtor's estate represented by Receiver on one hand and the claims of one or all his creditors on the other and other questions of priority of title. The section is, however, limitted to matters not otherwise specifically provided for in the Act. A.I.R. 1942 Bom. 159 =I.L.R. (1942) Bom. 175=44 Bom. L.R. 132=201 Ind. Cas. 188.

——S. 4.

Section 4 sub-section (1), specifically lays down that the powers conferred by that section are "subject to the provisions of this Act."

Consequently, it must be held that when an order is made under some other section of the Act, and can lawfully be made under that section, then S. 4 will have no application to that particular order. A.I.R. 1936 Rang. 26=13 Rang. 717=160 Ind. Cas. 109.

——Ss. 4, 53, 54—Petition under S. 53 or S. 54—S. 4, if applies.

To a petition to set aside or declare as void a deed of transfer made by an insolvent under S. 53 or S. 54, S. 4 of the Act has no application. A.I.R. 1935 Mad. 432=158 Ind. Cas. 59 (2).

——S. 4—Applicability to transfers of nominal and colourable nature—Powers of Insolvency Court—Insolvent having fractional interest in property—Duty of Court.

Section 4 applies to transactions of a nominal and colourable nature, whether or not under the section the Insolvency Court has power to annul transfers which are intended to be operative but are otherwise calculated to defeat and delay creditors.

The fact that the insolvent has a fractional interest in the property does not make any difference in the exercise of the Insolvency Court's powers under S. 4. A.I.R. 1934 Nag. 47=15 N. L. J. 85=141 Ind. Cas. 667 (2).

——Ss. 4 and 54.

All orders passed under S. 54 cannot be treated as orders under S. 4. A.I.R. 1933 Lah. 242=33 P.L.R. 971=141 Ind. Cas. 36.

——Ss. 4 and 53.

Section 4 is controlled by S. 53 only in respect of real transfers made by the insolvent. A.I.R. 1932 Pat. 129 =11 Pat. 9=13 P.L.T. 298=136 Ind. Cas. 299.

——Ss. 4 and 53.

The words "subject to the provisions of this Act" in S. 4 mean "excluding questions otherwise provided for by the provisions of the Act," therefore, **prima facie** S. 4 should be taken to have no application to cases coming under S. 53 of the Act. A.I.R. 1931 Mad. 745 =54 Mad. 989=34 L.W. 105=61 M. L. J. 820=132 Ind. Cas. 641.

——Ss. 4 and 53.

Section 4 of the Provincial Insolvency Act is subject to the provisions of S. 53 of the Act. 94 Ind. Cas. 429 =48 All. 414=24 A. L. J. 495=A.I.R. 1926 All. 470.

——Ss. 4 and 68—Application to set aside sale by Receiver.

An application to set aside a sale by a Receiver under orders of the Court on the ground that the property in question was not liable to sale lies, not under S. 68 but under S. 4 of the Act. A I.R. 1938 Nag. 320=178 Ind. Cas. 110.

——S. 4—Questions of title or priority—Adjudication of karta of family and appointment of Receiver.

The order of a District Judge adjudicating **karta** of a joint Hindu family as insolvent and appointing a Receiver falls under S. 4, the order in effect being an order deciding rights or, at any rate, deciding priority and is therefore. appealable without leave. A.I.R. 1937 Cal. 517=41 C.W.N. 1079=I.L.R. (1937) 2 Cal. 675= 66 C. L. J. 315=172 Ind. Cas. 914.

——S. 4.

The decision of the question whether the sale by an insolvent was **benami** would fall under S. 4, Provincial Insolvency Act, and hence a second appeal would lie. A.I.R. 1937 Lah. 441=173 Ind. Cas. 531.

——S. 4—Question whether creditor has existing claim—Second appeal, competency of.

The question whether a creditor has a subsisting claim against the debtor by reason of a discharge receipt, which is impeached on the ground of fraud and misrepresentation does not fall within the purview of S. 4, and a Second appeal does not lie from an appellate order passed by a District Judge on such a question. A.I.R. 1935 Bom. 80=36 Bom. L.R. 1236=59 Bom. 161 =154 Ind. Cas. 566.

——S. 4.

An order to an **interim** Receiver to enter upon the property of third person is clearly not one within the scope of S. 4. A.I.R. 1935 Cal. 558=39 C.W.N. 1167 =158 Ind. Cas. 704.

——Ss. 4 and 75.

Section 4 empowers the District Judge to decide all questions whether of title or priority or of any nature whatsoever and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognisance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing compelete justice or making a complete distribution of property. S. 4 read with S. 75 and Sch. I of the Provincial Insolvency Act does confer a right of appeal to the aggrieved party in a case in which an order of the present description has been made by the District Judge. A.I.R. 1933 Cal. 151=56 C. L. J. 440=142 Ind. Cas. 484.

——S. 4—Scope.

Under S. 4 (1) the powers of the Court of Insolvency are very wide and do not in any way militate against S. 28 (2). 125 Ind. Cas. 28=1930 A. L. J. 989=A.I.R. 1930 All. 552.

——S. 4—Dispute between creditors as to priority—Applicability.

Where an estate has devolved on insolvents by inheritance and there are creditors of the deceased and also

creditors of the insolvents, the question of priority between the two has to be decided by the Court of Insolvency. 125 Ind. Cas. 28=1930 A. L. J. 989=A.I.R. 1930 All. 552.

——S. 4—Dispute between insolvent and secured creditor as to amount due—Applicability.

An Insolvency Court has jurisdiction to dispose of a matter arising between an insolvent and a creditor, even though the creditor is a secured creditor, when the question relates to the amount of the debt. 121 Ind. Cas. 181=A.I.R. 1930 Lah. 98.

——S. 4.—Dispute over distribution of sale proceeds among secured creditors—Applicability.

Where mortgaged property is sold evidently with the consent, or, at any rate, without any objection by the secured creditors and the dispute arises over the distribution of the sale proceeds, in such a case the question of priority between the different mortgagees does arise incidentally in the insolvency proceedings and the Insolvency Court has jurisdiction to decide such question under S. 4. 121 Ind. Cas. 181=A.I.R. 1930 Lah. 98.

——S. 4—Gift by insolvent—Applicability.

The provisions of S. 4 must be limited to the exercise of jurisdiction of the Court over the properties of the insolvent which vest in the Court or the Receiver, i.e., the property which belongs to or is vested in the insolvent at the commencement of the bankruptcy proceedings, or which is acquired by or devolves on him before his discharge. Where therefore a gift made by the insolvent is valid, the property gifted ceases to be the property of the insolvent and no order under S. 4 can therefore be passed against such property. 124 Ind. Cas. 639=11 P.L.T. 138=A.I.R. 1930 Pat. 305.

——S. 4—Question of title to property outside jurisdiction—Applicability.

Proceedings under S. 4 are not restricted to the decision of the title and property within the territorial jurisdiction of the Court. 114 Ind. Cas. 112=A.I.R. 1929 Sind 135.

3. Discretion of Court.

——S. 4—Jurisdiction, exercise of—Discretion.

The exercise of jurisdiction which the Insolvency Court derives under S. 4 is purely discretionary. Whether in any particular case an Insolvency Court in India should refuse to exercise its jurisdiction, must necessarily depend upon the facts of each case and no hard and fast rule can be laid down in that behalf. The Insolvency Court may decide any question which it may deem expedient or necessary to decide for the purpose of doing justice or making a complete distribution of property, and in doing so, it has ample power to decide questions of title arising between the estate of an insolvent and a third party. 223 Ind. Cas. 330=12 B.R. 394=A.I.R. 1947 Pat. 7.

——S. 4—Separate suit—Discretion of Insolvency Court.

There is nothing in S. 4 (3), to warrant the statement that the Insolvency Court can dismiss an insolvency petition on the ground that the questions raised in it are too difficult or complicated for the Insolvency Court to decide. The qurstion whether the relation of debtor and creditor exists between the petitioning creditor and the debtor sught to be adjudged insolvent is a question expressly and explicitly for the decision of the Insolvency Court. The Insolvency Court has no discretion to refuse to decide this question and to refer the parties for the decision of it to a different tribunal. A.I.R. 1941 Mad 895=I.L.R. (1942)Mad. 147=(1941) 2 M. L. J. 362=54 L.W. 278=1941 M.W.N. 797=199 Ind. Cas. 796.

——S. 4—Discretion—Interference.

Section 4 confers very wide powers on the Insolvency Court to try all questions of title, priority, etc. Where the Court has exercised the discretion under S. 4, the High Court will not interfere in second appeal or revision. The mere fact that a party will be deprived of the right of a first appeal to the High Court is not in itself material when jurisdiction to try the matter has been conferred on the Insolvency Court. A I.R. 1940 Lah. 124=190 Ind. Cas. 327.

——S. 4.

Section 4, only empowers the Insolvency Court for the sake of convenience to decide any questions of title, priority, etc., which arise in the course of insolvency proceedings. It is open to the Insolvency Court to try such questions or leave them to be decided by an ordinary Civil Court, if it chooses to do so. A.I.R. 1938 Lah. 73=I. L. R. (1938) Lah. 439=40 P.L.R 1000=181 Ind. Cas. 301.

——S. 4.

Section 4 confers very wide powers on the Courts and those powers are sufficient to enable the Court to inquire into the question of liability of a transferee of the insolvent for mesne profits of the property on the transfer being made. Whether it should inquire into it or not, is a matter for its discretion. A.I.R. 1938 Nag. 50=20 N. L. J. 271=I.L.R. (1940) Nag. 486=172 Ind. Cas. 573.

——S. 4,—Title of stranger challenged on motion—Difficulty or dispute regarding title — Proper course.

Some little care is necessary in disposing of all matters in insolvency which have the effect of deciding the title alleged to reside in third parties so as to defeat such title and bring the property within the estate of the insolvent. Only in very simple cases should title suits be, in effect disposed of on motion and that normally where there is any real difficulty or dispute where either an Official Receiver or a creditor is challenging the apparent title of a stranger so as to bring property within the estate of the insolvent, the proper course will be to refer the parties to a suit. A.I.R. 1938 Nag. 247=I.L.R. (1939) Nag. 484=175 Ind. Cas. 526.

——S. 4—Discretion of Insolvency Court.

Where certain properties worth over Rs. 12,000 which admittedly belonged to an insolvent at one time were sold by the Official Receiver and purchased by certain persons who, in their turn, subsequently sold them to the insolvent's wife and one of the creditors applied under S. 4 for a declartion that the properties were really purchased by the insolvent and the Insolvency Court referred the petitioner to a regular suit:

Held, that in a case of this kind it was a matter within the discretion of the Court whether to exercise

jurisdiction under S. 4 or to refer the petitioner to a separate suit and as the dispute was of a difficult character, the Court acted properly in refusing to adjudicate the question under S. 4. A.I.R. 1935 Mad. 720=1935 M.W.N. 583=156 Ind. Cas. 677.

——S. 4.

An Insolvency Court is not bound under S. 4 to decide the question of title that might be raised in proceedings before it. A.I R. 1933 Nag. 373=30 N.L.R. 112=147 Ind. Cas. 539.

——S. 4—Discretionary powers of Court.

The exercise of the jurisdiction which the Insolvency Court derives from S. 4 is purely discretionary. Whether in any particular case an Insolvency Court in India should refuse to exercise its jurisdiction must necessarily depend upon the facts of such case and no hard and fast rule can be laid down in that behalf.

Where an application was filed under S. 4 to decide the question of the validity of a mortgage, the amount involved being a large one and complicated questions of law arising in the case, and there were two decrees of competent Courts in which the mortgage had been declared valid and given effect and it also appeared that no useful purpose would be served to the other creditors by deciding the question:

Held, that under the circumstances, it would be an abuse of the powers given to the Insolvency Court under S. 4 to re-adjudicate on the same question and that it was not expedient to decide the dispute referred to in the application which should, therefore, be dismissed. A.I.R. 1933 Sind 185=144 Ind. Cas. 678.

——S. 4.

The jurisdiction under S. 4 is, however, of a discretionary character and in cases which involve the determination of difficult questions of title, the Insolvency Court will be well-advised in asking the Official Assignee to institute proceedings in an ordinary Civil Court. A.I.R. 1932 Mad. 66=61 M. L. J. 763=1931 M.W.N. 1131=34 L. W. 788=135 Ind. Cas. 739.

——S. 4—Discretion of Court.

The power of the Court under S. 4 to decide all questions arising in insolvency is undoubted and it is only a matter of discretion whether the procedure under the Act should be adopted or a suit should be directed. A.I.R. 1932 Mad. 513=36 L.W. 219=140 Ind. Cas. 674.

——S. 4.

So far as questions of title against strangers are concerned, the Court should ordinarily decline to go into them where the Receiver claims no higher right than the insolvent himself; but if the Court, in its discretion, chooses to determine the question, the decision cannot be said to he bad on the ground of want of jurisdiction or to be any the less a decision binding between the parties under sub-s. (2) to S. 4, provided that it is not in conflict with any provision of the Act itself. A.I.R. 1932 Cal. 642=36 C.W.N. 492=59 Cal. 1135=56 C.L J. 446=139 Ind. Cas. 323.

——S. 4—Enquiry under—Discretionary power.

The powers given under S. 4 are discretionary. It is a very wide section and unless the Courts feel compelled by the facts of the case to embark upon enquiry they are not bound to do so. 126 Ind. Cas. 483=1930 M.W.N. 470=A.I.R 1930 Mad. 782.

——S. 4—Application for declaration of title under S. 4—Pendency of proceedings in Civil Court—Procedure.

Before the Insolvency Court exercises the discretion vested in it by S. 4 to entertain an application for declaration that certain properties belong to the insolvents, it should be satisfied that it is expedient to withdraw the case from the jurisdiction of the ordinary tribunals and to decide it in a summary way. 120 Ind. Cas. 513=A.I.R. 1930 Sind 97.

——S. 4—Suit-time-barred—Application if lies.

When tne Insolvency Court is called upon to exercise its jurisdiction under S. 4 it would, except under very special circumstances, refuse to exercise that jurisdiction where a suit instituted on the same date as the application made before it, is liable to be defeated by the plea of limitation, that is to say, it would not afford relief to the aggrieved party to resort to this section when the enforcement of such relief before an ordinary tribunal is statute barred. 115 Ind. Cas. 330=A.I.R. 1929 Sind 94.

——S. 4—Decision unnecessary or inexpedient—Refusal to decide—Discretion of Court.

S. 4 enables an Insolvency Court to adjudicate upon questions of title which it may deem expedient in the interest of justice.

But the proviso to S. 56 (3) which controls the power given by S. 4 is in the way of a Court removing any person from the possession of property whom the insolvent has not a present right to remove. In such a case it would be a mere waste of time to adjudicate upon questions of title as it would not have power to recover the property freed from the obstruction by others. S. 4 reserves the power to Insolvency Courts to decline to decide questions not deemed by them necessary or expedient. In such cases the Receiver has his remedy by a suit. 79 Ind. Cas. 322=18 M. L. W. 884=33 M.L.T. 230=A.I.R. 1924 Mad. 387.

4. Duty of Court.

——S. 4—Judicial sale—Duty of Insolvency Court—Title of insolvent—Disclosures.

It is clearly the duty of the Insolvency Court, apart from any objections from the parties before it, to be satisfied as to the propriety of a judicial sale held in respect of the insolvent's estate.

In judicial sales it is incumbent on the Court to be scrupulous in the extreme and anything that may affect the bid has to be disclosed with all fairness and in sufficient detail. It is the clear duty of the Insolvency Court to apprise the intending bidders that the question of insolvent's title to the property is **sub judice.**

Where the purchasers are misled into purchasing a property, the title whereto is being questioned in a pending litigation of which they were kept in ignorance, the sale is liable to be set aside and the purchase money to be refunded. 36 Cal. 323 (P. C.) Appl. 103 Ind. Cas. 695=A.I.R. 1927 Cal. 834.

——S. 4—Question of title—Duty of Court.

Under S. 4 of the Provincial Insolvency Act (V of 1920) the Court has power to decide the question of

title raised by claimants, and if it did not deem it expedient or necessary to decide any such question, it should under S. 4 (3) hold that it has reason to believe that the debtor had saleable interest in the property. Where the Court does neither, its order is bad in law and cannot be upheld. 89 Ind. Cas. 761=52 Cal. 662=A.I.R. 1925 Cal. 932.

5. Enquiry under.

——S. 4—Enquiry under—When ordered.

A purchaser preferred a claim to the property on the basis of his purchase from the Insolvent after the property was attached in execution of a money-decree. That claim was not investigated but was dismissed for default:

Held, that the order dismissing the claim for default was neither final nor conclusive. It was not only expedient but necessary that the question of title to the property in question should be decided in the subsequent suit under S 4, Provincial Insolvency Act. A.I.R. 1938 Cal. 373=182 Ind. Cas. 455.

——S. 4—Proper stage.

There is nothing in S. 4, as to the stage up to which the Court is competent to take proceedings under S. 4, but under sub-s. (2), the intention of the Legislature is perhaps that the Insolvency Judge should not take action under S. 4 after the property has been sold. That perhaps should be the ordinary practice, and a convenient practice. But where a minor has been adjudicated an insolvent and the order has been found to be illegal and the property was taken possession of by the Official Receiver and even when it was sold, he could not raise any objection under S. 4, and owing to his minority, he could not contest the validity of the order adjudicating him an insolvent, S. 4 is wide enough to cover the case and it will be the duty of the Insolvency Judge to do justice between the parties and to restore to the person his property which has been seized under an illegal order, especially when the order has been cancelled by the Judge. A.I.R. 1936 Lah. 376=38 P.L.R. 1082=162 Ind. Cas. 481.

——S. 4—Proper stage.

Before an order of adjudication is made, it is not necessary to inquire whether transfers made in favour of third persons are genuine or not. Consequently, where an application for adjudication is made and **interim** Receiver appointed, it is not open to the Insolvency Court to inquire, before the order of adjudication is made, as to whether a transfer by the applicant is genuine or not. An application by the Receiver to start proceedings under S. 4 before adjudication is misconceived. A.I.R. 1935 Cal. 558=39 C.W.N. 1167 =158 Ind. Cas. 704.

——S. 4—Scope and procedure.

Section 4 intends that the Court in matters of forcible realization of property, is to act with the procedure and no doubt with the judicial caution of a Civil Court and the claimants have a right to be heard judicially and to have from the Court a final decision before the property is wrested from their possession. A thorough enquiry is all the more necessary under this section as an order passed under it is final and binding on the parties. A summary order passed without any reference to this section cannot, under any circumstances, be treated as a proper and valid order under the section. A.I.R. 1934 Lah. 1006=37 P.L.R. 205=156 Ind. Cas. 278.

——S. 4.

As the Insolvency Court has to administer the estate of the insolvent to settle the claims of the creditors, it is advisable that that Court should itself inquire into such matters. A.I.R. 1934 Nag. 47=15 N.L.J. 85=141 Ind. Cas. 667 (2).

——S. 4—Trial—Procedure.

A question of title under S. 4 (1), Insovency Act, must be tried like a regular suit after having all the parties before the Court, taking their pleadings, admitting their documents and hearing their evidence 108 Ind. Cas. 602=A. I. R. 1928 Lah. 556.

6. Finality of decision.

——Ss. 4 and 75—Claim case under S. 4—Finding is decision though claim is not disposed of.

In the case of a claim sought to be made under S. 4 a finding, which does not dispose of the claim amounts to a decision come to or an order made within the meaning of S. 75 (1). A.I.R. 1946 Nag. 42=I. L. R. (1945) Nag. 719=1945 Nag. L. J. 447.

——Ss. 4 and 5—Decision under S. 4 is final and conclusive and operates as res judicata—Direction by Court that another proceeding might be taken for having the point more adequately considered and decided is immaterial.

A decision under S. 4 is final and conclusive between the parties and operates as res judicata. A mere direction by the Insolvency Court that another proceeding might be taken for having the point more adequately considered and decided is of no avail in considering the plea of res judicata.

The Official Receiver in the insolvency proceedings sold certain property as belonging to the insolvent. The alienee having been obstructed by the son of the insolvent in taking possession applied under S. 5 for removal of obstruction. The son claimed a share in that property alleging it to be joint family property. The Court held that the property was the-self acquired property of the insolvent father, and the son had no title to or interest in it. The Insolvency Court at the same time observed that the son may file a suit to establish his right. The decision of the Insolvency Court was confirmed on appeal and revision. On the strength of this observation the son brought a suit claiming a share in the property alleging it to be joint family property:

Held, that the decision of the Insolvency Court though wrong on merits must be deemed to have been under S.4 and as such was final and conclusive against the son. The suit by the son therefore was barred by res judicata. The direction by the Insolvency Court as to the filing of the suit was of no avail. A.I.R. 1946 Mad. 141=1945-2 Mad. L. J. 384=58 L.W. 562=1945 M.W.N. 673=224 Ind. Cas. 16.

——Ss. 4, 5—Claim by third party decided under S. 4 on merits—Effect—Dismissal for default—Separate suit.

Under S. 4, the Court is not bound to go into claims raised by third parties; but where the Court deems it expedient and necessary to deal with the claim raised by a third party under S. 4 and decides it on merits, the claimant is not entitled to raise the same question again in any other litigation. But when the claim petition by the third party is not disposed of on merits but is dismissed for default under O. 9, R. 8, Civil P.C., S. 4 has no application as the Court cannot be said to have made any decision. Hence a seperate suit by the claimant to establish his claim is not barred either by S. 4 or by S. 5. A.I.R. 1943 Mad. 230=1942-2 M.L.J. 778=56 L.W. 215=1943 M.W.N. 31=207 Ind. Cas. 386.

——S. 4.

When an Official Receiver has allowed an order to be passed against him ex parte and has applied unsuccessfully to have that order set aside or reviewed, and fails to avail himself of his remedy by way of appeal or revision, he should not be permitted to make use of the provision of S. 4 to reagitate a question which has been finally decided against him. A.I.R. 1942 Mad. 423=55 L.W. 117=1942-1 M.L.J. 238=1942 M.W.N. 146=I.L.R. (1942) Mad. 691=201 Ind. Cas. 693.

——S. 4.

Mortgagor becoming insolvent after execution of mortgage — Suit by mortgagee — Application under Ss. 4 and 33 by Official Receiver to same Court rejected and mortgagee's suit decreed—Appeal by Official Receiver against order of dismissal only and not against decree:

Held, that the appeal was not barred on the principles of res judicata. A.I.R. 1942 Mad. 226=201 Ind. Cas. 187=54 M.L.W. 654=(1941) 2 M.L.J. 932.

——S. 4.

It is left to the discretion of the Court to entertain a petition under S. 4. The party who is bound by a decree or order of a Civil Court is not entitled to re-agitate the same question by another suit and what cannot be done by another suit cannot be achieved by means of proceedings under S. 4. The procedure under S. 4 is only a substitute for a regular suit. Where the Official Receiver is a party to a proceeding in his capacity as the representative of the estate of the insolvent he is not entitled to re-open an adverse decision in an application under S. 4. His remedy is only to appeal as any other party to the proceeding against the order of the Civil Court if he is dissatisfied with it. A.I.R. 1940 Mad. 733=1940 M.W.N. 519=193 Ind. Cas. 138.

——S. 4—Decision if under, binding on person who was not claimant before Insolvency Court as judgment in rem.

According to S. 4 (2), the decision under S. 4 is only binding on the debtor's estate on the one hand and the claimants against him or it or persons claiming under them. The decision is only binding on the insolvent and the claimants against him. A person who was admittedly not a claimant before the Insolvency Court but merely appeared as a witness in the insolvency proceedings, cannot come within the purview of sub-s. (2) of S. 4. The language of S 41, Evidence Act, also shows that a decision of this kind was not intended to be covered by the provisions of that section. That section applies to final judgments, orders or decrees. The decision of the Insolvency Judge under S. 4 is subject to appeal under S. 75 and cannot thus be said to be final. A.I.R. 1939 Lah. 87=41 P.L.R. 302=183 Ind. Cas. 63.

——S. 4—Execution of decree—Insolvency Court declaring decretal debt fictitious—Decree, if can be executed—Decision, if binding on parties to proceedings even after proceedings are dismissed.

According to S. 4 (2), the decision of the Insolvency Court is final and binding "for all purpose." The scope of the section is not limited to the insolvency proceedings only. Where, in proceedings on an application by the judgment-debtor for being declared insolvent to which the decree-holder was also made a party, the Insolvency Court declares a decretal debt to be fictitious, it cannot be recovered by an execution of that decree. The finding of the Insolvency Court has the effect of rendering the decree inoperative as it is tantamount to a declaration that the decree was non-existent and the finding is binding on the decree-holder as well as the judgment debtor. A.I.R. 1938 Lah. 148=177 Ind. Cas. 204.

——S. 4—Decision of Court — Evidence Act, S. 41.

The decision of the Insolvency Court amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely as against him but absolutely within the meaning of S. 41, Evidence Act. In other words, the decision is a decision in rem and is valid against all persons. A.I.R. 1937 Rang. 369=173 Ind. Cas. 354.

——Ss. 4, 52—Execution sale—Judgment-debtor adjudicated insolvent—Insolvency proceedings—Court refusing to set aside sale—Subsequent application by insolvent and another creditor to set aside sale—Maintainability.

In certain execution proceedings, the property of the judgment debtor was put up for sale and sold. The debtor was declared insolvent. In the proceedings in insolvency taken by the Receiver under S. 4, the Court found that no fraud was committed in respect of the sale. Subsequently, some years after confirmation of the sale, an application was made by the insolvent together with another creditor and they asked under S. 4 of the Act for a declaration that the very sale which had been the subject of the earlier decision by the Judge in insolvency on the application of the Receiver, was invalid, and again raised the question of the jurisdiction of the Court, under S. 52, Insolvency Act. The sale was held to be illegal and without jurisdiction:

Held, that the matter had been already decided in the earlier application and that decision being a judgment in rem, could not be disturbed by subsequent applications even if not between the same parties:

Held also, that the Receiver not having taken any steps to appeal from the order in the earlier proceedings it was not right, having taken that definite attitude and taken advantage of that attitude that the auction-purchaser should be prejudiced either on behalf of the insolvent or on behalf of the creditors by an attempt to set aside the sale which took place so long ago and when a previous attempt to set aside the sale had failed. A.I.R. 1935 Pat. 273=1 B.R. 486=155 Ind. Cas. 734.

——S. 4—Judge refusing to decide question of title—His successor, if precluded.

Even though a Judge, for some reason or other declines to decide the question of title under S. 4, his successors cannot be precluded from going into the question of title and deciding it under that section. A.I.R. 1934 Lah. 936 (2)=37 P.L.R. 487=153 Ind. Cas. 997.

——S. 4.

An order by the Insolvency Judge dismissing an objection petition in the objector's absence and without giving him any notice of the hearing is irregular and illegal and must be set aside. A.I.R. 1933 Oudh 83=9 O.W.N. 1165=142 Ind. Cas. 826.

——S. 4.

Section 11, Civil P.C., with all its explanations will apply to a decision of the Insolvency Court under S. 4, Provincial Insolvency Act. A.I.R. 1933 Nag. 373=30 N.L.R. 112=147 Ind. Cas. 539.

——S. 4.

Where a claim by the insolvent's sons has been negatived by the Insolvency Court in proceedings under S. 4, a suit by the sons for declaration of their title is not maintainable. A.I.R. 1933 Lah. 789=34 P.L.R. 1063=146 Ind. Cas. 912.

——S. 4—Decision of Insolvency Court against stranger—Res judicata.

Per Dalal and King JJ.—If the matter is once decided even as against a stranger by the Insolvency Court the jurisdiction of the Civil Court would be barred under S. 11. C. P. Code. Sulaiman, J. in A. I. R 1926 All. 470 and A.I.R. 1924 All. 40 Appr. A.I.R. 1927 All. 66, Foll.; 37 All. 65 Appr; A.I R. 1921 Mad. 204, Appr; A.I.R. 1926 Mad. 363, Foll. 113 Ind. Cas. 819=51 All. 550=1929 A.L J. 155=A.I.R. 1929 All. 105 (F. B.).

——S. 4—Person claiming attached property—Matter placed before Insolvency Court—Insolvency Court's decision if final.

No doubt it is open to a person claiming the property attached by the Insolvency Court to bring a regular suit in order to obtain an adjudication on the merits of his claim, but if he places the matter before the Insolvency Court and that Court decides to determine the question, its decision is final and binding for all purposes as between the debtor and the debtor's estate on the one hand and all claimants against him or the estate on the other. 119 Ind. Cas, 733=30 P.L.R. 533=A.I.R. 1929 Lah. 761.

——S. 4—O. 21, R. 58—Attachment before judgment of some property—Objection raised—Judgment-debtor declared insolvent before disposal of objection — Receiver taking possession of all properties—Fresh objections raised as to balance of properties — Both objections rejected—Order of Insolvency Court in respect of later objection if final.

Property was attached before judgment in a suit against the brother of the plaintiff's deceased husband, against which the plaintiff filed a petition under O. 21, R. 58, but before the objection could be disposed of the judgment-debtor in the original suit filed an application to be adjudicated an insolvent and was adjudged an insolvent, and on the same date the Court ordered the Receiver to take possession of the property previously attached as well as certain other properties of his, whereupon the plaintiff filed a fresh objection with regard to these other properties which had been seized by the Receiver, but no fresh objection was filed by her with regard to the property which had been previously attached before judgment. After the Receiver had taken possession of all properties, the District Judge disposed of both the objections by one order dismissing both the claims. The plaintiff then filed an appeal from this order to the High Court which was dismissed under O. 41, R. 11. The plaintiff subsequently filed the present suit for a declaration, but it was dismissed by the Subordinate Judge on the ground that in view of the order of the Insolvency Court the suit was not maintainable:

Held, that as regards the property which had been seized by the Receiver during the insolvency proceedings and the objection which was disposed of by the Insolvency Court the order was final, as under S. 4, Act V of 1920, the Insolvency Court acts like a Civil Court and its order is binding on the plaintiff; but the order passed on the objection filed by the plaintiff under O. 21, R. 58, C. P. Code, which was on the application of a creditor transferred by the execution Court to the District Judge is not final, and therefore a separate suit in respect of the property covered by the objection under O. 21, R. 58, was maintainable. 108 Ind. Cas. 156=26 A.L. J. 39=A.I.R. 1928 All. 158.

——S. 4—Notice given to transferee on application of Receiver—Transferee failing to appear—Case decided ex parte—Separate civil suit for declaring ownership—If barred.

A transferee who has neglected the opportunity fully given in the Insolvency Court has no right of separate suit in the ordinary Civil Court to set aside the order passed by the Insolvency Court.

Where on an application by Receiver under S. 53, notice was issued to the transferee who failed to appear and the case was decided ex parte and after his attempt to get the exparte order set aside failed, he instituted a suit in Civil Court for declaring his ownership to the property.

Held, that the suit is barred by S. 4, A.I.R. 1024 All. 40, Foll. 98 Ind. Cas. 1001=24 A.L.J. 897=49 All. 71=A.I.R. 1927 All. 66.

——S. 4—Old and New Acts.

S. 4 (2) of the Act of 1920 did not invest Insolvency Courts with a jurisdiction which did

not exist formerly. Prior to the Act V of 1920 also, decrees of an Insolvency Court had the same effect of binding the debtor and the debtor's estate and his sons. 15 A.L.J. 661, Affirmed. 84 Ind. Cas. 790=47 All. 263=22 A.L.J. 1097=6 L.R.A.Civ. 109=A.I.R. 1925 All. 221.

——S. 4—Question wheher mortgagee's rights belonged to insolvent or not.

Where in insolvency proceedings the question at issue was whether the mortgagee's rights in certain properties, belonged to the insolvent or to the objector.

Held, the question ought to be tried by the Insolvency Court finally under S. 4 (1) of the Act after framing issues and recording evidence, because the Insolvency Court has jurisdiction to finally settle all such questions. 79 Ind. Cas. 552 =A.I.R. 1925 Oudh 109.

——S. 4—Order disallowing claim to insolvent's property.

The decision of the Insolvency Court against an objector claiming a property attached by the Receiver in insolvency is conclusive and no suit will lie, as it is precluded by Section 4. 71 Ind. Cas. 979=A.I.R. 1923 All. 293.

——S. 4—Question of title gone into by Insolvency Court at instance of party—Separate civil suit on same matter if lies.

If a person complains of the act of the Receiver and asserts a title and goes to the Insolvency Court to redress his grievance, he cannot afterwards turn round and litigate the matter afresh in a Civil Court. If the Insolvency Court decides to exercise its jurisdiction under S. 4 (3) of Act V of 1920, it ought to make clear beyond question that it is doing so and the reason for the course it is taking. If the Insolvency Court finds that difficult questions of securities are involved, it may leave the contending creditors to fight out in Civil Court but pass such orders relating to the interest of the debtor as would not affect the rights of contending creditors. 66 Ind. Cas. 863= A.I.R. 1922 All. 128.

7. Hindu father's insolvency.

——S. 4—Decree against father and sons, value of.

The creditors of Hindu father who was adjudicated insolvent filed a suit against him without obtaining the leave of the Insolvency Court and obtained a decree against the father personally and against the joint family property in the hands of the sons:

Held, that it was open to such sons to say that the suit would not be competent because leave of the Court had not been obtained and since the suit could not be proceeded against their father, it could not be proceeded against them as well. But no objections were taken by the sons and the decree had become final against them. The decree, in so far as it was against the sons, could not be declared a nullity in proceedings under S. 4, Provincial Insolvency Act. A.I.R. 1942 Mad. 360=1942 M.W.N. 69=(1942) 1 M.L.J. 177=55 L.W. 101=202 Ind. Cas. 17.

——S. 4—Suit by sons for partition—Decree for partition subject to mortgage—Sale by Receiver of father's property alone free from mortgage—Purchaser's rights—Obstruction by sons—Power of Insolvency Court to deliver possession of son's share—Absence of declaration under S. 4, effect of—Insolvency Court—Powers of execution, limits of.

A Hindu father was adjudicated insolvent. The sons sued for partition impeaching a mortgage executed by the father but a decree for partition was made declaretng the validity of the mortgage. The Official Receiver sold only the 'insolvent's property' free from the mortgage though he intended to sell the son's shares also. The purchaser applied for delivery of possession, the sons obstructed and an application was made under Ss. 4 and 5 for removal of obstruction. The application was allowed, but on appeal to the District Judge, the purcheser was referred to a separate suit and the application was dismissed on second appeal.

Held, (i) that the appeal to the lower Appellate, Court was not incompetent and even assuming it was incompetent the second appeal was maintainable;

(ii) that the Insolvency Court had no power to proceed against the sons' shares in execution as the son's shares were not sold and as the decree declaring that their shares were liable was not made by that Court but by the Civil Court and delivery of the property could not, therefore, be given to the purchaser by the Insolvency Court. A.I.R. 1933 Mad. 475=147 Ind. Cas. 494.

——S. 4—Hindu father's insolvency—Sale by Official Receiver—Remedy of purchaser as regards sons' shares.

When a Hindu father is declared an insolvent, in so far as the sons' shares are concerned, the purchaser from the Official Receiver is not entitled to apply for delivery of possession under S. 4. His remedy would be by going to the ordinary Courts and by filing regular suits for possession. 109 Ind. Cas. 516=51 Mad. 567=27 M.L.W. 515= A.I.R. 1928 Mad. 531=55 M.L.J. 163.

——S. 4—Sale by Official Receiver of whole interest—Right of purchaser to joint possession of sons' shares also.

Where the purchaser from Official Receiver has purchased the whole interest in the property of a Hindu insolvent father and his sons there is no reason why he ought not to be given joint possession of the insolvent's share only along with the sons. 109 Ind. Cas. 516=51 Mad. 567=27 M.L.W. 515=A.I.R. 1928 Mad. 531=55 M.L.J. 163.

——S. 4—Insolvent's title to property questioned by his sons—Sale if proper.

Where the sons of the insolvent object to the sale of insolvent's property by the Official Receiver on the ground that they were divided from the insolvent, and that their shares should not be sold

the property should not be sold before deciding the question under S. 4. 92 Ind. Cas. 249=23 M.L.W. 80=1926 M.W.N. 169=A.I.R. 1926 Mad. 360.

8. Interpretation—"Of any nature whatsoever".

——S. 4—"Of any nature whatsoever," meaning of.

The words "of any nature whatsoever" in S. 4 are not to be read as ejusdem generis with the preceding words "question of title or priority." A. I. R. 1942 Bom. 159=I. L. R. (1942) Bom. 175 =44 Bom. L. R. 132=201 Ind. Cas. 188.

——Ss. 4, 75, 25—Decision of question whether debtor has right to present petition for insolvency, whether comes under S. 4.

The words "of any nature whatsoever", used in S. 4 do not include or embrace within their purview the determination of question whether the debtor has a right to present the petition for insolvency. Such a decision is contemplated only under S. 25 (2). A. I. R. 1942 Oudh 80= 1941 O. W. N. 1218=1941 A W. R. C. C. 347= 196 Ind. Cas. 881.

——S. 4—Order passed under Ss. 53 and 54.

The words "or of any nature whatsover" in S. 4, are incompatible with the ejusdem generis rule of interpretation, and that S 4 (1) must be taken to give the Court power, subject to the provisions of the Act, to decide all questions which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. Section 4 is not intended to cover orders made under Ss. 53 and 54. A. I. R. 1940 Bom. 51=I. L. R. (1940) Bom. 1=41 Bom. L. R. 1258=187 Ind. Cas 508.

——S. 4—"Or of any nature whatsover" significance of.

In S. 4, the term "or of any nature whatsoever" is a very wide one. It must however, be read in conjunction with the earlier part of the section which refers to questions whether of title or priority and with the opening words of the section "subject to the provisions of this Act." In other words, the term "or of any nature whatsoever" must be subject to the limitation of ejusdem generis or to the limitation to orders not specifically provided for in the Act. A. I. R. 1938 All. 28=1937 A. L. J. 1071=I. L. R. (1938) All. 50=1937 A. W. R. 1068=172 Ind. Cas. 997.

——S. 4—"Of any nature whatsoever" significance of.

The expression 'of any nature whatsoever,' in S. 4 has to be read ejusdem generis with the first expression i. e., questions of title or priority and such questions of title or priority can arise only after the adjudication is made. A. I. R. 1935 Bom. 80=36 Bom. L. R. 1236=59 Bom. 161=154 Ind. Cas. 566.

9. Jurisdiction and Powers of Court.

See also: Note 8.

——S. 4—Jurisdiction of insolvency Court—Whether transfer impeached is nominal and fictitious—Insolvency Court's power to decide—S. 53—Scope.

Under S. 4 of the Provincial Insolvency Act the Insolvency Court has jurisdiction irrespective of S. 53 of the Act, to determine whether a transaction by the insolvent which is impeached is nominal and fictitious.

It is true that S. 4 is merely declaratory of the jurisdiction of the insolvency Court and does not declare and substantive law. It has to be read subject to the other provisions of the Act. Therefore, if a transaction falls within the ambit of S. 53 of the Act, it can only be challenged if the conditions laid down in that section are satisfied. Transactions which are challenged on the ground of their being fictitious or nominal do not fall within the ambit of S. 53; and S. 4 is wide enough to confer upon the Insolvency Court jurisdiction to decide whether those transactions were in fact nominal or fictitious. If a transaction is nominal or fictitious, it is not necessary to set it aside as it is void ab initio, and all that the Official Receiver might require is a declaration that it is in fact void and of no effect. The proper issue to be raised and tried in such a case is whether the transaction or transfer challenged by the Receiver is nominal and fictitious as alleged by him. If the Court comes to the conclusion that it is nominal and fictitious, it should be declared void under S. 4. If it is not found to be nominal or fictitious, but real, though voluntary in its nature, then it would fall within S. 53; and if not challenged by the Receiver within the period of two years prescribed by S. 53, it cannot be avoided by the Receiver in insolvency, and his application will fail. 37 Bom. L. R. 478, appr. 1930 Oudh 314 Not Foll. I.L.R. (1949) Bom. 129=A.I.R. 1949 Bom. 129=51 Bom. L. R. 28 (F. B.).

——Ss. 4, 53, 54—Powers of Insolvency Court—Scope and extent of.

An Official Receiver can challenge a sale or transfer even if it does not fall within the purview either of S. 53 or S. 54 Prov. Insol. Act. If the Official Receiver claims that the property which is the subject of a sale or transfer is still the property of the insolvent in the eye of the law in spite of those transactions, there is nothing to prevent him from moving the Insolvency Court under S. 4 of the Act, to have the rights of the insolvent declared in the property which is the subject of sale or transfer and the Insolvency Court has the same power in dealing with that question as any other Civil Court has. The powers of the Insolvency Court under S. 4 are not limited by Ss. 53 and 54 of the Act. The Insolvency Court has the widest powers conferred upon it by S. 4, to deal with any question of title or priority or of any nature whatsoever which might arise for consideration in the case. The provisions contained in Ss. 53 and 54 on the one hand those in S. 4 on the other are not mutually exclusive. Questions arising under Ss. 53 and 54 of the Act might as well fall within the

ambit of S. 4. A.I.R. 1939 All. 431=1939 A. L. J. 350=1939 A. W. R. 316=182 Ind. Cas. 947.

——S. 4.

Section 4 confers the widest powers on an Insolvency Court and there can be no justification for holding that it cannot set aside a sale which is challenged by the Official Receiver unless it is specifically alleged that the sale was benami on behalf of the insolvent. A.I.R. 1939 All. 431=1939 A.L. J. 350=1939 A.W.R. 316=182 Ind. Cas. 947.

——Ss. 4, 53, 56 (3), proviso—Insolvency Court—Jurisdiction to go into question of fictitious or genuine character of sale by insolvent—Transferee from insolvent under sham deed of transfer—Whether a mere benamidar.

The Insolvency Court has jurisdiction to go into questions involving the fictitious or genuine character of sales and into the questions whether they were intended or not to defeat creditors under S. 53, T. P. Act, conferred on it by the terms of S. 4, Provincial Insolvency Act.

Per Barlee, J.—Section 4 gives a Court of Insolvency jurisdiction to decide all questions of title, but there is nothing in the Act outside Ss. 53 and 54 to empower it to annul a genuine transfer after title has passed. It is the function of the Court to collect and distribute the insolvent's property: and the proviso to S. 56 (3) expressly forbids interference with property to which the insolvent has no present claim. But when an insolvent has executed a sham deed of transfer, the transferee is a mere banamidar who holds the property in trust. The title is in the insolvent, and there is no necessity to annul the transfer and the Court under S. 55 (3) can remove the benamidar. A.I.R. 1935 Bom. 316=37 Bom. L.R. 478=157 Ind. Cas. 680.

——S. 4—Application under S. 53 time-barred—Maintainability under S. 4—Extent of Court's jurisdiction under S. 4.

The fact that the application as one under S. 53 is time-barred does not prevent the Official Receiver from having recourse to S. 4. The section is extremely wide and empowers the Court to decide all questions whether of title or priority or of any nature whatsoever, and whether involving matters of law or of fact which may arise in any case of insolvency, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

An Insolvency Court in India would be right in assuming jurisdiction under S. 4 of the Provincial Insolvency Act in cases where the Bankruptcy Court in England would exercise jurisdiction under S. 102 of the English Bankruptcy Act. 97 Ind. Cas. 321=A.I.R. 1927 Sind 66.

——Ss. 4 and 51—Application involving question of title to property made after annulment of adjudication—Jurisdiction of Insolvency Court—C P. Code, S. 151.

After the annulment of adjudication the Insolvency Court has no jurisdiction to entertain and decide under S. 4 of the Provinclal Insolvency Act an application involving question of title to property as a step towards the realization of the assets of the insolvent. S. 51 of the Act applies only in the case of an undisputed title of the insolvent to property. S. 151, C.P. Code, cannot be invoked to give jurisdiction to the Insolvency Court to take action under S. 4 of the Provincial Insolvency Act when that jurisdiction is already lost as a result of the order of annulment. I.L.R. (1948) Nag. 284=1948 N.L.J. 112=A.I.R. 1949 Nag. 39.

——S. 4—Remedy of creditor after annulment of adjudication.

Section 4 gives the Insolvency Court no power to decide questions of the nature therein described after the adjudication had been annulled. After that stage has been reached, the powers of the Insolvency Court are limited by S. 37.

The remedy of the aggrieved creditor lies in challenging the order of annulment of adjudication, and so long as that order is unchallenged, he has no remedy in the Insolvency Court. A.I.R. 1935 Nag. 246=31 N.L.R. 36 Sup.=161 Ind. Cas. 981.

——Ss. 4, 5 and 56—Sale by Official Receiver—Power of Court to give possession to purchaser.

Sections 4, 5 and 56 are very wide and empower the Insolvency Court to give possession to the purchasers of a property sold in insolvency proceedings at the instance of an Official Receiver. Hence, where on the insolvency of a Hindu father the family property inculding the sons' shares is sold by the Official Receiver, the Insolvency Court can give possession to the purchaser. A. I.R. 1944 Mad. 481=(1944) 2 M.L.J. 52=57 L.W. 451=1944 M.W.N. 492=I.L.R. (1945) Mad. 10 (F.B.).

[Overruling 51 Mad. 567=A.I.R. 1928 Mad. 531.]

——S. 4.

Section 4 does not empower the Court to dispossess anybody. It only empowers it to decide all questions of title, etc., arising in the insolvency. Having decided such questions, it has to be empowered to seize the property and dispossess the person in possession. That can only be done under S. 56 (3). A.I.R. 1940 Nag. 233=1940 N.L.J. 283=I.L.R. (1941) Nag. 757=190 Ind. Cas. 455.

——S. 4—Insolvent's property sold in execution of decree—Court can pass order of refund of sale proceeds in favour of Receiver.

Where, in execution of a decree the property of the insolvent has been sold after the petition for his adjudication has been admitted, the Insolvency Court can, under S. 4 on an application by the Official Receiver, pass an order of refund of the sale proceds in favour of the Official Receiver and it is not necessary to direct the Official Receiver to institute a separate suit for the recovery of the money. A.I.R. 1939 Mad. 896=(1939) 1 M.L.J. 203=1939 M.W.N. 177.

——S. 4.

Where one creditor on behalf of all moves the Insolvency Court to bring into the estate of the

insolvent half the produce of the fields belonging to the insolvent on the ground that according to the lease given to lessee, he was entitled to half the produce, but the lessee alleges that the lease was on rental basis and produces a lease which is proved to be sham, the Insolvency Court cannot pass an order the effect of which is to bring all the produce into the estate of the insolvent. A.I.R. 1938 Nag. 247=I.L.R. (1939) Nag. 484=175 Ind. Cas. 526.

——S. 4.

Jurisdiction conferred by S. 4 is not limited by the express powers given by Ss. 53 and 54 to annul certain transfers. The Insolvency Court has jurisdiction to decide the validity or otherwise of the registration of deeds where neither party intends that certain items included in the deed should really pass from one to the other, and their inclusion is only meant to enable the document to be registered by the Sub-Registrar of a particular place. A.I.R. 1937 Mad. 32=1936 M.W.N. 852=168 Ind. Cas. 87.

——S. 4.

It is open to the Insolvency Court under S. 4 to try the question whether the insolvent is entitled to certain property or not when there is a dispute about the title to it. A.I.R. 1937 Mad. 32 =1936 M.W.N. 852=168 Ind. Cas. 87.

——S. 4.

The Insolvency Court has jurisdiction under S. 4 to deal with a disputed question of title between a purchaser from the insolvent and a purchaser of the same property in a sale by the Official Receiver. A.I.R. 1936 Mad. 955=44 L.W. 650 =1936 M.W.N. 1209=71 M.L.J. 656=166 Ind. Cas. 69.

——Ss. 4, 5, 59—Whether controlled by S. 59.

Even assuming that S. 59 is exhaustive as to the duties and powers of a Receiver, it does not follow that it controls the powers of the Court under S. 4. Under S. 4, the Court would only decide questions of title which it may deem expedient and necessary to decide and would not summarily order a disputed debt to be deposited nor would it be likely to enter into an enquiry about the same. But it would not be beyond the capacity of the Court even to decide such a question. (1935) 158 Ind. Cas. 990=18 N.L.J. 14.

——S. 4 (3).

Where questions of title are raised and claims are put in, the questions may be decided by the Insolvency Court or if the Court thinks that it is not expedient that the insolvency Court should decide it, then it may proceed under S. 4 (3). A.I.R. 1934 Cal. 122=58 C.L.J. 118=149 Ind. Cas. 677.

——S. 4—Exercise of discretion—Power to sell insolvent's interest without enquiry.

The Court under Sub. S. (1) has full power to decide a question of title. But where it does not deem it expedient or necessary to decide any question of the nature referred to in Sub-S. (1) but has reason to believe that the debtor has a saleable interest in any property, it may, without further inquiry, sell such interest in such manner and subject to such conditions as it may think fit. 72 Ind. Cas. 320=26 C.W.N. 921=A.I.R. 1924 Cal. 533.

——S. 4.

Under S. 4, the Insolvency Court has full power to decide all questions of title but the Court has to exercise its authority under S. 4 by applying its mind properly to all the implications. A.I.R. 1934 Lah. 1006=37 P.L.R. 205=156 Ind. Cas. 278.

——S. 4.

Under S. 4, a judge can decide the question of title as between the auction-purchaser and the alleged transferee of the property in dispute from the insolvent. A.I.R. 1934 Lah. 936=37 P.L.R. 487 =153 Ind. Cas. 997.

——Ss. 4 and 51.

Where a Receiver applies under S. 51 for refund to him of the sale proceeds of a sale of the insolvent's property in execution of a decree, the Insolvency Court is competent and is bound to enquire into the application. A.I.R. 1933 Lah. 477 =14 L. 724 =34 P.L.R. 1076=144 Ind. Cas. 580.

——S. 4.

The provisions of S. 4 are very wide and they confer on Insolvency Courts full power to deal with all questions of title as between the Official Reciever or Official Assignee, and a stranger with reference to property which is claimed on the one hand as being the insolvent's and on the other as the stranger's property. A.I.R. 1932 Cal. 642=36 C.W.N. 492=59 C. 1135=56 C.L.J. 446=139 Ind. Cas. 323.

——S. 4.

The proposition that the Insolvency Court at the time of the declaring a person insolvent cannot go into the question of the existence of a particular debt is unsupportable. On the other hand the Court, in order to decide whether a petitioner is unable to pay his debts, must go into the question of the existence of the alleged debts if disputed. A.I.R. 1932 Lah. 620=33 P.L.R. 422=139 Ind. Cas. 384.

——S. 4.

Under S. 4, the Insolvency Court may decide any question which it may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property and in doing so it has ample power to decide questions of title arising between the estate of an insolvent and a third party. A.I.R. 1932 Mad. 66=61 M.L.J. 763=1931 M.W.N. 1131= 34 L.W. 788=135 Ind. Cas. 739.

——Ss. 4, 5, 53—Annulment of transfer—Power to direct transferee to pay mesne profits.

Where an Insolvency Court annuls a transfer under S. 53, it has got jurisdiction under S. 4 to pass an order directing the transferee to pay

mesne profits to the Official Receiver and effect can be given to such an order under S. 5 of the Act. A.I.R. 1932 Mad. 66=1931 M.W.N. 1131=61 M.L.J. 763=34 L.W. 788=135 Ind.Cas. 739.

——S. 4—Mortgagee agreeing to sale by Insolvency Court—Power of Insolvency Court to adjudicate claims.

If a mortgagee agrees to have the mortgaged property sold by the Insolvency Court retaining his lien on the sale proceeds, he must suffer any claimants to raise objections and to have them adjudicated upon under S. 4. A.I.R. 1931 Lah. 3=32 P.L.R. 254=130 Ind. Cas. 333.

——S. 4—Claim by a creditor that he is a secured creditor—Power of Court to decide.

The Court has in insolvency proceedings jurisdiction to require from a creditor of the insolvent claiming to be secured creditor, proof of such a claim. It is not imperative that the Receiver should file a regular petition in the nature of plaint or there must be at first an enquiry under S. 53 or 54. The ipse dixit of a creditor that he is a secured creditor cannot have the effect of precluding the Court from judicially determining the matter. 113 Ind. Cas. 105=55 Cal. 1053=32 C.W.N. 427=A.I.R. 1928 Cal. 609.

——S. 4—Question of title—Power of Court to decide.

Section 4 is introduced in the Act in 1920 and confers wide powers on the Insolvency Court to decide all necessary questions of title, etc. Presumably this power is conferred to enable the Court to decide such questions when they cannot be decided under other sections of the Act. A.I.R. 1930 Lah. 122.

——S. 4—Question of title—Power of Court to decide.

Under S. 4 the Insolvency Court has jurisdiction to decide questions of title as between an Official Assignee and a stranger with reference to property which is claimed by the Official Assignee as the insolvent's and which, on the other hand, is claimed by the stranger as his. 102 Ind. Cas. 115=31 C.W.N. 502=A.I.R. 1927 Cal. 474.

——S. 4—Matters in which Insolvency Court has exclusive jurisdiction.

Insolvency Court has exclusive jurisdiction to determine questions as to annulment of transfers not made in good faith and for valuable consideration and to decide questions of title for determinatton of the dispute under Ss. 53 and 4 and therefore the jurisdiction of other Courts is impliedly barred. 105 Ind. Cas. 50=4 O.W.N. 751=A.I.R. 1927 Oudh 357.

——Ss. 4 and 56—Question as to insolvent's title to property—Power of Court.

Under S. 56 (3) an order cannot be passed against persons who claim adversely to the insolvent. The Court cannot, acting under S. 56, direct any person to deliver up property in his possession to the Official Receiver unless the insolvent is entitled on the date of such application to the possession of such property. If a title, however flimsy, is set up by the person in possession, the Court should not act under S. 56. The Court, however, may, on a proper application being made under S. 4 of the Act, try the issue whether the insolvent is entitled to the property or not. But, in order to enable the Court to do that a proper application ought to be made under S. 4, and the other side should be asked to plead thereto. When an order is passed under S. 56 (3), it does not determine the rights of the parties, and though the Judge may incidentally determine the question, yet it cannot be said that the question is finally determined. 92 Ind. Cas. 573=49 Mad. 762=23 M.L.W. 94=1926 M.W.N. 172=1926 M.W.N. 121=A.I.R. 1926 Mad. 363=50 M.L.J. 180.

——S. 4—Question as to act of insolvency and property of insolvent—If can be tried together.

Section 4 is very comprehensive in its term and it is not illegal for a Court to try together the two questions (a) whether A has committed an act of insolvency, and (b) whether the property in respect of which the act is alleged to have been committed belongs to A or B. 97 Ind. Cas. 174=A.I.R. 1926 Lah. 679.

——S. 4—Powers of Court—Old and New Act.

There is no provision in the Old Provincial Insolvency Act (III of 1907) corresponding to S. 4 of the present Act. There were conflicting decisions in regard to the power of the Court to deal with the claim of third parties against the insolvent and it was to set at rest the doubt that existed upon the subject that S. 4 was introduced into the present Act. It will be seen that very wide powers are given to the Court under S. 4; the Court may decide any question which it may deem it expedient or necessary to decide for the purpose of doing complete justice or making complete distribution of property. 65 Ind. Cas. 394=1922 M.W.N. 110=15 L.W. 273=45 Mad. 434=31 M.L.T. 86=A.I.R. 1922 Mad. 147=42 M.L.J. 185.

——S. 4—Questions arising under S. 53, T. P. Act.

A Court exercising insolvency jurisdiction has to decide all questions of general law, such as the questions raised by S. 53, T. P. Act, just as it has to decide questions arising in insolvency which are covered by special provisions of the Insolvency Act while administering the law under its own procedure. 63 Ind. Cas. 601=44 All. 71=19 A.L.J. 862=A.I.R. 1922 All. 196.

——S. 4—Power of Court.

Section 4 of Act V of 1920 has given Courts full power to decide the merits of the claims of third parties. 61 Ind. Cas. 589=A.I.R. 1921 Nag. 159.

10. Limitation.

——S. 4—Application under by Receiver—Limitation—Plea in defence—If barred—Limitation Act—Application of.

S. 4 of the Provincial Insolvency Act is only declaratory of the jurisdiction of the Insolvency Court. It does not in any way alter any law, nor does it deprive any party of any rights that he might have under the law. The section only empowers the Insolvency Court to try matters referred to in the section; it does not in any way oust the jurisdiction of the ordinary Courts and the Insolvency Court has always the discretion to refer the Receiver to a suit instead of trying a matter under S. 4. Any defence which could be put forward by a party in a suit would be equally available to him in an application by the Receiver under S. 4, and the Court is bound to consider all the defences open to the party against whom the application is made. Although the Limitation Act does not apply to an application made by the Receiver, since the defence under the Limitation Act would be open to the party if a suit were filed by the Receiver, that defence equally available to him in the application by the Receiver and it cannot therefore be held that an application by the Receiver can never be barred by the law of Limitation on the ground that there is no article in the Limitation Act applicable to an application by the Receiver under S. 4 of the Provincial Insolvency Act. I.L.R. 1950 Bom. 678=52 Bom. L.R. 606=A.I.R. 1950 Bom. 399.

——S. 4—Application by Official Receiver—Limitation—Starting point.

Where there are a number of creditors of the insolvent, the Official Receiver is entitled to take the date from which limitation for an application under S. 4 begins to run, to be the date at which the last of these creditors becomes aware of the transaction. A.I.R. 1943 Mad. 252=56 L.W. 70=(1943) 1 M.L.J. 125=1943 M.W.N. 100=209 Ind. Cas. 390.

——S. 4—T.P. Act, S. 53—Limitation.

Even on the view that proceedings under S. 4 of the Prov. Insol. Act should be held to be tantamount to a suit under S. 53 of the T.P. Act, it would follow that the suit would have to be within time when the Insolvency proceedings began. This would be six years under Art. 120 of the Limitation Act from the date of accrual of the cause of action. A.I.R. 1938 Nag. 546=1938 N.L.J. 279=I.L.R. (1940) Nag. 293=181 Ind. Cas. 297.

——S. 4—Application to set aside order of Official Receiver—Limitation.

Even an application under S. 4 should be made within 21 days, if it is one to set aside an order of the Official Receiver. A.I.R. 1935 Lah. 60.

——S. 4— Limitation for suit—Order under S. 4 (3).

Where an order under S. 4 (3) for sale of certain properties was passed by the Insolvency Judge, and he not considering it necessary to decide the question of title, left it to be decided by a competent Civil Court, in a suit brought by plaintiff for declaration of his title to the properties:

Held, that Art. 13 of the Limitation Act would not stand as a bar to the suit. A.I.R. 1933 Cal. 263 =36 C.W.N. 621=143 Ind. Cas. 475.

11. Receiver's powers.

——Ss. 4, 68—Claim by stranger — Official Receiver's jurisdiction to decide claim—Consent of parties, effect of—Dismissal of claim—Remedy.

The Official Receiver brought an insolvent's property to sale. The insolvent's wife claimed a share in it. The claim was allowed by the Official Receiver. On appeal under S. 68, the case was remanded to the Official Receiver by consent of the parties. On further enquiry, the Official Receiver dismissed the claim and the wife made an application under S. 4:

Held, (i) that the Official Receiver had no jurisdiction to determine a claim of this sort. A.I.R. 1933 Mad. 471=38 L.W. 896=146 Ind. Cas. 204.

——S. 4—Order for stay of sale by Receiver—Forum.

Where in the course of an insolvency proceeding the Official Receiver, either at his own instance or at the instance of a creditor, proposes to sell properties claimed by a third person, the claimant may apply to the District Judge under S. 4 for an order to prevent the sale of the properties. The claimant cannot apply to the Official Receiver nor can the Official Receiver adjudicate on the claim. 78 Ind. Cas. 1017=47 Mad. 446=19 M.L.W. 251= 1924 M.W.N. 163=33 M. L. T. 279=A.I.R. 1924 Mad. 529=46 M.L.J. 80.

——S. 4—Important matters between insolvent and body of creditors.

A contention raisng a very important matter between the insolvent and the general body of creditors should be decided by the Court and not by an officer that may be appointed by the Court. 77 Ind. Cas. 589=2 Pat. 724=A.I.R. 1924 Pat. 259.

12. Remedies.

——S. 4—Jurisdiction of Civil Court.

The existence of insolvency proceedings does not take away the jurisdiction of the ordinary Civil Court. Civil Court has jurisdiction to deal with the subject matter of S.4. A.I.R. 1940 Mad. 564 =51 L.W. 429=1940 M.W.N. 365=(1940) 1 M.L.J. 647=192 Ind. Cas. 810

——S. 4.

Section 4 gives, at any rate, concurrent jurisdiction to the Insolvency Court with ordinary tribunals to try questions of title which might arise between the Official Receiver and the assignee from the insolvent. Whether the Insolvency Court would elect to try these questions of title which have been raised before it in the proceedings initiated by the application of the Official Receiver or relegate the parties to the ordinary tribunals is a matter for that Court to decide according to the circumstances of the case and the High Court cannot lay down any hard and fast rule. A.I.R. 1934 Lah. 365=15 Lah. 294= 35 P.L.R. 271=147 Ind. Cas. 1026.

——Ss. 4, 68—Person aggrieved by act of Receiver—Remedy of.

The remedy under S. 68 is not the only remedy open to a person aggrieved by an act of the Receiver. A stranger to insolvency proceedings may, at his option, seek his redress in the ordinary Civil Court or he may apply under S. 68 but if he takes the latter course, he must comply with the terms of the section. He cannot be heard to say, in order to avoid the effect of the plain terms of the proviso to S. 68, that he makes his application under S. 4 and not under that section. A.I.R. 1934 Rang. 97=149 Ind. Cas. 43.

——S. 4.

The remedy against an order on a claim petition passed by the Official Receiver without jurisdiction is not by way of appeal under S. 68, but by moving under S. 4 and therefore, the fact that no appeal was preferred under S. 68 was not a bar to the application. A. I. R. 1933 Mad. 471=38 L. W. 896=146 Ind. Cas. 204.

——S. 4.

Any one aggrieved by an order of an Insolvency Court may make an objection and invite a decision of that Court under S. 4 or he may file a suit, but he cannot pursue both remedies and if he obtains a decision of the Insolvency Court under S. 4, a suit by him with regard to the same subject-matter would be barred. Still less can a person aggrieved by an order of the Insolvency Court make an objection to the order in the Insolvency Court and get a decision of that Court under S. 4 and then file a suit on another ground with regard to the same subject-matter. A. I. R. 1933 Nag. 373=30 N. L. R. 112=147 Ind. Cas. 539.

——S. 4—Right of suit.

A stranger who claims property taken possession of by the Official Receiver both against him and the insolvent can institute a suit to establish his right independently of S. 4. But the insolvent himself is amenable, so far as the question of title to the property or its liability to be sold is concerned, only to the jurisdiction of the Insolvency Court and he cannot invoke the aid of ordinary Courts to establish his rights against the Official Receiver. A. I. R. 1933 Lah. 65=34 P. L. R. 31=140 Ind. Cas. 808.

——S. 4.

It is open to a person claiming property attached by the Insolvency Court to bring a regular suit for adjudication on the merits of his claim, but if he places the matter before the Insolvency Court and that Court proceeds to determine the question, its decision is final and binding for all purposes as between the debtor and the debtor's estate and all claimants against him or the estate on the other. A. I. R. 1932 Nag. 109=28 N. L. R. 89=139 Ind. Cas. 288.

——S. 4—Claimant prevented from obtaining final decision of the Insolvency Court—Remedy.

If the existence of a transfer, or if the property is sold as unencumbered, the lien on the proceeds of sale is denied by the Receiver, the claimant can ask the Court to adjudicate upon his rights under S. 4. In case the claimant is prevented from obtaining final decision on the matter he can obtain it by institution of a civil suit. 123 Ind. Cas. 539 =A. I. R. 1930 Lah. 180.

——S. 4—No decision by Insolvency Court—Sale by Receiver—Separate suit by claimant—Leave of Insolvency Court if necessary.

Where there is a decision after full enquiry by a Bankruptcy Court, the same matter cannot be enquired into by the Civil Court, because the idea is to give to such decision the force of res judicata. Where therefore the Insolvency Court has refused to entertain and enquire into or adjudicate upon the rights of the stranger claimant, or the latter has not preferred any alaim for the consideration of the Bankruptcy Court there is no decision by it which would operate to oust the jurisdiction of the Civil Court to decide the matter. Therefore where property is sold by the Receiver as the property of the insolvent and a third party challenges the title of the insolvent to that property, and seeks a declaration of title as against the purchaser, there is no need to implead the Receiver as a co-defendant, and it is unnecessary also to obtain the leave of the Insolvency Court to proceed against the purchaser. Where the plaintiff's application with Insolvency Court is rejected summarily or on the ground that it is barred by time and not on the merits, the permission of the Insolvency Court is not necessary for the plaintiff's suit for declaration of his right. 54 P.R. 1917; 55 P.R. 1917 and A.I.R. 1924 All. 40. Foll. 87 Ind. Cas. 1000=A. I. R. 1925 Nag. 363.

——S. 4—No application by claimant to Insolvency Court—Separate civil suit if barred.

Under the New Act if as question of title has been actually raised by a stanger to the insolvency and decided by the Insolvency Court the decision is final, and the question cannot be re-opened in a separate regular suit. This however does not mean that exclusive Jurisdiction has been conferred on the Insolvency Court, and that the only remedy open to the aggrieved stranger is to apply to that Court. Where a person has made no attempt to bring the matter up before the Insolvency Court and there is no order of the Insolvency Court which can be pointed out as amounting to a decision within the meaning of sub-clause (2) of S. 4 he is at perfect liberty to have recourse to the ordinary Civil Courts. 77 Ind. Cas. 57=21 A. L. J. 737=4 L.R.A. Civ. 483 =46 All. 16=A. I. R. 1924 All. 40.

13. Retrospective operation.

——S. 4—Retrospective effect.

In interpreting a statute, as a general rule, alterations in forms of procedure are retrospective in effect and apply to pending proceedings. The provisions of S. 4 of Act V of 1920 are mere alterations in the procedure and as such are retrospective. A. I. R. 1932 Nag. 109=28 N.L R. 89= 139 Ind. Cas. 288.

——S. 4—Law applicable—Claim to insolvent's property—New Act.

Where an order of adjudication has been passed under the Old Act and a claim to the property

is advanced after the enforcement of the New Act, and the claim is determined according to the procedure prescribed by the New Act, the order is final. 119 Ind. Cas. 733=30 P.L.R. 533=A.I.R. 1929 Lah. 761.

14. Transactions more than two years old.

——Ss. 4 and 53.

Section 53 empowers the Court to annul certain transfers which take place within two years of the insolvency, and S. 54 to annul others which occur within three months before; but either section does not take away the general and wide jurisdiction and powers conferred by S.4. Sections 53 and 54 are enabling sections. They confer certain additional powers on the Insolvency Court which an ordinary Civil Court does not have. They are not restrictive and do not take away anything which is already there. Section 53, Provincial Insolvency Act, is wider than S. 53, T.P. Act, and it gives added benefits to the creditors. If they want to avail themselves of these additional benefits they must bring themselves within the two years rule. If not they are left to their remedies under the ordinary law. But these remedies can be pursued in the Insolvency Court under S. 4, though it would be open to that Court on grounds of expediency, to refer the parties to a civil suit. Section 4 travels much wider than the small class of litigation which centres round fraudulent transfers, and so does the Provincial Insolvency Act. All that the words "subject to the provisions of the Act" mean, is that where the Act otherwise provides the Insolvency Court is not to act as a Civil Court. Neither S. 53 nor S. 54 deal with sham transfers. For one thing such transfers do not require annulment, and for another they are not really transfers, they only pretend to be. Hence there are matters relating to the property which the Court can deal with apart from Ss. 53 and 54. No doubt if the transfer is sham then the property continues to reside in the insolvent, and on insolvency it vests in the Court and the Court can then act under S. 56. But that is the effect once the transfer is found to be sham. Section 56 does not vest the Insolvency Court with jurisdiction to decide that question. Section 4 does that and if the Insolvency Court can determine this question of title when the transfer is alleged by the Receiver or the creditors to be sham, and determine whether the title lies in the insolvent or the transferee, that is to say, determine whether it is wholly void or not, it can decide the allied question as to whether the title is voidable and whether it is liable to be avoided. Both are equally, foreign to Ss. 53 and 54 and equally germane or otherwise to S. 4 and in nearly every case both positions are raised in the alternative. A. I. R. 1944 Nag. 44=1944 N. L. J. 1= I.L.R. (1944) Nag. 342=213 Ind. Cas. 241 (F.B.).

[Overruling A.I.R. 1938 Nag. 546=I.L.R. (1940) Nag. 293=181 Ind. Cas. 297].

——S. 4.

Section 53, T.P. Act, is not exhaustive and applications can be made under S. 4, Provincial Insolvency Act where the creditor asserts that the transaction which he wishes to set aside is a sham and nominal one. It is, therefore, no impediment to the reception of the application by the Court under S. 4 that the alienation in question was more than two years before the insolvency. A.I.R. 1943 Mad. 252=56 L.W. 70=1943-1 M.L.J. 125=1943 M.W.N. 100=209 Ind. Cas. 390.

——Ss. 4, 53 — Question relating to fictitious character of transfer not falling under S. 53—If can be tried under S. 4.

It is open to an Insolvency Court to try a question under S. 4 relating to the fictitious character of the transfer even though it does not fall under S. 53 of the Act, the petition having been made by the creditor more than four years after the transfer. A.I.R. 1941 Oudh 403=1941 O.W.N. 752=1941 A.W.R. 186=194 Ind. Cas. 600.

——S. 4.

Where a transfer is made by a person more than two years before his adjudication, it can be set aside under S. 4 of the Act and not under S. 53. The Insolvency Court can deal with the question according to the same principles which would govern a suit for avoidance of the transfer under the ordinary law. A.I.R. 1938 Lah. 73=I.L.R. (1938) Lah. 439=40 P.L.R. 1000 =181 Ind. Cas. 301.

——S. 4.

Section 4 does not give a wider power than that which is contained in S. 53 to annul transfers executed more than two years before the date of the petition. 1936 O.W.N. 960.

——S. 4—Property at date of gift considerable—Gift, not fraudulent.

An insolvent made a gift under a registered deed more than two years before the adjudication, consisting of a small room in favour of his wife as a provision in her old age, and on the date of the gift, the property of the insolvent was worth a great deal more and most of the debts in insolvency were incurred after the date of the gift:

Held, that it would not be reasonable to infer that the gift was made fraudulently with the object of defeating the creditors. A.I.R. 1936 Lah. 593=38 P.L.R. 67 =163 Ind. Cas. 956.

——S. 4—Jurisdiction of Court to enquire.

Where an insolvent transferred certain immovable property two months more than 2 years before he filed an insolvency petition and one of the creditors applied under S. 4 alleging that the transfer was wholly fictitious and praying that the Court may look into the **bona fides** of the transfer:

Held, that the Court had jurisdiction to enquire into the **bona fides** of the transfer at the request of creditor. A.I.R. 1936 Rang. 54=161 Ind. Cas. 687.

——S. 4.

The Insolvency Court has jurisdiction to go into the question of title raised on the basis of a transfer which was made more than two years prior to the adjudication of the transferor as an insolvent. Section 53 does not deal with the jurisdiction of the Insolvency Court, but only lays down certain rules of law affecting those transactions which fall within its scope, it does not control or restrict the jurisdiction conferred upon the Court by S. 4 to decide all questions of title. A.I.R.

1934 Lah. 365=35 P.L.R. 271=15 Lah. 294=147 Ind. Cas. 1026.

——S. 4.

The restriction as regards transfers more than two years old contained in S. 53 applies only to real transfers and has no application to mere sham transactions. A I R. 1933 Lah. 197=34 P.L.R. 669=143 Ind. Cas. 630.

——S. 4.

An application by the Official Receiver to avoid a transfer made by an insolvent more than two years before presentation of the insolvency petition as a fraudulent transfer, is cognizable under S. 4. Consequently, the Insolvency Court has jurisdiction to inquire into and set aside such an alienation. A.I.R. 1933 Mad. 527=37 L.W. 508=64 M.L.J. 397=1933 M.W.N. 206=146 Ind. Cas. 530 (2).

——S. 4.

Under S. 4, an Insolvency Court can declare a transfer to be void, even though it was more than two years old on the date of adjudication. A.I R. 1933 Pesh. 46=142 Ind. Cas. 97.

——S. 4.

A question that arises out of a transfer effected two years before adjudication and alleged to have been made to delay or defeat creditors can be enquired into by the Insolvency Court. A.I.R. 1932 Cal. 642=36 C.W.N. 492=59 C. 1135=56 C.L.J. 446=139 Ind. Cas. 323 (D.B.).

——S. 4.

Under S. 4, the Insolvency Court has full jurisdiction to determine the question of title which is based on a deed of transfer which is wholly fictitious though it is alleged to have been executed more than two years prior to the presentation of the application for adjudication. Section 53 does not apply to a case of this nature, as the alleged transfer is not required to be annulled. A.I.R. 1932 Nag. 109=28 N.L.R. 89=139 Ind. Cas. 288.

——Ss. 4, 53—Benami **transfer by insolvent.**

In the case of **benami** transactions, the limitation of two years imposed by S. 53 does not apply and an Insolvency Court can decide the question whether a transfer by an insolvent is **benami** under S. 4 of the Act even if the transaction took place more than two years before the presentation of the petition in insolvency. A.I R. 1932 Pat. 129=11 Pat. 9=13 P.L.T. 298 =136 Ind. Cas. 299.

——S. 4.

Per **Pullan, J.**—The Insolvency Court has power under S. 4 to set aside a transfer made more than two years before the adjudication where the transfer was intended to be inoperative from the beginning and the insolvent had remained in possession of the property. A.I.R. 1931 Oudh 124=8 O.W.N. 147=6 Luck. 614=131 Ind. Cas. 433.

——Ss. 4 and 53—Transfer executed more than two years before adjudication.

Section 4 is to be read subject to the provisions of the Act, and it gives to the Court full powers to decide all questions of title or priority or of any nature whatsoever, and whether involving matters of law or of fact which may arise in any case of insolvency coming within the cognizance of the Court. This section does not give to the Insolvency Court any power wider than that which is contained in S. 53 to annul transfers executed more than two years before the date of adjudication on the ground of their being **benami** executed to defraud creditors. Transactions of such nature must be challenged if at all in ordinary Civil Court. A I.R. 1929 All. 105 (F B.) not Foll. 123 Ind. Cas. 217=7 O.W.N. 377=A.I.R. 1930 Oudh 314.

——S. 4—Question of validity of transfer made 2 years prior to adjudication—Power to decide.

Dalal and King, JJ.—Section 4 deals with jurisdiction and this jurisdiction will be circumscribed only by such subsequent sections as deal with the jurisdiction of the Court. Ss. 53 and 54 do not deal with the jurisdiction of the Insolvency Court, but only lay down rules as to the manner in which evidence should be considered in certain cases arising in that Court. Those sections, therefore, do not control the provisions of S. 4 though S. 56 does. Insolvency Court can try the issue whether the Insolvent is entitled to the property or not after proper opportunity is given to the other side to plead to the application.

Per **Sen, J.**—The Court of Insolvency is a creature of statute. It is a special tribunal having jurisdiction over a limited range of cases within such limits as have been imposed by the statute to which it owes its existence. Unless the Insolvency Act expressly or by necessary implication (1) took away the powers of the ordinary Civil Courts to adjudicate upon the validity or otherwise of certain transfers which are sought to be impugned, either upon the ground of fraud or on the ground of want of consideration, etc., and (2) invested the Insolvency Court with the trial of such matters the jurisdiction of the Civil Courts is not affected or impaired.

An Insolvency Court cannot try a question of title relating to a transfer which has taken place more than two years before the order of adjudication having regard to the provisions of S. 53, Insolvency Act. Where the transfer was intended not to be operative from the beginning and the insolvent has remained in possession of the property, the Receiver may apply for its annulment, but where the transfer was executed by a proper instrument and duly registered and was intended to put the property beyond the reach of the creditors and a third party is claiming under the transfer, such a transaction cannot be treated as a mere paper transaction. In the latter case, S. 53, Insolvency Act, will apply. 113 Ind. Cas. 819=51 All. 550=1929 A. L. J. 155=A.I.R. 1929 All. 105 (F.B.)

15. Transfer from Transferee.

——S. 4.

Remedy in respect of transfer from the transferee of the insolvent can only be obtained from the Insolvency Court in exercise of jurisdiction under S. 4 and not under S. 53 or S. 54. A.I.R. 1941 Cal. 298=73 C. L. J. 225=199 Ind. Cas. 412.

——S. 4.

When an alienation by an insolvent is declared void under S. 4 on the ground of fraud, a subsequent transfer made by the alienee is also void and cannot stand. A.I.R. 1937 Lah. 323=174 Ind. Cas. 697.

——S. 4.

Where the Court has set aside on an application by the Receiver a transfer by insolvent to his wife, as fraudulent, the decision is binding on the transferee to whom the property was transferred by the wife after its transfer in her favour by her insolvent husband. The fact that such transferee of the wife was not a party to the proceedings for setting aside the transfer is not material, the decision being a decision **in rem**. A.I.R. 1937 Rang. 369=173 Ind. Cas. 354.

——Ss. 4, 53—**Transferee transferring property to** third party—Receiver's application for annulment of insolvent's transfer—Third party not impleaded—Order of annulment, if binding on third party—Right to show that original transfer was made in good faith.

Where the transferee of an insolvent transfers the property to a third party and the Receiver has knowledge of it, but in a subsequent petition by the Receiver for annulment of the transfer made by the insolvent, the third party is not impleaded, he is not bound by an order of annulment made against the transferee from the insolvent. It will, therefore, be open to him to show that the original transfer by the insolvent was made in good faith and for valuable consideration and also to show that he himself acted in good faith and paid full consideration being unaware of the insolvency proceedings. A.I.R. 1935 All. 673=1935 A.L.J. 573=57 A 900=1935 A.W.R. 536=155 Ind. Cas. 684.

——Ss. 4, 53—**Alienation by insolvent—Subsequent** alienee made a party—Original transfer falling through—Subsequent transfer, if to be set aside.

Where the original alienation by an insolvent is challenged and the subsequent alienees are also made parties, the subsequent transfers should also be set aside when the original transfer falls through, as the former cannot have any greater validity than the latter. If the Insolvency Court has no power to do so under S. 53, it has power to do so under S. 4. A.I.R. 1934 Lah. 101 (2)=15 Lah. 349=37 P.L.R. 8=148 Ind. Cas. 1013.

——S. 4.

In proceedings under S. 53, though later transactions by a transferee from an insolvent cannot be questioned on a ground peculiar to themselves and independent of the attack in the main transaction, yet if the sale deed by the insolvent was not **bona fide**, the further transactions by the transferee also fall to the ground along with it.

Even if S. 53 does not apply, such transactions can be declared void under S 4. A I.R. 1933 Mad. 271=1932 M.W.N. 821=143 Ind. Cas. 372.

16. Who can move.

——S. 4—**Composition scheme — Re-opening—Application by creditor.**

Where a Court accepts a composition in respect of the insolvent's debts and the adjudication is annulled the creditor not having the notice of the proposed composition is entitled to file an application under S. 4 to re-open the whole matter. But he has to bring his case under S. 38 (4). The fact that he can file an appeal under S. 75 against the acceptance of the composition is immaterial. A.I.R. 1944 Mad. 327=57 L.W. 48=(1941) 1 M.L.J. 84=1944 M.W.N. 197.

——S. 4.

A proceeding under S. 4 can be conducted by the Receiver alone and not by a creditor. If a claim is to be laid under S. 4 to a particular property on the ground that it forms a part of the insolvent's estate, it is the Receiver and the Receiver alone, who is entitled to put forward that claim. A.I.R. 1942 Cal. 584=75 C.L.J. 263=206 Ind. Cas. 628.

——S. 4.

The Court itself cannot initiate a proceeding under S. 4 and decide a question of title without being moved by any body to do so. The procedure to be followed in such cases is for the creditor to apply to the Court to direct the Receiver to institute proceedings under S. 4, and the Court can pass a conditional order making it a condition precedent that the creditor so applying should put the Receiver in funds and properly indemnify him against the costs of the action. A.I.R. 1942 Cal. 584=75 C.L.J. 263=206 Ind. Cas. 628.

——Ss. 4, 59 (d)—**Declaration of transaction as** fictitious—Procedure to be adopted by Receiver—Creditor, if can move Court in his own name under S. 4.

Section 4 gives jurisdiction to the Insolvency Court to deal with matters which were not previously within its jurisdiction, but a creditor, who, under the old law could not have filed a suit to establish a right, could not be given by its terms any right to move the Insolvency Court. The right of suit to establish a claim to property as part of the insolvent's estate lies in the Receiver in exercise of his powers under item (d) of S. 59 of the Act, and this is true whether the right is exercised in the Insolvency Court itself by virtue of the jurisdiction conferred on it by S. 4, or by way of separate suit in the appropriate Court. Therefore, where the Court is called upon to exercise jurisdiction under S. 4 for declaring a transaction as fictitious, it should be for the Receiver to move the Court in this behalf, and even with the premission of the Court, a creditor should not be allowed to do so in his own name. A.I.R. 1941 Cal. 298=73 C.L.J. 225=199 Ind. Cas. 412.

——S. 4.

The mere fact that the name of the alleged transferee is entered in the schedule of creditors does not disentitle other creditors from moving the Court under S. 4 to set aside an alienation made in his favour by the insolvent. A.I.R. 1937 Lah. 242=39 P.L.R. 405=172 Ind. Cas. 402.

——S. 4.

Proceedings under S. 4 need not necessarily be initiated by a plaint or a regular application. The section is so worded that it is open to the Court to take proceedings **suo motu.** A.I.R. 1933 Lah. 789=34 P.L.R. 1063=146 Ind. Cas. 912.

——S. 4.

Application to the Insolvency Court to remove the obstruction after the possession of the property need not be presented by the Official Receiver. 1933 M.W.N. 1487.

——S. 4.

A Hindu husband promised to pay his first wife maintenance at a certain rate and gave her a house to

live in, in return for her giving consent to his marrying a second wife, such consent being necessary prior to second marriage of the husband according to the rules of the caste to which the parties belonged. The terms were reduced to writing, signed by the parties and attested by witnesses. In pursuance of the agreement the first wife took possession of the house and the husband married a second wife. Subsequently, on the adjudication of the husband as insolvent, the Receiver of his estate applied under S. 4 to recover possession of the house the first wife was occupying:

Held, that the agreement was entered into for valuable consideration and was a valid one. A.I.R. 1932 Bom. 602=34 Bom. L.R. 1317=140 Ind. Cas. 745.

——S. 4—After-acquired property—Dealings by insolvent—Avoidance—Application by Receiver.

Where a bankrupt, who has not obtained his discharge, enters into transactions in respect of property acquired after the bankruptcy, all such transactions are void as against the Receiver who can therefore move the Court for their avoidance. 97 Ind. Cas. 221 =4 Rang. 125=5 Bur. L. J. 98=A.I.R. 1926 Rang. 179.

17. Miscellaneous.

——Ss. 4 and 53—Suit by defeated claimant to attached property against attaching decree-holder and judgment-debtor—Judgment-debtor becoming insolvent—Official Receiver made party—Suit not contested by the Official Receiver—Sale deed in favour of plaintiff found to be supported by consideration and not entered into to defeat creditors by all the Courts—Application under Ss. 4 and 53 of the Provincial Insolvency Act by the Official Receiver thereafter—Re-agitation of the question of the validity of the sale—Competency.

In a suit by a defeated claimant to attached properties against the attaching creditor and the judgment-debtor, the Official Receiver was made a party on the judgment-debtor's insolvency. The Official Receiver did not contest the suit and the plaintiff's claim was allowed by the trial Court which found that the sale in favour of the plaintiff was for valuable consideration and was not intended to defeat creditors of insolvent. An appeal and a second appeal failed. Thereafter the Official Receiver bestirred himself and filed an application under Ss. 4 and 53 of the Provincial Insolvency Act for a declaration that the sale deed in favour of the plaintiff was without consideration and was for defeating the claims of creditors of the insolvent. On the question whether the Official Receiver could agitate the point over again.

Held, the question on which a new decision was now sought for arose out of the facts and contentions which had already been completely adjudicated upon in proceedings to which he was a party. Hence he could not be allowed to reagitate the question of title before the Insolvency Court. 1937 Lah. 4, Foll. 1949 M. W. N. 460=A. I. R. 1950 Mad. 184=(1949) 2 M. L. J. 128.

——Ss. 4, 77.

District Court of Amherst in Burma, requesting District Court at Ramnad under S. 77 to sell insolvents' property alleged to be in Ramnad District—Person claiming title to property sold, by application under S. 4 in Amherst Court—Application returned for presentation to Ramnad Court—Fresh application under S. 5 on Ramnad Court:

Held, that the fact that the fresh application was filed under S. 5 of the Act did not preclude Ramnad Court from treating the petition as being filed under the appropriate section, namely, S. 4.

Held further, that the proper Court to decide this question in the circumstances was the District Court of Ramnad. A.I.R. 1941 Mad. 580=1941 M.W.N. 246 =53 L.W. 370=(1941) 1 M.L.J. 423=198 Ind. Cas. 562.

[**Reversing**: 1940 M.W.N. 905=A.I.R. 1941 Mad. 75=52 L.W. 377].

——Ss. 4 and 28—Leave of Court—Implied leave.

Where a creditor made an application to a District Munsif sitting as an Insolvency Court, under S. 4, praying for a declaration that a certain transaction was **benami** and the Munsif entertained the application, heard it and gave a decision upon it:

Held, that though no formal application had been made for leave under S. 28 of the said Act and no formal leave had been granted, the fair inference from what took place was that leave of the Court had been granted and the application under S. 4 was not, therefore, barred for want of leave under S. 28.

[Their Lordships drew the attention of Insolvency Courts, Official Receivers and the Official Assignee to the observations made by the Judicial Committee in **V. P. R. V. Chokalingam Chetti v. Seethai Achi**, 107 Ind. Cas. 237]. A.I.R. 1935 Mad. 46=67 M. L. J. 616=1934 M.W.N. 1034=40 L.W. 693=153 Ind. Cas. 624.

——S. 4.

A person filing objection under S. 4 is not estopped from contending that the Official Receiver had no Jurisdiction on the ground that he had consented to the remand as it is a matter of jurisdiction and not of mere irregularity of procedure. A.I.R. 1933 Mad. 471 =38 L.W. 896=146 Ind. Cas. 204.

——S. 4—Insolvency of Mahomedan heir—Priority of ancestor's creditors to insolvent's creditors.

Under Mahomedan law, although upon the death of the ancestor, his estate devolves immediately upon his heirs, the heirs take it subject to the payment of his debts and, therefore, although there may not be a specific charge upon the estate for the payment of debts, the debts may be deemed to constitute a general charge on the estate. That being so, if such an estate devolves upon a person who is subsequently declared insolvent, the creditors of the insolvent cannot seize the property in competition with the creditors of the deceased. 125 Ind. Cas. 28=1930 A.L.J. 989=A.I.R. 1930 All. 552.

——S. 4—Nature of application.

An application under S. 4, Prov. Insolvency Act, does not amount to a 'suit' within the meaning of O. 21, R. 63, Civil P. C. 1937 M.W.N. 1046.

——S. 4—Nature of proceedings—Proceeding in insolvency if a suit.

An insolvency proceeding is a suit. 9 Pat. 664=A.I.R. 1930 Pat. 588.

——S. 4—Mortgagor becoming insolvent—Mortgaged property compulsorily acquired—Right of mortgagee to mortgage amount from compensation.

If the mortgagor becomes insolvent it is only the equity of redemption that vests in the Official Receiver and if during the pendency of the insolvency proceedings the mortgaged property is compulsorily acquired the mortgagee will be entitled to his mortgaged amount from the compensation received for the property acquired. 20 M.L.W. 667=A.I.R. 1925 Mad. 245.

——S. 5.

Synopsis.

1. 'Ad interim' protection order.
2. Appeal and Revision.
3. Application of C. P. C.
4. Inherent powers.
5. Review.
6. Scope of Section.
7. Transfer of case.
8. Miscellaneous.

1. 'Ad interim' protection order.

——S. 5—Ad interim protection order.

In the face of Ss. 23 and 31 the Insolvency Court has no inherent jurisdiction under S. 5 to pass a protection order or to direct that the warrant of arrest issued against the alleged insolvent by any Court in execution of a money-decree should not be executed. A.I.R. 1934 Lah. 113=148 Ind. Cas. 975.

——S. 5—Ad interim protection — Exercise of power by District Judge—Interference by High Court.

Section 5 of the Provincial Insolvency Act empowers the District Judge to grant **ad interim** protection to a person who has applied for being adjudged an insolvent. Where the District Judge in the exercise of his discretion has refused to grant **interim** protection, unless the discretion has been wrongly exercised, the High Court will not interfere. 85 Ind. Cas. 677=20 M.L.W. 879=1925 M.W.N. 271=A.I.R. 1925 Mad. 170 =47 M. L. J. 783.

2. Appeal and Revision.

——Ss. 5 and 75—Right of appeal—Test—"A decision come to or an order made"—What would amount to—Order granting application under O. 1, R. 10, C.P. Code, to add aliences from insolvent as parties to insolvency application—Appeal to District Court—Competency.

S. 5 of the Provincial Insolvency Act cannot override the provisions of S. 75 of the same Act in so far as the latter section confers a right of appeal in any instance. It is not permissible to read the provisions of S. 75 with a further modification that the provisions are subject to the provisions of the C.P. Code.

An order which finally decides a point of controversy between the parties would fall within the words "a decision come to or order made" which occur in S. 75 (1) of the Provincial Insolvency Act.

Against orders granting an application made under O.I, R. 10, C.P. Code, praying that certain aliences from the insolvent may be added as party respondents in an insolvency application and that the delay in filing such an application may be excused, two revision petitions were sought to be filed in the High Court on the ground that as they were not appealable under O. 43, C.P. Code, appeals to the District Court were incompetent. On a question as to the competency of the revisions to the High Court:

Held, the only question to be decided was whether the orders in question were orders made or decisions come to by the judge in the exercise of insolvency jurisdiction. They are such orders and they definitely conclude a particular dispute between the parties, namely, whether the alienees were to be made parties or not and fall within the words "a decision come to or an order made" within the meaning of S. 75 (1) of the Provincial Insolvency Act. Revisions against those orders to the High Court would be incompetent inasmuch as appeals lie to the District Court. I.L.R. (1949) Mad. 106=61 L.W. 305=A.I.R. 1948 Mad. 520= 1948 M.W.N. 301=(1948) 1 M.L. J. 310.

——S. 5—Appeal—Order refusing to set aside dismissal of appeal for default—If appealable.

An order under O. 41, R. 19, refusing to set aside an order of dismissal of an appeal passed **ex parte** is appealable even though the order of refusal was passed in appeal in the course of the insolvency proceedings. 120 Ind. Cas. 791=A.I.R. 1930 Lah. 112.

——S. 5—(1907), 3, 46—Leave to appeal—Order dismissing petition for fraud, etc.—When lies.

No appeal lies from an order of dismissal of an insolvency petition made on the ground of fraud etc., except with the leave of the District Court or the High Court. 7 Bur. L.T. 53=7 L.B.R. 257=24 Ind. Cas. 438.

——S. 5—Revision—Order by District Judge for taking additional evidence—If revisable by High Court.

An order for additional evidence passed by the District Judge on appeal is not final within S. 75 (1), and no revision lies under the provisio to S. 75 (1), from such order. But under S. 5 (2), there being no provision in the Act which says that interlocutory order is final and the High Court having power to set aside an interlocutory order passed in a civil suit, it has power to set aside the order for additional evidence. 61 Ind. Cas. 589=A.I.R. 1921 Nag. 159.

3. Application of C. P. C.

——S. 5—Application of Civil P.C.—Rule relating to protection of Ruling Princes, if rule of procedure.

Even by the combined operation of S. 141, Civil P.C and S 5 Provincial Insolvency Act, all the provisions of the Code relating to suits are not attracted to Insolvency proceedings. The insolvency Act authorizes the Insolvency Court to give notice of the date of the hearing of the insolvency petition to all creditors and debtors irrespective of the question whether they are Sovereign Princes or Ruling Chiefs. The rule relating to the protection of Sovereign Princes and Ruling Chiefs from being sued as embodied in S. 86, Civil P.C., is not a rule of procedure as contemplated by S. 141 of the Code,

A.I.R. 1940 Cal. 244=I.L.R. (1940) 1 Cal. 344=71 C.L.J. 316=44 C.W.N. 333=189 Ind. Cas. 667.

——S. 5 (2)—Cross objections — Procedure applicable.

It is clear from the provisions of S. 5 (2) that the procedure relating to cross objections in O. 41, R. 22, Civil P.C., would apply to appeals under the Provincial Insolvency Act. A.I.R. 1940 Nag. 292=1940 N.L.J. 385=I.L.R. (1942) Nag. 156=201 Ind. Cas. 439.

——S. 5—Application of Civil P.C.

Order 21, R. 98, Civil P.C., is a special rule limited to the case of a decree-holder trying to obtain possession under the decree. The Provincial Insolvency Act has its own rules in this behalf and so a rule of Civil P.C., pertaining to another matter cannot be applied by analogy under the general provision of S. 5, Provincial Insolvency Act. A.I.R. 1940 Nag. 233=1940 N.L.J. 283=I.L.R. (1941) Nag. 757=190 Ind. Cas. 455.

——Ss. 5 and 18—Application of Civil P.C., O. 9, R. 13.

Order 9, R. 13 applies to insolvency proceedings also. A.I.R. 1940 Pat. 623=6 B.R. 567=187 Ind. Cas. 794.

——S. 5—Procedure—Applicability of C. P. Code, O. 9, R. 13.

Under S. 5, Provincial Insolvency Act, the provisions of the Civil Procedure Code, including those contained in O. 9, are made applicable to proceedings under that Act except when they are inconflict with any of its provisions. The Insolvency Court therefore is not justified in returning an application for setting aside an **ex parte** order of adjudication without satisfying itself that it had not been presented in good faith. Further inquiry should be ordered if Court is satisfied that the application is presented in good faith. 121 Ind. Cas. 303=A.I.R. 1930 Lah. 996.

——S. 5—Setting aside ex parate order—Order setting aside sale by Insolvent—Transferee ex parte—Power to re-hear case.

Where a sale has been set aside **ex parte** against the transferee in an insolvency proceeding, he can be given opportunity to prove his case if sufficient cause for his non-appearance is shown. 103 Ind. Cas. 381=A.I.R. 1927 Mad. 897.

——S. 5—Application of Civil P.C.

By virtue of S. 5, the provisions of Civil P.C., are applicable subject to the provisions of the Act. When an application under S. 53 is dismissed, subsequent application under S. 54 is not barred. A.I.R. 1937 Lah. 668=39 P.L.R. 914=173 Ind. Cas. 514.

——S. 5—C.P.C., O. 6., R. 17—Applicability.

Section 5, Prov. Insol. Act (1920), renders the provisions of O. 6, R. 17, Civil P.C., relating to amendment of pleading applicable to petitions made under the Act. A.I.R. 1935 Mad. 202=67 M.L.J. 924.

——S. 5—Court's power to carry out its orders.

Under S. 5, the Court has the general powers under the Civil P.C., and has power to carry out its own order. (1935) 158 Ind. Cas. 990=8 N.L.J. 14.

——S. 5—Powers of restitution—Application of S. 144, Civil P.C.

Where the High Court set aside an order of the Insolvency Court directing the Receiver to distribute the assets of the debtor among the scheduled creditors but the Receiver had made payments before the order was so set aside:

Held, that S. 144, Civil P.C., applied and that the Insolvency Court had jurisdiction to order that the persons who had received payments should refund the amount to the Receiver. A. I. R. 1933 All. 117=1932 A.L.J. 1095=143 Ind. Cas. 330.

——S. 5—Application against several debtors— Single application for adjudication—Maintainability—Procedure.

There is no legal bar to a single application being made by a creditor for adjudicating two or more persons as insolvents if they are jointly liable on a debt or have committed a joint act of insolvency. The question, however, whether such an application should be jointly tried and decided will depend on the facts of each case. The proper test to be applied to such case is to treat the petition as a suit as it should be under S. 5; if the suit is bad for multifariousness, the petition should not be proceeded with. But if it is free from this defect, the Court should try it and if it comes to the conclusion that all the debtors or some of them should be adjudicated insolvents, it should pass an order to that effect. 12 L.L.J. 96=A.I.R. 1930 Lah. 592.

——S. 5—Injunction—Sale threatened by alleged secured creditor—Power of Court to grant injunction.

Under S. 5 the Insolvency Court has the same powers which an ordinary Civil Court has under the Civil Procedure Code, and those powers include the powers mentioned in O. 39. Hence an Insolvency Court is justified in granting an injunction to prevent a creditor who claims a lien over certain of the debtor's assets and which is disputed by other creditors from bringing the property to sale pending the decision of the dispute between the two creditors. 111 Ind. Cas. 908=6 Rang. 352=A.I.R. 1928 Rang. 241.

——S. 5—(1907)—S. 47—C. P. C., Or. 39, R. 1——Injunction—Insolvency Court, when can issue.

The insolvency court cannot stay every pending litigation but can only issue an injunction, if circumstances enumerated in Or. 39, R. 1, C.P.C. are proved to exist.

Since a court cannot under Or. 39, R. 1, issue an injunction upon a person not a party before it, the Insolvency Court also cannot issue an injunction against a person not a party before it. 3 Pat.L.J. 456=(1918) P.H.C.C. 302=5 Pat. L.W. 250=46 Ind. Cas. 224.

——S. 5—Sale in insolvency proceeding—Limitation to set aside sale.

The provisions of O. 21 of the C. P. Code are applicable to Insolvency proceedings, and the limitation applicable to a petition for setting aside a sale in an insolvency proceeding must be thirty days as laid down in O. 21, read with Art. 166: A.I.R. 1921 Nag. 25, Foll. 102 Ind. Cas. 543=A.I.R. 1927 Nag. 262.

——S. 5—Liability of defaulting purchaser— Applicability of C. P. Code—Liability to pay deficit.

The sale and action taken by the Insolvency Court for the realization of the insolvent's property are

proceedings in Court under the Insolvency Act and the provisions of O. 21 are applicable to them. The Insolvency Court has the power to call upon the defaulting purchasers to pay the deficits caused by their default and to recover them under O. 21, R. 71. 62 Ind. Cas. 307=17 N.L.R. 49=A.I.R. 1921 Nag. 25.

——S. 5 (1)—(1907), S. 47 (1)—C.P.C., S. 21—Applicability of.

Section 21 C.P.C. is not applicable to proceedings under the Pro Ins. Act by virtue of S. 47 (1) of the Act. Objection to the jurisdiction of the insolvency court can be taken on appeal. 18 C. W. N. 1050=20 Ind. Cas. 370.

——S. 5—(1907), Sec. 47—C.P.C., Sch. II.

A court cannot refer to arbitrators, a proceeding in Insolvency as Sch. II of the C.P.C., does not apply to proceedings under the Pro. Insolvency Act. 50 P. R. 1916=135 P.W.R. 1916=151 P.L.R 1916=34 Ind. Cas. 549.

——S. 5—(1907), S. 47—Attachment—Procedure.

Sec. 47 lays down no procedure for effecting an attachment; so the court must follow the same procedure as it would do in the exercise of its original civil jurisdiction. 36 All. 65=12 A.L.J. 24=24 Ind. Cas. 752.

4. Inherent powers.

——S. 5—Inherent powers to alter or vacate orders.

By virtue of the provisions of S. 5 (1), an Insolvency Court may exercise all the powers which are conferred upon it as a Civil Court of original jurisdiction unless such powers are contrary to the provisions of the Prov. Insol. Act; but S. 151, Civil P. C., does not confer upon a Court authority to do that which is prohibited by law. A Court has no inherent power to alter or vacate its own order and cannot invoke its inherent powers for this purpose. Consequently, a Provincial Insolvency Court has no power to alter or revoke its orders. A.I.R. 1940 Rang. 156=1940 Rang. L. R. 392=189 Ind. Cas. 421.

——S. 5—Inherent powers—Whether same as those of Civil Courts—**Ex parte** order—Injustice from—If can be undone—S. 17—Scope of.

An Insolvency Court, while passing an order under S. 43, Prov. Insol. Act, annulling adjudication, omitted to pass an order under S. 37, Prov. Insol. Act, directing that the property of the insolvent shall vest in the Official Receiver:

Held, that the Insolvency Court possessed inherent powers of a Civil Court to make necessary orders for the ends of justice and to prevent the abuse of the process of the Court and the Court could add the omission at a late stage.

The Insolvency Judge has the power to undo the injustice which is likely to have resulted from his **ex parte** order when no innocent third party had acquired any rights. A. I. R. 1934 Lah. 468=15 Lah. 698=36 P.L.R. 499=153 Ind. Cas. 993.

——S. 5—Inherent powers of Court—Stay of proceedings.

Though the Prov. Insol. Act does not expressly empower the Court to pass on order staying the insolvency proceedings, still the Court is competent to pass such an order in the exercise of its inherent jurisdiction on the analogy of the somewhat similar provisions contained in S. 94 of the Presi. Towns Insol. Act. A.I.R. 1931 Sind 65=130 Ind. Cas. 559.

——S. 5—Claim of third party—Power of Court to investigate.

Section 151 of the Civil Procedure Code, read with S. 47 (2) of Act III of 1907 enabled Courts to make some trial of the question whether certain property should vest in the Court.

As to the extent to which such trial should proceed under Act III of 1907, the Court has only to satisfy itself that the process of the Court was not abused. The existence of a sale-deed which is suspected to be a paper transaction does not necessarily show that the insolvent's title to the property is really doubtful. The existence of such a sale-deed does not bar the Court from enquiry whether such deed is a bogus one so that the Court is not absolutely precluded from deciding the claims of third parties. 61 Ind. Cas. 589=A.I.R. 1921 Nag. 159.

——S. 5—(1907), S. 47—Dt. Court, power of, to stay sale in the Sub-Court.

The Dt. Judge has no jurisdiction to stay a sale proceeding in the Sub-Court, either under S. 47 or S. 151 C. P. Code. 3 L.W. 250=32 Ind. Cas. 897.

——S. 5—(1907), S. 47—Inherent power—Dismissal of insolvency petition—C. P. Code, S. 151.

An Insolvency Court has inherent power to dismiss an insolvency petition if it is presented not for **bona fide** obtaining an adjudication but for a collateral or inequitable purpose, or if it is an abuse of the process of Courts. 32 All. 645=7 A.L.J. 855=7 Ind. Cas. 39.

Review.

——Ss. 5 and 43 and C.P. Code, O. 47, R.1—Orders passed under S. 43 of the Provincial Insolvency Act in ignorance of full facts—If reviewable.

Orders passed under the Provincial Insolvency Act are reviewable as O. 47, R. 1, Civil Procedure Code, is rendered applicable to proceedings in insolvency by S. 5 of the Provincial Insolvency Act.

Where matters of which the Court should have been apprised by the Official Receiver are not brought to its notice and the Court annuls the insolvency under S. 43 of the Provincial Insolvency Act, the Court would have jurisdiction to entertain an application for review of such an order when its attention is drawn to the facts which were not placed before it by the Official Receiver and which justify a re-consideration of the previous order. I.L.R. (1948) Mad. 659=A.I.R. 1948 Mad. 233 =60 L.W. 711=1947 M. W. N. 674=(1947) 2 M.L.J. 425.

——S. 5—Order passed without notice to insolvent—Court can vacate order.

An Insolvency Court possesses the same powers as other Civil Courts have to correct its own errors, committed inadvertently or by an oversight.

Consequently, where an order has been passed by the Insolvency Court vitally affecting the insolvent, without notice to him, the Court is entitled to go into the

matter afresh and to vacate the order if it thinks proper. A.I.R. 1943 Pat. 142=22 Pat. 74=23 P.L.T. 697=9 B.R. 248=205 Ind. Cas. 570.

——S. 5—Powers of review.

A Court acting under the Prov. Insol. Act has power to review its own orders under S. 5 (1) read with O. 47, R. 1, Civil P. C. A.I.R. 1933 Nag. 39=28 N.L.R. 295 =141 Ind. Cas. 48.

——S. 5—Setting aside ex parte orders — Powers of review.

In the exercise of insolvency jurisdiction, the Mofussil Courts have, by virtue of S 5, the right of review and the right to entertain applications under O. 9, Civil P. C., to set aside orders passed **ex parte.** A.I.R. 1932 Mad. 63=61 M.L.J. 719=1931 M.W.N. 924=34 L. W. 735=135 Ind. Cas. 750.

——S. 5—Review—Power of Receiver.

Official Receiver cannot be delegated with the power to review his orders under S. 5. If the Receiver thinks that a debt has been improperly entered in the schedule, he may apply to the Court to expunge such entry or reduce the amount of the debt. 105 Ind. Cas. 366=A.I.R. 1928 Sind 40.

——S. 5—Power of Court—Review.

Court has power to review its own order of annulment. A.I.R. 1923 Mad. 355 and A.I.R. 1922 All. 206, Foll. 94 Ind. Cas. 351=23 M.L.W. 644=1926 M.W.N. 256=A.I.R. 1927 Mad. 175=51 M.L.J. 60.

——S. 5—Power of Court.

Section 5 provides that the Court "shall have the same powers and shall follow the same procedure as it has and follows in the exercise of its original civil jurisdiction." Therefore the District Judge does not act illegally in altering his order after it had been passed. 72 Ind. Cas. 225=46 Mad. 405=19'3 M.W N. 212=A.I.R. 1923 Mad. 355=44 M.L. J. 251.

——S. 5—Power of Court in appeal — Order granting review by District Judge—Interference by High Court.

The District Judge as an Appellate Court in insolvency jurisdiction can exercise the same power under the C. P. Code which he would exercise ordinarily. He also can grant a review. The High Court will be guided by the procedure laid down in C. P. Code in dealing with an appeal preferred under S. 75 (3) of the Provincial Insolvency Act, from an order of the District Judge granting review of judgment in an appeal; and it will not interfere with the order under appeal unless it is one to which objection could be taken under the provisions of R. 7, O. 47, C. P. Code. 67 Ind. Cas. 317=44 All. 605=20 A.L. J. 517=A.I.R. 1922 All. 206.

6. Scope of Section.

——S. 5—Limits on power.

Since the powers given by S. 5, Provincial Insolvency Act, are expressly subject to the provisions of the Act, and the provisions of S. 43 (1) are mandatory, they must to that extent be limited. A.I.R. 1926 Mad. 942, Foll. 125 Ind. Cas. 946=8 Rang. 187=A.I.R. 1930 Rang. 166.

——S. 5—(1907), S. 47—Scope of.

The powers referred to under S. 47 are powers to be exercised in proceedings which the Insolvency Court has power to entertain under other provisions of the Act. 7 Ind. Cas. 765 Foll. 46 Ind. Cas. 377 (Cal.)

——S. 5—S. 47—C. P. C., Or. 21, R 71—Scope of Sec 47 different (54) from that of Or. 21.

As regards the court's powers and duties in connection with sale of property, the operation of S. 47 of the Insolvency Act, in connection with the Receiver's sale of the insolvent's property, is not the same as the operation of O. 21 of the C. P. C. which deals with the execution of civil court decrees; and so R 71, Or. 21 of C P. C., cannot be invoked by the Receiver for realising a loss sustained by the failure of the highest bidder at the auction sale of the insolvent's property to deposit one-fourth of the purchase money. 39 All. 267=15 A.L. J. 253=37 Ind. Cas. 830.

7. Transfer of case.

——S. 5 (2)—'Subject as aforesaid', meaning of— Power of High Court to transfer cases to be disposed of under its extra-ordinary civil jurisdiction.

The words "subject as aforesaid" in S. 5 (2) of the Act mean subject to the ordinary civil jurisdiction of the District Court in insolvency matters, that is, in all proceedings in insolvency, the proceeding must commence in the District Court. The High Court can transfer cases to be disposed of in the High Court under its extraordinary civil jurisdiction. A.I.R. 1936 Lah. 608=38 P.L.R. 235 and 1013=17 Lah. 582= 160 Ind. Cas. 972.

——S. 5—Transfer of case—Sub Judge to High Court—Maintainability.

An application to withdraw an insolvency petition from the file of a Subordinate Judge and transfer it for trial and disposal to the Original Side of the High Court is not maintainable. 114 Ind. Cas. 352=52 Mad. 57=28 M.L.W. 369=A.I.R. 1928 Mad. 1091= 55 M.L.J. 671.

——S. 5—Transfer of case—Powers of High Court, Original Side.

Original Side of the High Court is not competent to transfer insolvency proceedings from one Court to the other. The powers conferred by S. 5 of the Provincial Insolvency Act, which are made subject to the other provisions of the Act, cannot be exercised in such a way as to give the Original Side of the High Court a jurisdiction from which it is expressly excluded by the terms of the Act whether that section is read with S. 24, C. P. Code or cl. (11) of the Letters Patent. 100 Ind. Cas. 265=4 Rang. 554=A.I.R. 1927 Rang. 105.

8. Miscellaneous.

——Ss. 5 and 44 (2) — Madras Agriculturists Relief Act (IV of 1938), S. 21—Adjudication in 1930 —Absolute discharge in 1932—Estate vested in Official Receiver—Declaration of dividend and disbursement —Petition by insolvent to stay disbursement in order to allow him to claim benefit of the Act IV of 1938— Petition to revive his liability after discharge would not lie.

The petitioner was adjudged an insolvent in 1930. He obtained as absolute order of discharge in 1932, though his properties continued in the hands of the Official Receiver for the purpose of satisfying the proved debts rateably. In 1944 the first dividend was declared and was substantially paid out. The second dividend was pending disbursement, when the petitioner moved the Insolvency Court to stay the disbursement, claiming benefits under S. 21, of the Act IV of 1938.

Held, that the debts were no longer, by reason of his absolute discharge, the debts of the insolvent so as to attract the application of S. 21 of the Act IV of 1938. They were merely the debts of the estate vested in the Official Receiver's hands. The petitioner, having by his discharge escaped from the liability of the debts proved in the insolvency, was seeking to revive that liability in order that he might get those debts reduced so as to relieve the burden upon the estate vested in the Official Receiver, in the hope of some remnant coming back to him. This he cannot do. 59 L.W. 507=1946 M.W.N. 594=230 Ind. Cas. 213=A.I.R. 1947 Mad. 95=(1946) 2 M.L.J. 209.

——S. 5—Joint creditors—Application by one to adjudicate the debtor—Maintainability.

A creditor who is not the only person entitled to the benefit of a decree is not entitled to utilise the decretal debt upon which to found a petition for adjudication. 87 Ind. Cas. 751=A.I.R. 1926 Cal. 234.

——S. 5—Non-joinder of Receiver—Effect.

Where a Receiver was a party in the trial Court and had acquiesced in the order but was not made a party in appeal:

Held, the defect was not fatal where the order in appeal was in favour of the Receiver. 70 Ind. Cas. 572=1922 M.W.N. 717=A.I.R. 1922 Mad. 439.

——S. 5—Purchaser from Receiver—Possession with third party—Application for possession.

A purchaser from the Official Receiver of a property of the insolvent whom the Receiver represents, can obtain an order from the Insolvency Court for delivery of possession of the property, where his application is resisted by a third party.

Clause 3 of S. 56 is not limited to the case of an application by the Receiver and the terms of the clause are general. The operation of this clause cannot be limited to applications by the Receiver himself. 65 Ind. Cas. 394=45 Mad. 434=1922 M.W.N. 110=31 M.L.T. 86=A.I.R. 1922 Mad. 147=42 M.L.J. 185.

——S. 5—(1907), Sec. 47—Limitation—Extension of time.

Section 5 of the Limitation Act (1908), can be applied to cases under the Pro. Insol. Act. 80 P.W.R. 1916=33 Ind. Cas. 730 (Lah.).

——S. 6.

Synopsis.

1. Act of insolvency.
2. Interpretation—Decree for payment of money—Cls. (e), (h) and (i).
3. Cl. (a). Transfer of property to third person for benefit of creditors.
4. Cl. (b). Transfer with intent to defeat or delay creditors.
5. Cl. (c). Fraudulent preference.
6. Cl. (d). Departure or seclusion with intent to defeat or delay creditors.
7. Cl. (e). Sale of property in execution of decree.
8. Cl. (f). Petition to be adjudged insolvent.
9. Cl. (g). Notice of suspension of payment.
10. Miscellaneous.

1. Act of insolvency.

——S. 6—Act of insolvency—Nature of act.

The enumeration of the various acts of insolvency in S. 6 contemplates those acts which, in the public eye, shake the credit of a debtor and are likely to cause a scramble amongst the creditors for his assets. A.I.R. 1942 Mad. 306=(1942) 1 M.L.J. 38=55 L.W. 28=1942 M.W.N. 117=199 Ind. Cas. 793.

——S. 6.

Any transfer of an interest in an immovable property by a debtor cannot, by itself, be regarded as an act of insolvency. Where a debtor raises money for his own business by mortgaging a house and the transaction has not in the least degree diminished the value of his assets but merely transformed them partly into a more liquid form and subsequently loses the money thus raised, such a subsequent loss cannot have the retrospective effect of converting the transaction into an act of insolvency if it was not an act of insolvency at the time when it took place. A.I.R. 1940 Lah. 496=191 Ind. Cas. 414.

——S. 6—Act committed by agent—Adjudication of principal.

Where a business belonging to three brothers was carried on by the eldest brother and the three brothers were adjudicated insolvents on the ground that the eldest brother had secluded himself and had also expressly stated to the creditors that he could not pay their debts and the two younger brothers contended that they cannot be adjudicated on the basis of acts committed by their eldest brother:

Held, that so far as the question of seclusion was concerned, that was an act of the eldest brother alone and could not be attributed to his younger brothers; but as the eldest brother was carrying on the business his statement of inability to pay his debts was binding on the younger brothers and was an act of insolvency so far as the younger brothers were concerned. A.I.R. 1937 Mad. 13=44 L.W. 651=1936 M.W.N. 1040=71 M.L.J. 730=166 Ind. Cas. 80 (2).

——S. 6—Joint Hindu family — Application by creditor of family business to adjudicate members as insolvents.

An act of insolvency to serve as the basis of an adjudication upon a creditor's petition, must be an act committed by his debtor and unless there is a personal liability in respect of the debt, there is no such relation of debtor as will serve to support an adjudication order.

Where a creditor of a joint family business applied for the adjudication of all the members of the joint

family as insolvents and they were adjudicated on the ground that they had all joined in alienations of the family property which amounted to a fraudulent preference, but there was no sufficient evidence to show that the members other than the managing member had taken part in the management or had in any way incurred personal liability for the debts:

Held, that adjudication of those members of the family who had not incurred personal liability was illegal. A.I.R. 1936 Mad. 64=43 L. W. 587=1936 M.W.N. 539=160 Ind. Cas. 478.

——S. 6—Which act can form basis of adjudication.

A person cannot be adjudicated as an insolvent at the instance of his creditors on an act of insolvency not relied on in the application against him.

Therefore, the mere mention by the petitioner of a warrant of arrest having been issued against the debtor during the insolvency proceedings does not justify the Court to take notice of it and make it the basis of its order when this fact is not mentioned in the petition and which is an event which happened subsequently. A.I.R. 1935 Pesh. 168=159 Ind. Cas. 529.

——S. 6—Avoidance of service.

Avoidance of service in connection with one particular execution proceeding is not an act of insolvency. A.I.R. 1935 Rang. 281=158 Ind. Cas. 61.

——S. 6—Concealment of property.

Concealment of property to defeat creditors does not constitute an act of insolvency. A.I.R. 1933 Lah. 725 (1) =34 P.L.R. 987=146 Ind. Cas. 628 (1).

——S. 6—Continuing act of insolvency—Arrest and Imprisonment.

Where a person is arrested and imprisoned in execution of a decree there is a continuing act of insolvency throughout the period of his imprisonment. A.I.R. 1931 Lah. 112=32 P.L.R. 51=131 Ind. Cas. 112.

——S. 6.

Adjudicating a person an insolvent is a matter of serious consequence and Courts of Law should take particular care to see that the provisions of the law in the matter are observed strictly and carefully considered. The mere fact that a person admits he owes money to a creditor and also admits that he is unable there and then to pay the amount cannot possibly be regarded as the commission of an act of insolvency as defined by the various clauses in S. 6. 110 Ind. Cas. 737=A.I.R. 1928 Mad. 393.

——S. 6—Declaration of inability to pay.

Although a declaration of inability to pay debt by a debtor does not by itself amount to an act of insolvency, yet when that act of the debtor produces an impression on the creditors' minds that the debtor was unable to pay debts and would suspend payment of debts unless a certain offer of discharge of all the debts by the sale of the properties of the debtor is accepted, it amounts to an act of insolvency. 109 Ind. Cas. 83=A.I.R. 1928 Mad. 903.

——S. 6.

Where the insolvent himself gives evidence saying that he is unable to pay the debts and where the situation is as if he is himself the petitioner, there is no purpose in closely scrutinising the acts of insolvency. 86 Ind. Cas. 229=21 M.L.W. 52=A.I.R. 1925 Mad. 483.

——S. 6—Inability to pay—Temporary absence from village—Value of.

A debtor was absent from his village for two or three hours when a **munim** of his creditor's shop went to him for collecting the debt. The debtor was purchasing cloth from the same creditor and using the proceeds to pay off his other creditors but did not pay this particular creditor from whom he purchased the cloth. For about one month he had not been keeping up his accounts and also had ceased to do his business with vigour:

Held, that none of these acts constituted an act of insolvency within the meaning of the Act.

Held further, that the fact that the debtor was unable to pay his debts was not in itself sufficient 88 Ind. Cas. 440=23 A.L.J. 536=6 L.R.A.Civ. 415= A.I.R. 1925 All. 564.

——Ss. 6, 25—(1907), Ss. 4 and 15—"Unable to pay debts"—Meaning of Application if maintainable —Abuse of process of the court.

Under the Provincial Insolvency Act a debtor cannot be declared an Insolvent merely because he has actually on hand an amount less than his debts on the ground that he has to realise his assets from others. Use of Bankruptcy Law for a purpose foreign to its object (e. g.) ask the court to realise debtors' share of family property from a brother refusing to give it is an abuse of the process and cannot be granted. Where an application amounts to an abuse of the process of the court it will not be granted. 14 M.L.T. 305=25 M.L.J. 545=21 Ind. Cas. 293.

——S. 6—Composition deed.

The execution of a composition deed by a debtor amounts to an act of insolvency. 97 Ind. Cas. 257= A.I.R. 1927 Sind 78.

2. Interpretation—Decree for payment of money—Cls. (e), (h) and (i).

——S. 6—Decree for payment of money, what is —Award for payment of money creating lien, whether such decree.

In case there is no antecedent mortgage, an award for payment of money, reserving the right of the decree-holder to enforce the decree as a personal decree is a decree for the payment of money even though the award creates a lien over immovable property as a security for the money debt. A.I.R. 1944 Sind 217.

——S 6 (i) (as amended by Bombay Act, XV of 1939)—Decree for payment of money, what is.

Quaere.—Whether a preliminary mortgage-decree directing payment of the amount into Court is a decree on which could be founded an insolvency notice. A.I.R. 1943 Bom. 257=45 Bom. L.R. 504=208 Ind. Cas. 416.

——**S. 6 (e)—Decree for payment of money,** meaning of—Decree for costs in partition suit, whether such decree.

It is true that a suit for money necessarily results in a decree for the payment of money but a decree for the payment of money may arise in suits other than suits simply for the payment of money. Hence, where in a partition suit, a decree for costs is passed along with the relief of partition, such decree is a decree for money as the judgment debtor is personally liable for the costs. If, in the execution of such decree, the Property of the judgment debtor is sold, his act is an act of insolvency within S. 6. A.I.R. 1943 Sind 176=I.L.R. (1943) Kar. 203=208 Ind. Cas. 604.

——**S. 6 (e) and (h)—"For payment of money," meaning of.**

In Cl. (h) of the S. 6 the words "for the payment of money" must be interpreted as meaning "decrees that are personally enforceable against the judgment-debtor." The same interpretation must be put on that phrase in Cl. (e). It is one of the recognized cannons of construction that the words used in a statute must be given similar meanings unless such an interpretation leads to obvious anomalies or absurdities. A.I.R. 1938 All. 59=1937 A.L.J. 1221=1937 A.W.R. 1111=I.L.R. (1938) All. 84=173 Ind. Cas. 875.

——**S. 6 (e)—Decree for payment of money, meaning of—Decree on foot of mortgage, whether such decree.**

There is a distinction between a decree based upon a purely personal claim and a decree based upon a mortgage or charge antecedent to the suit. In the one case, the essential relief claimed in the suit would be for a personal relief and in the other the essential relief would be for a sale of the property. So that what is contemplated by the expression "in execution of the decree for the payment of money" is a decree capable of execution by the arrest of the person or against the general estate of the person against whom the decree is passed. Where a particular property is hypothecated for a debt either by way of mortgage or charge, the relief can only be against that particular property and not against the general estate. In such cases, the decree that is passed, though in one sense, is for the realisation of the money secured by the mortgage or charge, will not be a decree for the payment of money because it is not capable of enforcement in the first instance against the person or the general estate until the property which has been secured by the mortgage or charge is exhausted. Consequently, a decree based on a mortgage or a charge antecedent to the suit is not a decree for payment of money and the sale in execution thereof will not be an act of insolvency on which an application for adjudication can be founded. A.I.R. 1937 Mad. 433=45 L.W. 260=1937 M.W.N. 406=170 Ind. Cas. 65.

——**S. 6 (e) and (h)—'For the payment of money'—Meaning of.**

Clauses (e) and (h) of S. 6 must be construed to have the same meaning. Under Cl. (h), the phrase, "for the payment of money" means a decree which has been passed personally against the individual concerned. A.I.R. 1935 Oudh 406=11 Luck. 61=1935 O.W.N. 374=154 Ind. Cas. 908.

3. Cl. (a). Transfer of property to third person for benefit of creditors.

——**Ss. 6 (a)—(1907), S. 4 (a)—Third person.**

The words "third person" do not exclude conveyance to some of the creditors as trustees for the whole body of creditors. 30 M.L.J. 415=34 Ind. Cas. 602.

——**Ss. 6 (a), 28—(1907), Ss. (4) (a), 16—Assignment to trustee.**

An assignment to trustees for the benefit of creditors operates as a revocable mandate to the assignees. No trust is created until at least some of the creditors have assented to the deed; before such assent the assignees are in the position of trustees **de son tort** and if the debtor is adjudicated insolvent before assent the assignees will have to handover the assets to the Official Receiver. Until all the conditions of the trust deed are fulfilled, remuneration should not be recovered by the trustee. 6 S.L.R. 183=19 Ind. Cas. 443.

4. Cl. (b). Transfer with intent to defeat or delay creditors.

——**S. 6 (b)—Applicability.**

Clause (b) of S. 6 would apply only to the cases where transfer is intended to defeat all the creditors as a whole. It has no application to the case where the transfer has the effect of preferring some creditors over others. A.I.R. 1940 Oudh 205=1940 A.W.R 67=1940 O.W.N. 146=185 Ind. Cas. 771.

——**S. 6 (b)—Applicability.**

Section 6, Cl. (b) is not applicable where the transfer is not made to defeat or delay all the creditors but the sale proceeds have been utilised towards the payment of debts of other creditors. Such a transfer does not amount to an act of insolvency of the debtor within the meaning of S.6 (b). A.I.R. 1937 Lah. 495 =173 Ind. Cas. 733.

——**Ss. 6 (b), 9 (1) and 54—"Creditor"—Meaning—Debt coming into existence after alleged act of insolvency.**

As the word "creditor" is used in Ss. 6 (b), 7, 9 (1) and 54 of the Provincial Insolvency Act as not to include a person who becomes a creditor of the insolvent after the date of the transfer or other act of insolvency, it follows that the debt on which the insolvency petition is based must be due at the time when the alleged act of insolvency is committed. I.L.R. (1947) All. 623=1947 A.L.J 408=1947 A.L.W. 158=1947 A. W. R. (H.C.) 318=A.I.R. =1947 A. 383.

——**S. 6—Partition between Hindu brothers.**

The partition between the brothers constituting a joint Hindu family of the family houses cannot be treated as a transfer with intent to defeat or delay the creditors. When the debts are incurred by some of the brothers only, on account of a new business started by them, the share of the other brothers is not liable for such debts and the partition does not prejudice the creditor. A.I.R. 1940 Oudh 205=1940 O.W.N. 146=1940 A.W.R. 67=185 Ind. Cas. 771.

——**S. 6—Partition of joint family property.**

Where a debtor effected a partition with his undivided brother giving him all his property and taking for

himself only a small amount of cash and made no provision for settlement for his debt:

Held, that the partition may be taken to have been effected with intent to delay or defeat creditors and it, therefore, constituted an act of insolvency. A. I. R. 1936 Lah. 336=37 P. L. R. 297=161 Ind. Cas. 978.

——S. 6—Partition by father.

A partition of joint family estate by father without making adequate provision for the settlement of his debts may amount to a transfer of property with intent to delay and defeat creditors and so constitute an act of insolvency. A. I. R. 1936 Lah. 336=37 P. L. R. 297=161 Ind. Cas. 978.

——S. 6—Partition without providing for debts.

Voluntary partition of the joint family estate by a father governed by the Mitakshara Law, who is a debtor, between himself and his minor sons without making adequate provision for settlement of his debts amounts to transfer of his property with intent to delay and defeat his creditors and so constitutes "an act of insolvency" which would entitle his creditor to present an insolvency petition against him. 128 Ind. Cas. 401=A. I. R. 1930 Nag. 215.

——S. 6 (b)—Intent to defeat or delay creditors —Test.

The words "with intent to defeat or delay the creditors" in S. 6 is a mental act and can only be determined if one looks into the surrounding circumstances. The true test to apply in such cases is whether the alleged insolvent is in a position to pay his debt, and whether the property which has been transferred bears such a proportion to the whole property that the remaining or the residue of the property is still sufficient from the point of view of an ordinary businessman, to meet the debts of the creditors who remain unsatisfied. A I.R. 1940 Pat. 187=7 B. R. 123 =5 C. L. T. 69=190 Ind. Cas. 665.

——S. 6 (b).

Under S. 6 (b) the question of the inability of the debtor to pay his debts is not directly relevant though it would be relevant in considering the application of S. 6 (c) which depends on S. 54. A. I. R. 1940 Pat. 411=21 P. L. T. 150=6 B. R. 346=186 Ind. Cas. 368.

——S. 6 (b)—Ioference from consequences of debtor's act.

The "intent to defeat or delay the creditors" is to be gathered from the consequences of the debtor's act and if the transfer has the effect of substantially reducing the area, which was available to the creditors for realizing their debts by temporary alienation, and if the transfer by itself is not enough to bring in sufficient money to discharge the existing liabilities, the transfer must be deemed to have been made with intent to defeat and delay creditors although the primary motive of the debtor in effecting the transfer might be different. A. I. R. 1939 Lah. 349= I. L. R. (1939) Lah. 408=41 P. L. R. 785=185 Ind. Cas. 489.

——S. 6 (b) and (c)—Question of inadequacy or otherwise of consideration—Whether material.

Clauses (b) and (c) of S. 6 refer to any transfer. The question of inadequacy or otherwise of the consideration is not an element of the transfer which constitutes an act of insolvency. It can properly arise only after and if the order of adjudication is made and proceedings for annulling the transfer are taken at the instance of the Receiver or the creditors. A. I. R. 1937 Pat. 134=17 P. L. T. 857=3 B. R. 397=168 Ind. Cas. 140.

——S. 6 (b)—Court finding debtor committed act of insolvency—If can see whether such debtor had sufficient property to pay his creditors.

Under S. 6 (b), it is an act of insolvency if the debtor makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors. Therefore, when the District Judge finds that he had committed an act of insolvency, he has no jurisdiction to decide whether he owns sufficient property to pay his creditors. It is entirely besides the mark in determining that he ought to be adjudged or not. A. I. R. 1937 Lah. 618=39 P. L. R. 292=173 Ind. Cas. 918.

——S. 6—Sufficient assets left after transfer of part assets—Transfer, not act of insolvency.

Where a transfer of part of the assets to satisfy pre-existing debtors still leaves sufficient assets in the hands of the debtor to enable him to meet his other engagements, such a transfer does not constitute an act of insolvency as it cannot be said of the transfer that it was made with intent to defeat or delay creditors. A.I.R. 1936 Rang. 129=162 Ind. Cas. 115.

——S. 6 (b).—Inference.

A mere transfer of property in favour of a relation would not **per se** amount to an intention to defeat or delay his creditors even if it affects a substantial portion of the transferor's estate, until and unless it is proved that the person concerned owns a large amount of money, and that he is financially embarrassed and is therefore, likely to take the property out of the reach of his creditors. A.I.R. 1935 Pesh. 168=159 Ind. Cas. 529.

——S. 6 (b)—Intent to defeat or delay creditors—Test.

Section 6 (b), refers to a transfer with intent to defeat or delay a person's creditors. A mere finding that the effect of a transfer would be to defeat one creditor is quite immaterial. The transfer must be made with intent to defeat the creditors as a whole. A.I.R. 1934 Rang. 242=153 Ind. Cas. 146 (2).

——S. 6 (b)—Transfer of interest in colony land.

Where the the transfer of interest in certain colony land took place within three months of a petition to adjudicate the transferee as insolvent and the transfer was affected by him for not being required by the colonization authorities to take up his residence in the colony, the transfer cannot be said to be with intent to defeat or delay his creditors. On the basis of such transfer no act of insolvency can be said to be committed as required by S. 9 (1) (c), Prov. Insol. Act. A I.R. 1934 Lah. 507=148 Ind. Cas. 832.

——S. 6—Transfer to near relation.

The consideration for a transaction alleged to be fraudulent was Rs. 48,000 and the present advance

was only Rs. 439; the rest was all to be paid to creditors. This was executed on the 25th October 1921 and the petition for adjudication was filed on 24th January 1922. The transferee was a near relation of debtor. The debtor was in embarrassed circumstances at the time:

Held, that the transaction was a fraudulent one and there was an available act of bankruptcy for the creditor to apply under the Act. 110 Ind. Cas. 167=51 Mad. 495=27 M.L.W. 508=A.I.R. 1928 Mad. 480=55 M. L. J. 235.

——S. 6 (b) (d) and (e)—(1907), S. (4) (b) (d) and (e)—Act of insolvency.

If the property of a debtor is only put up for sale but not actually sold that does not amount to an act of insolvency. Mere departure of the debtor from his dwelling house does not amount to an act of insolvency His intention in departing must be considered. 13 S.L.R. 187=56 Ind. Cas. 158.

——Ss. 6 (b) and 27—(1907), Ss. 4 (b) and 16—Transfer with intent to deprive creditors—Firm—Partner—Adjudication.

A transfer of property with intent to delay or defeat creditors is an act of insolvency. A notice suspending payment of debts by one of the partners of a firm cannot be used for the purpose of getting an order of adjudication against the firm but it can be used for showing whether or not transfers which were made shortly before the petition of insolvency were made for the purpose of defeating or delaying the creditors. 55 Ind. Cas. 186 (Cal.).

——S. 6 (b)—(1907), S. 4 (b)—Makes a transfer—Nominal or sham deed.

A nominal or **benami** deed of sale executed with intent to defraud creditors is an act of bankruptcy within the mischief of S. 4 (b); but a sham transfer not intended to be effective for any purpose and not affecting any right of property does not fall within the section. 25 M.L.T. 12=9 L.W. 22=36 M.L.J. 180=50 Ind. Cas. 593.

——S. 6 (b)—(1907), S. 4 (b)—Transfer of property—Collusive suit—Withdrawal.

A collusive suit and subsequent withdrawal from or compromising of the same with the express object of putting another party in possession of immovable property amounts to a transfer of property by an insolvent within the meaning of S. 4 (b). 13 A.L.J. 434=29 Ind. Cas. 217.

——(1920) Ss. 6 (b), 75—(1907), S. 4 (b) and S. 46 (1)—Revision by Chief Court—Question of fact—Question whether transfer was made with intent to defeat or delay creditors.

The Chief Court will not interfere under S. 46 (1) with an order, made by the Dt. Court in appeal unless some questions of law has been wrongly decided. The question whether a person transferred his property with intent to defeat or delay his creditors under S. 4 (b) of the Insolvency Act, is one of fact. 102 P.R. 1916=85 P.L.R. 1917=36 Ind. Cas. 594.

——S. 6—Proof—Onus.

In insolvency proceedings by the creditor, the burden of proving that the mortgage was fraudulent or without consideration lies upon the creditor. A.I.R. 1934 Rang. 242=153 Ind. Cas. 146.

5. Cl. (c). Fraudulent preference.

See also: **Provincial Insolvency Act, S. 54.**

——S. 6 (c)—Fraudulent preference—Onus—Test.

Onus of proving that the alienation by the debtor constituted fraudulent preference under S. 6 (c) is on the party impugning the transfer and the test is to see what was the dominant motive of the debtors in satisfying these particular creditors. The dominant motive in the case held was to prefer the three creditors who were related to the agents of the joint family firm, and the transfers were fraudulent within the meaning of S. 54 of the Act because these three creditors were given preference over other creditors. A.I.R. 1942 Lah. 121=44 P.L.R. 96=201 Ind. Cas. 200.

——S. 6 (c)—Test.

Having a view 'to give preference to a creditor' is a mental act and can only be determined if one looks into the surrounding circumstances. The true test to apply in such a case is whether the alleged insolvent is in a position to pay his debts and whether the property which has been transferred bears such a proportion to the whole property that the remaining or the residue of the property is still sufficient from the point of view of ordinary businessman to meet the debts of the creditors who remain unsatisfied. A.I.R. 1940 Pat. 187=13 R.P. 261=7 B.R. 123=5 C.L.T. 79=190 Ind. Cas. 665 (DB).

——S. 6 (c).

An insolvent sold a house to **W** and **L** for an ostensible consideration of Rs 3861 due on a promissory note for Rs. 3343. At that time he owned fields which had been previously mortgaged and which had been subsequently foreclosed. The only other property left to him was not worth more than about Rs. 3000 and he had admitted debts amounting to Rs 10,000. There was no satisfactory evidence to show that any pressure was brought to bear on him:

Held, that the dominant motive was to prefer his creditors **W** and **L** and that therefore, the sale to them was an act of fraudulent preference within the meaning of S. 6 (c) of the Act. A.I.R. 1937 Nag. 226=I.L.R. (1939) Nag. 463=174 Ind. Cas. 61.

——S. 6 (c).

In determining whether a transfer by a debtor is a fraudulent preference, the Court can take into consideration other acts of preference committed by the debtor shortly before and shortly after the particular act in question. A.I.R 1936 Mad. 275=1935 M.W.N. 1159=43 L.W. 516=161 Ind. Cas. 348.

——S. 6—Alienations under pressure.

Where all the alienations are the result of pressure on the part of the creditors, they cannot be said to be voluntary and the fact that some these creditors are relatives does not affect the question. A.I.R. 1935 Lah. 278.

——S. 6—Preference to one creditor—Execution of mortgage deed having such effect.

Where a mortgage, whereby the possession of all the property is handed over to the creditor, has the effect

of giving the creditor a preference over other creditors the mortgage deed, being executed within three months of the application for adjudication, comes under S. 54 and the execution of the mortgage deed amounts to an act of insolvency under S. 6. 52 A. 476=126 Ind. Cas. 363=1930 A.L.J. 370=A.I.R. 1930 A. 282.

——S. 6—Fraudulent preference—If implied in act of insolvency.

Although a certain act of a man may be sufficient to adjudicate him an insolvent, it does not necessarily mean without more that the act is, for example, a fraudulent preference under S. 53. 105 Ind. Cas. 138=50 Mad. 815=26 M.L.W. 248=1928 M.W.N. 9=A.I.R. 1927 Mad. 869=53 M.L.J. 742.

6. Cl. (d). Departure or seclusion with intent to defeat or delay creditors.

——S. 6 (d)—Intent to defeat or delay creditors—Inference from circumstances.

The question of intention is always a difficult one for Courts to decide and direct evidence in proof of intention is well-nigh impossible. Intention is a question of fact and has to be inferred from the facts and circumstances of each case. Where the debtors have been carrying on at one time a fairly extensive business, for them to close their place of business and leaving the locality in an unaccountable manner and taking residence within the territories of a Native State are clear indications of an intention to defeat or delay creditors. A.I.R. 1936 Lah. 176=37 P.L.R. 776=161 Ind. Cas. 151.

——S. 6 (d)—Attempt by debtor to deprive single creditor of fruits of his decree, whether act of insolvency.

Under S. 6 (d), it is as essential feature of an act of insolvency that the act should be done with the intent to defeat or delay the creditors generally of the debtor. It is insufficient to allege or to prove that the act was done with the intent to defeat or delay any particular creditor. Where a debtor attempts to deprive any one creditor of the fruits of a decree against him, it does not amount to an act of insolvency. A.I.R. 1935 Rang. 281=158 Ind. Cas. 610.

——S. 6 (d) (ii)—Departure from place of business with intent to delay and defeat creditors—What constitutes.

Where the debtors stopped their business and their creditors could not find them at their usual place of business and the debtors did not tell even their own servant as to their whereabouts:

Held, that these facts constituted sufficient departure from their usual place of business with intent to delay and defeat the creditors within the meaning of S. 6 (d) (ii) of the Provincial Insolvency Act. A.I.R. 1949 E.P. 359=51 P.L.R. 172.

——S. 6 (d)—(1907), S. 4—"Act of an agent is that of the principal" for constituting acts of bankruptcy.

For the purposes of committing acts of insolvency the act of an agent may be act of the principal in India though English law requires an act of bankruptcy to be a personal act or default.

Departure of an agent from place of business becomes an act of insolvency of the principal. (2 C.W.N. 306 Fol.). 39 Mad. 693=29 M.L.J. 788=3 L.W. 13=(1916) 1 M.W.N. 12=31 Ind. Cas. 583.

——S. 6 (d) (iii)—Secluding to deprive creditors,

Where a warrant for the arrest of a judgment-debtor in execution of a decree is issued and the debtor conceals himself in order to avoid his arrest, such conduct of the debtor is an act of insolvency within S. 6 (d) (iii). A.I.R. 1932 Lah. 28=133 Ind. Cas. 626.

7. Cl. (e). Sale of property in execution of decree.

See also: Note 2.

——S. 6 (e)—Property sold in execution of decree—Meaning of—Sale set aside on deposit—Effect.

The words "property has been sold in execution of a decree", used in O. 21, Rr. 89 and 90, Civil P. C. refer, not to an indefeasible sale, but to a sale which has been actually held but which may be set aside as a result of subsequent proceedings. No greater weight can be given to the words in S. 6 (e), Prov. Insol. Act, than they carry in the relevant rules of O. 21, Civil P. C., to which Cl. (e) of S. 6, Prov. Insol. Act naturally has reference.

Consequently, the fact of a sale of a debtor's assets in execution of a decree is enough for purposes of S. 6, (e) and a subsequent deposit whereby the sale is set aside or a subsequent objection founded on some material irregularity resulting in the setting aside of the sale will not alter the fact that the property was sold in execution of the decree. A.I.R. 1942 Mad. 306=(1942) 1 M.L.J. 38=55 L.W. 28=1942 M.W.N. 117=199 Ind. Cas. 793.

——S. 6 (e)—Sale of debtor's property in execution of decree for rent—Madras Estates Land Act.

Sale of property which is vested in the debtor and is in his physical possession for decree for arrears of rent under Madras Estates Land Act operates as an act of insolvency under S. 6 (e), Prov. Insol. Act. A.I.R. 1941 Mad. 99=52 L.W. 479 (2)=(1940) 2 M.L.J. 555=193 Ind. Cas. 787.

——S. 6 (e)—Sale of property in execution against person as legal representative.

The sale of property in execution of a decree passed against a person in his capacity as a legal representative of a deceased person does not amount to an act of insolvency within the meaning of S. 6 (e), Insol. Act. A.I.R. 1938 All. 59=1937 A.L.J. 1221=1937 A.W.R. 1111=I.L.R. (1938) All. 84=173 Ind. Cas. 875.

——S. 6 (e)—Sale, when takes place.

The sale in execution is complete when the property is knocked down to highest bidder and it is not open to the Court thereafter to offer the property to any person who may be prepared to purchase it for higher amount.

Therefore, an act of insolvency in S. 6 occurs when the property is sold and not when the sale is confirmed. A.I.R. 1938 Lah. 819=40 P.L.R. 841=179 Ind. Cas. 367.

——S. 6 (e)—Sale of separate property of one partner—If ground for adjudication of the firm.

Sub-S. (e) refers only to the property of the person, against whom an application for adjudication is made. It cannot be said that the separate property of one partner becomes the property of the other by reason of their being partners. 97 Ind. Cas. 393=24 M.L.W. 390=1926 M.W.N. 977=A.I.R. 1926 Mad. 976=51 M.L. J. 326.

8. Cl. (f). Petition to be adjudged insolvent.

——S. 6—Rejected petition of insolvency.

A debtor commits an act of insolvency if he petitions to be adjudged an insolvent. It does not matter if his petition is rejected. 109 Ind. Cas. 578=A.I.R. 1929 Lah. 72.

——Ss. 6, 25—(1907), Ss. 4 and 5 (1)—Adjudication, refusal of—Grounds.

A Judge cannot dismiss a debtor's petition for insolvency saying that he is not satisfied that the debtor is unable to pay his debts. 15 C.W.N. 990=12 Ind. Cas. 48.

9. Cl. (g). Notice of suspension of payment.

——S. 6 (g)—Acts of Insolvency—Notice to creditor of intention to suspend payment—Presentation by debtor of application to Debt Conciliation Board—If amounts to such notice—Statements during such proceedings—When amounts to such notice—Madras Debt Conciliation Act (XI of 1936), Ss. 4, 8 and 25.

The presentation **simpliciter** of an application for settlement of claims under the Debt Conciliation Act does not amount to an intimation by the debtor that he had suspended or was about to suspend payment of all his debts. An application for settlement does not necessarily involve that a settlement will be arrived at under which no creditor would receive the entire debt due to him. The mere declaration in the petition that the debtor was unable to pay his debts is not sufficient to amount to a notice of suspension of payment of debts. The real test is, what effect would the notice produce on the mind of the creditor receiving it as to the intention of a debtor with regard to his creditors. The provision in S. 25 of the Madras Debt Conciliation Act for stay of all proceedings before Civil Courts in respect of debts for the settlement of which application had been made cannot amount to an automatic suspension of payment of debts by the debtor. S. 8 of the Debt Conciliation Act does not contemplate the sending a copy of the application along with the notice of it to the creditors and it cannot be said that if the office of the Debt Conciliation Board sent a copy of the application along with the notice that act should be attributed to the debtor. 225 Ind. Cas. 454=1946 M.W.N. 18=A.I.R. 1946 Mad. 232=(1946) 1 M.L.J. 2.

——S. 6 (g)—Notice what is.

To bring the case within S. 6 (g), notice of suspension must be for the entire indebtedness. It must amount to an expression of a general intention to stop payment to every creditor. A.I.R. 1944 Cal. 370=48 C.W.N. 714.

——S. 6 (g)—Notice, requisites of.

The insolvency notice under S. 6 must be in respect of a decree or an order for payment of any amount due to such creditor. A.I.R. 1943 Bom. 257=45 Bom. L.R. 504=208 Ind. Cas. 416.

——S. 6 (g)—Essentials of notice.

Clause (g) of S. 6 lays down that the debtor must give notice that he has suspended payment. The mere service of notice by the Insolvency Court informing the creditor of the date on which the insolvency petition is to be heard cannot amount to giving notice by the debtor to his creditors that he has suspended payment. A.I.R. 1939 Cal. 313=69 C.L. J. 84=I.L.R. (1939) 1 Cal. 425=182 Ind. Cas. 701.

——S. 6 (g)—Notice of suspension, what amounts to.

Sending of a registered post card by a debtor bearing his signature, to one of his creditors, stating that there were so many debts that he was unable to pay and that it was useless for him to continue to make demands and that he might do whatever he liked in the matter, amounts to an act of insolvency within the meaning of S. 6 (g) of the Provincial Insolvency Act. A.I.R. 1937 All. 435=1937 A.L. J. 491=1937 A.W.R. 413=I.L.R. (1937) All. 616=170 Ind. Cas. 535.

——S. 6 (g).

The test as to whether the notice given by the debtor to the creditor amounts to an act of insolvency is to see what effect the notice would produce on the mind of a creditor receiving it as to the intention of the debtor with regard to his creditors and whether it would convey to the creditor that the debtor was about to stop payment or had stopped payment. A.I.R. 1935 Mad. 589 (2)=42 L.W. 427=69 M.L. J. 184=1935 M.W.N. 551=153 Ind. Cas. 966.

——S. 6 (g)—Notice to suspend payment, what amounts to.

In order to meet the creditors, the debtors sold their property and offered to make a rateable distribution among their unsecured creditors after satisfying the mortgage debt, of the balance of the sale proceeds. The amount so available for distribution was three annas nine pies in the rupee for each creditor:

Held, that when the debtors informed the creditor that they could pay no more than three annas nine pies in the rupee to their creditors, they, in effect, gave notice that they were about to suspend payment of their debts and that it was an act of insolvency. The question as to the motives of the creditor or whether the adjudication was likely to benefit him need not be considered when he has satisfied the condition imposed by the Provincial Insolvency Act for filing a petition and for having the debtors adjudicated on that petition. A.I.R. 1935 Mad. 589 (2)=1935 M.W.N. 551=69 M.L. J. 184=42 L.W. 427=158 Ind. Cas. 966.

——S. 6 (g)—Notice, requisites of.

Notice of suspension of payment means a declaration by the debtor that he does not intend to pay any of his debts, not that he does not intend to pay the debt of one particular creditor. Furthermore, the indebtedness must be admitted, and the notice must be a specific and deliberate act on the part of the debtor from which his inability or refusal to pay his debts generally can be plainly inferred. A false denial of the

debt due to one particular creditor is not and cannot be construed as a notice of suspension of payment of debts generally. A.I.R. 1935 Rang. 340=8 Rang. 279 =159 Ind. Cas. 749.

——S. 6 (g)—Scope.

In order to bring a case within S. 6, Cl. (g) of the Provincial Insolvency Act, it is necessary to establish such facts as indicate that the debtors are not merely refusing to pay particular creditors but that they have declined to pay any creditor or deal with any individual creditor or deal with their creditors as a body. A.I R. 1934 Pat. 526=15 P.L T. 461=1 B.R. 78=152 Ind. Cas. 655.

——S. 6 (g)—Notice to suspend, what is.

A debtor does not commit an act of insolvency merely by suspending payment of his debts, and that, under S. 6 (g) a debtor commits an act of insolvency only "if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts" due to his creditors generally. A.I.R. 1934 Rang. 87=12 Rang. 150=151 Ind. Cas. 190 (D.B.)

——S. 6 (g)—Notice of suspension, what is.

Where a debtor, calling together his creditors, told them that if they did not want him to sell the property and pay them individually, they could take over the property and realise their debts by selling it themselves:

Held, that the words used did not amount to a notice of suspension of payment within the meaning of S. 6, Cl. (g), Provincial Insolvency Act. A.I.R. 1933 Lah. 319=34 P.L.R. 682=144 Ind. Cas. 276.

——S. 6 (g)—Requisites of notices.

A mere declaration that a person is unable to pay his debts may not by itself amount to an "act of insolvency," but coupled with the context and the surrounding circumstances, it may amount to such an act. The test is the effect which the declaration would produce on the minds of the creditors in view of all the circumstances.

It cannot be laid down that mere temporary suspension of payment until the debtors are able to sell or mortgage their porperty cannot amount to an "act of insolvency."

The notice required by S. 6 (g) need not be in writing. A.I.R. 1933 Lah. 113=34 P.L.R. 43=141 Ind. Cas. 62.

——S. 6 (g)—Notice of suspension—Test.

When it has to be decided whether a debtor's statement amounts to suspension of payment or not, the following principles may be applied. The first is that a mere statement by a debtor that he is unable to pay his debts, however insolvent he may be, is not necessarily a notice within the meaning of the Act that he is suspending or about to suspend payment. The second principle is that one has to ascertain what the words used by the debtor would reasonably and ordinarily mean to the mind of a creditor. The third is that in construing the statement of the debtor, it has to be seen whether he has clearly indicated that not only is he not going to pay a particular creditor but that he intends to deal with his creditors collectively. Although no written notice of such suspension is necessary, yet it must be in a sense formal and must not merely be the result of a casual conversation.

Where the debtors offered to their creditors such cash as was in their possession and security for the balance of the debt:

Held, that it was not mere refusal to pay or a refusal to deal with the creditors under any circumstances and could not be treated as notice of suspension and that the admission of the debtors was not sufficient to bring it within the meaning of S. 6 (g), Prov. Insol. Act. A I.R. 1933 Pat. 461=14 P.L.T. 691=13 Pat. 78=148 Ind. Cas. 39.

——S. 6 (g)—Willingness to create trust for liquidation of debts, whether notice.

Where a debtor of a Bank, in reply to a circular letter sent by the Bank to its debtor pressing them for payment, wrote a letter to the Bank expressing his inability to meet the demand of the Bank and suggested to the Bank to raise money on some of his shares which he had pledged with the Bank and further, after persistent demands, expressed his willingness to create a trust for the liquidation of his debts:

Held, that neither the letter written by the debtor nor his conduct in expressing his willingness to create a trust amounted to a notice that the debtor had suspended or was about to suspend payment of his debts within the meaning of S. 6 (g). A.I.R. 1932 Lah 643=33 P.L.R. 992=14 Lah. 117=140 Ind. Cas. 275.

——S. 6 (g)—Essentials of notice.

A notice of suspension of payment of debts may be oral or in writing but it must be a notice deliberately given and must amount to an intimation to the creditors that the debtor intends to suspend the payment of his debts due to **all his** creditors; but mere intimation of inability to pay his debts does not ordinarily amount to such a notice though, taken with other circumstances, it may so amount. The notice must be such that the creditors may be led naturally to infer that the debtor intends to suspend the payment of his debts. A.I.R. 1932 Lah. 643=33 P.L.R. 992=14 Lah. 117=140 Ind. Cas. 275.

——S. 6—Notice of suspension of payments—Admission of insolvency—If sufficient.

A mere statement by a debtor that he has suspended or that he intends to suspend payment of his debts temporarily amounts to a notice of suspension under S. 6. A mere admission of insolvency is not enough. 121 Ind. Cas. 865=A.I.R. 1930 Sind 83.

——S. 6—Admission of insolvency—Difference.

Where it is difficult to distinguish between an admission of insolvency and a notice of suspension, in such a case the rule is that each case must be decided on its particular facts and that it is the effect on the mind of the hearer that has to be judged. 121 Ind. Cas. 865 =A.I R. 1930 Sind 83.

——S. 6—Declaration of intention to close business.

The words to the effect that "if you do not accept my offer I shall have to close my business" proved to have been used by a merchant mean that he intends to

suspend payments unless his request is granted, and in consequence of that he commits an act of insolvency. 121 Ind. Cas. 865=A. I. R. 1930 Sind 83.

——S. 6 (g)—Declaration of inability to pay debts and intention to deal with creditors collectively.

Where within three months of the application by the creditors for adjudicating a person insolvent, the person not only makes a statement that he is unable to pay his debts but further tells his creditors that he intends to deal with them collectively and not with one or more of them individually, such a statement clearly amounts to notice within Cl. (g). 112 Ind. Cas. 192=A.I.R. 1929 Lah. 136.

——S. 6—Notice of suspension of payment by one partner—Effect—Joint adjudication—Nature of act of Insolvency.

In order to sustain a joint adjudication against two or more persons it is necessary that some act of insolvency shall have been committed by each of them. But the act of insolvency may be a joint act committed by one partner on behalf of himself and as agent of others or as a matter of fact it may be committed by a person who is not a partner but a mere agent and his authority need not be special or explicit.

The act of a partner who gives notice that his firm has suspended or is about to suspend business is **prima facie** a joint act on behalf of all persons who are liable as partners in that firm unless they can show that they were solvent and able to pay the debts of the firm for which they were liable. The petitioning creditors should in that case be required to prove express authority of a partner on behalf of others to give notice of suspension. 100 Ind. Cas. 389=A.I.R. 1927 Sind 155.

——S. 6 (d) and (g)—Closing business—Manager of firm closing business and directing creditors to his pleader—Act of insolvency.

When during the temporary absence of the proprietor of a firm, the manager for the time being closed the business and put up a notice under the signature of his pleaders requiring the creditors to communicate with the pleaders:

Held, that these acts are sufficient to constitute an act of bankruptcy within cl. (d), sub-cls. (2) and 3, and cl. (g) of S. 6 of the Act. 97 Ind. Cas. 446=21 S.L.R. 280=A.I.R. 1927 Sind 18.

——S. 6 (g).

The fact of the debtor giving notice to his creditors that he has suspended payment of his debts is a sufficient act of insolvency to justify a petition under clause (g) of S. 6. 82 Ind. Cas. 742=A.I.R. 1925 Oudh 222.

——S. 6 (g)—Validity of oral notice—General notice to everybody.

An oral notice under Sub-S, (g) is sufficient but it must be a notice in an unambiguous, decisive form, made in a definite form of words to a particular creditor at a definite time, that the debtor has suspended payment of his debts. "Suspended payment of his debts" in this connexion means entire suspension of his whole indebtedness, or as is colloquially said of a bank, notice to stop payment, i.e., notice of a general intention to stop payment to everybody. 102 Ind. Cas. 191=49 All. 321=25 A.L.J. 219=A.I.R. 1927 All. 266.

——S. 6 (g)—Implied notice—Request not to press for a time or accept a percentage.

The notice contemplated by cl. (g) is a notice to be intentionally given by the debtor but the intention of the debtor can best be gathered from the circumstances under which the communication is made. Whether notice given by a debtor is sufficient or not must depend on the facts of each case. A request by the debtor to his creditors that they should not press for payment till such time as the market improved and in the alternative an offer to settle at a certain percentage is sufficient notice under S. 6, cl. (g). 95 Ind. Cas. 453 =A.I.R. 1926 Sind. 246.

——S. 6 (g)—Necessity of notice.

In order to constitute suspension of payment as an act of insolvency, the debtor must give notice to the creditor that he has suspended payment of his debts. A.I.R. 1933 Lah. 725=34 P.L.R. 987=146 Ind. Cas. 628 (1).

——S. 6 (g)—Notice, necessity of.

To support a creditor's petition founded upon an alleged act of bankruptcy under S. 6 (g), there must be a communication proceeding from the debtor made seriously giving the creditors or any of the creditors to understand from the state of circumstances as disclosed at the time that the debtor has suspended or that he is about to suspend payment; merely suspending payment is not an act of insolvency. A.I.R. 1931 Rang. 317= 135 Ind. Cas. 656.

——S. 6—Notice of suspension of payment.

It is clear from S. 6, cl. (g) that it is not the suspension of payment but the act of giving notice of suspension of payment that affords a cause of action, and provides the starting point from which limitation for presenting petition for adjudicating a person insolvent is to be counted. 112 Ind. Cas. 646=A.I.R. 1928 Sind 177.

10. Miscellaneous.

——S. 6—Minors—Adjudication.

The minor co-parceners of a joint Hindu family cannot be adjudicated insolvents. A.I.R. 1942 Lah. 121= 44 P.L.R 96=201 Ind. Cas. 200.

——S. 6—Partners—Plea of want of authority in partner committing act of insolvency—Maintainability.

If an ex-partner of a firm cannot plead that he is not a partner, he cannot raise any plea such as want of authority in another partner who has committed an act of insolvency, which plea may prejudice a petitioning creditor. 121 Ind. Cas. 865=A.I R. 1930 Sind 83.

——S. 6—Firm committing act of insolvency—Adjudication of partner.

A partner can be adjudicated an insolvent if the firm commits an act of insolvency. 93 Ind Cas. 448=A.I.R. 1926 Sind 90.

——S. 6-A—(As amended by Bombay Act XV of 1939)—Notice, requirements of.

The notice under S. 6-A must require the debtor to pay the amount due under the decree or order. A notice for payment of the amount under pre-decree less the figure at which the mortgagee has valued his security under S. 9 (2) is not a valid notice. A.I.R. 1943 Bom. 257=45 Bom. L.R. 504=208 Ind. Cas. 416.

——S. 7.

Synopsis.

1. Abatement
2. Creditor's Petition
3. Debtor's Petition
4. Heirs of Debtor
5. Joint debtors
6. Joint Hindu Family
7. Minors
8. Second Petition
9. Miscellaneous

1. Abatement.

——S. 7—Application for adjudication—Death of debtor—Proceeding, whether abates.

In proceedings for adjudication of a person as insolvent, he may be rightly declared such in spite of the fact that he died before the application for his being declared as insolvent was decided. The application may be allowed to proceed bringing on the record his legal representatives for realization and distribution of his property. A.I.R. 1932 Lah. 264=33 P.L.R. 151=33 Cr.L. J. 368=136 Ind. Cas. 733.

2. Creditor's Petition.

——S. 7—Creditor's petition—Insolvency notice—Counter claims by debtor must be against all creditors applying.

Where a debtor, in an affidavit filed in opposition to the insolvency notice, raises counter claims and set-off, they must be against all the creditors applying and not against one only. A.I.R. 1941 Bom. 37=42 Bom. L.R. 948=I.L.R. (1941) Bom, 89=192 Ind. Cas. 698.

——S. 7—Hearing of application on merits.

In case of an application under S. 7 by a creditor, the Court is bound to adjudicate upon the facts stated in the application and on the facts, if established, grant the proper relief to the applicants. The application cannot be rejected in **limine** on the ground that it was made to harass and coerce the debtor. A.I.R. 1937 Pat. 665=18 P.L.T. 839=4 B.R. 161=16 Pat. 724=172 Ind. Cas. 737.

——S. 7—Estoppel—Creditor party to deed of assignment.

A creditor who is a party to, or privy to, a deed of assignment to creditors cannot rely upon the execution of that deed as an act of bankruptcy although he may rely on an independent act of bankruptcy.

Creditors, who, after hearing a statement of inability to pay debts, do not press their bankruptcy rights but accept a portion of their just dues and do not interfere with the carrying on of the debtor's business, are not in the same position as creditors who, by a written document, which is at best a technical fraud, deliberately plan to administer the debtor's estate not in bankruptcy but by a special private arrangement all the assets being put into a pool. The former are not estopped from relying on the act of insolvency of the debtor. A.I.R. 1936 Mad. 27=43 L.W. 280=70 M.L.J. 545=162 Ind. Cas. 722.

——S. 7—Application pending suit.

The fact that a suit has been commenced to enforce a bond is not necessarily a bar to a petition for adjudication based on that debt. 87 Ind. Cas. 751=A.I.R. 1926 Cal. 234.

3. Debtor's Petition.

——Ss. 7 and 28—Test to determine right of debtor to apply insolvency, indicated—Scheme under S. 11 (1), C.P. and Berar Relief of Indebtedness Act. in force—Debtor cannot apply in insolvency.

The test to determine whether a debtor is entitled to make an insolvency application is to see whether his property on his adjudication vests under S. 28, Provincial Insolvency Act, in the Insolvency Court. If it does not, the Court has no jurisdiction to entertain the application. The vesting of the debtor's property in the insolvency Court is impossible so long as the scheme framed under S. 11 (1), C. P. and Berar Relief of Indebtedness Act remains in force. Consequently, a debtor bound by the scheme is not entitled to file an insolvency application so long as the scheme remains in force, and the insolvency Court has no jurisdiction to adjudge him an insolvent. A.I.R. 1946 Nag. 315=I.L.R. (1946) Nag. 490=1946 Nag. L. Jour. 226=224 Ind. Cas. 558.

——S. 7—Court's duty.

It is the duty of the Court, while administering the insolvency law to be statisfied **prima facie** and after following the necessary procedure and making the necessary investigation to come to a conclusion that the statements by the debtor are true and that the application for insolvency is **bona fide** and honest. A.I.R. 1937 Pat. 62=3 B.R. 237=166 Ind. Cas. 800.

——S. 7—Debtor's petition—Proof.

Where the debtor has himself gone into the witness-box and sworn that he has no assets and that his liabilities are as given in his petition and produced witnesses to prove that he is unable to pay his debts which amount to more than Rs. 500. legally speaking, this is enough to establish his case and it is for the creditors to prove that he had property from which he could pay off his liabilities. When the creditors fail to rebut the **prima facie** case proved by him, his petition must be accepted and not dismissed on mere suspicion which has no satisfactory basis. A.I.R. 1936 Pesh. 102=162 Ind. Cas. 278.

——S. 7—Omission of assets—Dismissal for omission of property fraudulently transferring to sons—Legality—Procedure.

A presented an application praying that he be adjudicated an insolvent. The District Judge dismissed his application on the ground that A had some land which he transferred to his sons but over which he still exercised rights of ownership, and further that he had not mentioned this land in his Schedule of assets;

Held, that the application should be granted and that the the District Judge, after declaring the applicant insolvent could have taken steps to annul the transfer of land. 123 Ind. Cas. 576=A.I.R. 1930 Lah. 167.

——S. 7—Proof of amount due—If can be inferred from filing of insolvency petition.

The mere filing of the insolvency petiton would not amount to proof or admission of the amount due. That has to be proved in subsequent proceedings. A.I.R. 1930 Mad. 874=53 Mad. 826=32 M.L.W 745 =128 Ind. Cas. 518=59 M.L.J. 513.

——Ss. 7, 11—(1907), Ss. 5, 6 (2)—"Reside" meaning of—Jurisdiction.

The applicant in an insolvency case before the District Judge of Lucknow was found at the time to be residing at Lucknow with his relative but had, sometimes, previous to his application, been residing in the Central Provinces:

Held, that the District Judge of Lucknow was wrong in refusing to entertain the application. 4 O.L.J. 106=39 Ind. Cas. 453.

4. Heirs of debtor.

——S. 7—Heirs of debtor—Adjudication of son for father's debts, legality of.

The son of a Hindu father who died after incurring debts on promissory notes cannot be adjudged insolvent on account of his liability as a member of the family to pay these debts out of the family properties, unless there are special circumstances which make him personally liable for the debts. A.I.R. 1931 Mad. 788 =61 M.L.J 518=34 L.W. 761=135 Ind. Cas. 31.

——S. 7—Debt by Hindu father—Decree against son as his father's representative—Adjudication of son—Validity.

A Hindu had incurred certain liabilities and died and his son succeeded to the assets of his father. The petitioning creditor having obtained a decree against the son as representing his father applied to have him adjudicated as insolvent:

Held, that the debt is not personally enforceable and so the son cannot be adjudicated an insolvent. 104 Ind. Cas. 642=50 Mad. 981=26 M.L.W. 400= A.I.R. 1927 Mad. 922=53 M.L.J. 403.

——S. 7—(1907), S. 5—Heir of deceased debtor—Fraudulent alienation—Petition to adjudge heir—If maintainable.

The petitioner and the person sought be adjudicated insolvent must be in the position of a creditor and debtor and therefore a creditor of the deceased cannot adjudge the heir an insolvent. 8 S.L.R. 93=25 Ind. Cas. 930.

5. Joint debtors.

——S. 7—Joint application against debtors, when lies.

A joint application by the creditor for adjudication of the debtors as insolvent is maintainable if there was a joint debt or a joint act of insolvency. A.I.R. 1937 Nag. 127=169 Ind. Cas. 846.

——S. 7—Application by debtors—Legality.

A joint petition for adjudication of several joint debtors is not of itself bad in law. A.I.R. 1937 Rang. 276 =14 Rang. 704=170 Ind. Cas. 471.

——S. 7—Joint debtors—Each alleged to have committed acts of bankruptcy—Single petition for adjudging both—Maintainability.

Where two partners are liable to a creditor under a joint debt and each of them is alleged to have committed act of bankruptcy, during the continuance of the joint debt by making certain alienations with a view to defraud or defeat the creditors of the firm or with the object of giving a fraudulent preference, a single petition for adjudging both of them as insolvents cannot be deemed to be unsustainable merely because they have not committed a joint act of insolvency. The test is, whether if the application were treated as a suit, the suit would be bad for multifariousness. 99 .Ind. Cas. 185=50 Mad. 256=24 M.L.W. 867= 1926 M W.N. 983=38 M.L.T. 29=A.I.R. 1927 Mad. 124=51 M. L. J. 712.

——S. 7—Debtors jointly and severally liable—Adjudication of one—Legality.

A bond upon which the debtor is jointly and severally liable with the other persons by whom it was given is sufficient to support a petition for adjudication against the debtor. 87 Ind. Cas. 751=A.I.R. 1926 Cal. 234.

——S. 7—Single petition for adjudication, when lies.

Joint debtors, who have committed a joint act of insolvency, may be proceeded against in one petition. 44 Mad. 810, Foll. 84 Ind. Cas. 968=2 Rang. 309= A.I.R. 1925 Rang. 36.

——S. 7—Single application for adjudication—Maintainability.

Where the debt due to the petitioning creditor is a joint debt of all the persons sought to be adjudicated insolvents and where the latter have been guilty of a joint act or joint acts of insolvency, a single application for their adjudication as insolvents is maintainable. Separate applications are not only unnecessary but undesirable. 63 Ind. Cas 916=44 Mad. 810=14 M.L.W. 428=1921 M.W.N. 330=A. I. R. 1921 Mad. 294= 40 M. L. J. 570.

6. Joint Hindu Family.

——S. 7—Joint Hindu family—Adjudication of members—Members, when can present joint petition.

Although the manager of a joint Hindu family can act on behalf of the family, the recognized restrictions on his power so to act in his representative capacity as to impose any personal liability on other members of the family render it impossible to treat any act of insolvency committed by him in relation to the affairs of the family, speaking generally, as an act committed by other members of the family also. It follows that the joint Hindu family, as such, cannot be adjudicatated insolvent but that two or more members of such a family who have incurred a joint personal liability may present a joint petition in insolvency (itself an act of insolvency) or may be proceeded against on one creditor's petition in case the joint act of insolvency can be

brought home to them. Minors must, however, be excluded in any case from insolvency proceedings started at the instance, whether of debtors or of creditors. The test to be applied is, whether, if the application was treated as a suit, the suit would be bad for multifariousness, that is, for misjoinder of different causes of action against different defendants; if no such objection can be successfully advanced, a single application for adjudication is maintainable. A.I.R. 1937 Pat. 665=18 P.L.T. 839=4 B.R. 161=16 Pat. 724=172 Ind. Cas. 737.

——S. 7—Application by some members of joint family—Effect.

An application for insolvency by some of the members of a joint Hindu family does not **ipso facto** result in the insolvency of all the members of the family. A.I.R. 1931 Lah. 125=131 Ind. Cas. 345.

——S. 7—Joint family—Adjudication of members—Legality.

Members of joint family can be adjudged insolvents in respect of debts for which they are jointly liable. Members of a joint Hindu family can be adjudicated insolvents in single petition by a creditor if they are liable on a joint debt or have been guilty of a joint act of insolvency but the debts must be debts due by the family. A.I.R. 1924 Lah. 44; A.I.R. 1928 Lah. 103 and A.I.R. 1925 Lah. 141, Foll.

There is no distinction between a suit and an application for insolvency as to proof of necessity for the debt. 109 Ind. Cas. 464=10 L.L.J. 207=A.I.R. 1928 Lah. 354.

——S. 7—(1907), S. 5—Member of joint Hindu family.

Members of joint Hindu family desirous of getting declared insolvent, must apply separately. 31 C.L. J. 206=24 C.W.N. 461=58 Ind. Cas. 531.

7. Minors.

——S. 7—Minor — Adjudication petition against firm—Minor partners not adjudicated.

Where a firm consists of adult and minor partners and an adjudication order is sought against the firm itself, it will not be made against the firm, but the adult partners alone will be adjudicated. A.I.R. 1935 Rang. 327=158 Ind. Cas. 570.

——S. 7—(1907), S. 5—Minor—Petition to adjudge.

A minor cannot be declared a bankrupt or made party to a petition for insolvency. 16 O.C. 68=19 Ind. Cas. 704.

8. Second Petition.

——S. 7—Second application pending first.

There is nothing either in the Provincial Insolvency Act or any other provisions of law which debars either a creditor or a debtor from proceeding by a fresh application under the Provincial Insolvency Act even where the debtor has been made an insolvent under the Punjab Laws Act and has not yet obtained an order of discharge and there is no vesting order and the property outside the province is immune from attachment at the instance of the Insolvency Court A.I.R. 1936 Lah. 407=38 P.L.R. 1099=164 Ind. Cas. 846.

——S. 7—Res judicata—Second petition, if barred.

Where an adjudication petition by a debtor is dismissed and he subsequently files another petition alleging change of circumstances, there can be no bar in the nature of **res judicata**. But the Court should not take the allegations of the petitioning appellants as correct without further proof. A.I.R. 1935 Pesh. 25 =154 Ind. Cas. 874.

——S. 7—Fresh application—Original application dismissed for default—Effect.

Where an application for adjudication as insolvent is dismissed for default, a fresh application can be made upon the same facts. 22 C.W.N. 671, Foll. 61 Ind. Cas. 870=2 P.L.T. 335=A.I.R. 1921 Pat. 472.

9. Miscellaneous.

——S. 7—Acts not alleged in petition—Validity of adjudication.

Persons ought not to be adjudicated on acts of insolvency which have not been relied on by the petitioning creditors. 119 Ind. Cas. 46=A.I.R. 1929 Mad. 910.

——S. 7—Application for adjudication and annulling transfer—Order of Court annulling transfer—Validity.

A creditor applied under S. 7 for adjudicating the debtor an insolvent and annulling alienation made by him. The lower Court being satisfied that an act of insolvency was committed by the debtor adjudicated him an insolvent and annulled the alienation:

Held, that only the Receiver appointed can so apply for annulment under Section 53. Until the Receiver declines or refuses to act no one else can do so. 2 P.L.J. 101, Foll. 66 Ind. Cas. 271=45 Mad. 189=14 M.L.W. 639=1921 M.W.N. 816=A.I.R. 1922 Mad. 246 =41 M.L.J. 606.

——Ss. 7, 10, 69—(1907), Ss. 5 and 6—Bad faith—Relevancy.

Order of adjudication follows as a matter of course when the essentials under the Act are satisfied. Whether the debtor has committed acts of bad faith is to be determined at the time of discharge and not at the time of adjudication. 57 Ind. Cas. 977 (Cal.).

——S. 8—Joint Hindu family firm—Adjudication.

The law in the Punjab is not different from that in other provinces and a joint Hindu family trading firm, as such, cannot be adjudicated insolvent. In such a case, therefore, the petition should be made individually against the persons who are alleged to be proprietors of the firm. A.I.R. 1940 Lah. 462=43 P.L.R. 363= I.L.R. (1941) Lah. 55=192 Ind. Cas. 532.

——S. 8—Joint Hindu family firm adjudicated insolvent—One member surrendering rights by release-deed in favour of Receiver—Subsequent attachment of his share by creditor—Effect.

Where a member of a joint Hindu family firm which has been adjudicated insolvent surrenders his rights by a deed of release in favour of the Receiver, the subsequent attachment of his supposed interest cannot confer upon the attaching creditor any additional right which would be paramount to the rights of the Receiver

A.I.R. 1935 All. 643=(1935) A.L.J. 673=1935 A.W.R. 672=155 Ind. Cas. 661.

——S. 8—Joint Hindu family firm adjudicated insolvent—Effect.

In the case of a firm carried on by a joint Hindu family, the effect of the adjudication of the firm as an insolvent is to make all the members of the family insolvent. A.I.R. 1935 All. 643=(1935) A.L.J. 673=1935 A.W.R. 672=155 Ind. Cas. 661.

——S. 8—Minor partner—Adjudication.

When a firm consists of adult and minor partners and an adjudication order is sought against the firm itself, it will not be made against the firm but the adult partners alone will be adjudicated. A.I.R. 1935 Rang. 327=158 Ind. Cas. 570.

——S. 9.

Synopsis.

1. Amendment of petition.
2. Appeal.
3. Applicability of section.
4. Burden of proof.
5. Conditions for adjudication.
6. Creditor's petition.
7. Debt.
8. Interpretation—Liquidated sum.
9. Powers and duty of Court.
10. 'Res judicata'.
11. Within three months—Sub. S. (1) (c).

1. Amendment of petition.

——S. 9.

The petitioner presented a petition under S. 9, Prov. Insol. Act, for adjudication of a joint Hindu family as insolvent. In the heading and the body of the petition, the names of the proprietors constituting the firm were given:

Held, that the petition should not be dismissed but the defect should be allowed to be amended by correcting the heading and the prayer. It was merely a case of correcting the misdescription of the persons sought to be adjudicated insolvents by transposing the name of the firm, of which they were alleged to be proprietors from the beginning of the heading to the end and, similarly altering the prayer so as to ask for their adjudication individually, and not of the firm through them. A.I.R. 1940 Lah. 462=I.L.R. (1941) Lah. 55=43 P.L.R. 363=192 Ind. Cas. 532.

——S. 9.

If the effect of the amendment is to introduce creditors as petitioning creditors who could not themselves present a petition after the three months have elapsed, or to put it differently, if its effect is to introduce a debt which, after the same period has elapsed, would not be a debt upon which the petition could be founded, then the Court will not grant leave to amend. But if, on the contrary, within that period a debt has been made a ground of the petition and it afterwards becomes desirable to add another party, the case stands on an entirely different footing. A.I.R. 1938 Mad. 884=48 L.W. 263=(1938) 2 M.L.J. 390=1938 M.W.N. 880=I.L.R. (1939) Mad. 144=182 Ind. Cas. 660.

——S. 9—Power of Court.

Under the provisions of the Insol. Act, the provisions relating to amendment of pleadings contained in the Civil P. C., would be applicable to the petitions made under the Act. The Courts have wide powers in the matter of allowing amendments but they have to be exercised judicially and with care.

A creditor filed a petition for the adjudication of the debtor as an insolvent and relied on certain transfers as acts of insolvency. The transfers referred to were only those which were alleged to have been effected by the debtor during the three months prior to the closing of the Court for summer recess on May, 1, 1934 and did not cover the acts which might have been committed by him subsequently, i. e., within three months before the actual presentation of the petition. The petition for insolvency was presented on July 3, 1934. An application for amendment of the petition by alleging subsequent acts of insolvency within three months of the presentation of the previous petition was put in with the object of saving it from being dismissed:

Held, that if the amendments were allowed, the petitioning creditor would be enabled to substitute new grounds for those which he had set up originally but which were of no avail to him. The effect of granting amendment would be to clothe the petitioning creditor with rights which he would not have had, if a new petition for insolvency was presented by him on the date on which he applied for leave to amend. In these circumstances, an amendment of this nature could not be granted. A.I.R. 1938 Mad. 53=1937 M. W. N. 1190=46 L. W. 815=(1937) 2 M. L. J. 737=176 Ind. Cas. 750.

——S. 9—When allowed.

Where the amendment that is sought is one that does not affect the substance of the petition but merely will have the effect of bringing the petition in conformity with the rules of practice or of remedying a formal defect, the Court, in its discretion, might properly grant leave for the amendment to be made even if the amended petition would necessarily be presented more than three months after the alleged act of insolvency provided that no hardship would thereby be worked to the respondents. But where the amendment is one that goes to the root of the petition and alters the substance of the act of insolvency alleged, the Court ought not to permit the amendment to be made if the effect of so doing would be that the amended petition would be re-presented more than three months after the date of the alleged act of insolvency. A. I. R. 1934 Rang. 87=12 R. 150=151 Ind. Cas. 190.

——S. 9.

The petitioning creditor was not aware of the several acts alleged to have been committed by the debtor with the object of defeating his creditors. According to him, immediately on his becoming aware of the acts relied upon by him in the insolvency application, he came to the court. According to him he was subsequently apprised of the fact that another transfer which is now relied upon by him was also made with the like intent and he came to Court within three months of the date of the transfer:

Held, that if, instead of applying for amendment, he had presented a fresh petition on that day incorporating this act as an additional act of insolvency and had craved leave to withdraw the original peti-

tion, he would have been justified in doing so. The fact that he has asked for an amendment of the original petition should not put him in a wrose position and the amendment should be allowed. A. I. R. 1934 Sind 33=148 Ind. Cas. 974.

——S. 9.

Where an insolvency petition was grounded on a sale by the debtor in favour of his wife which was alleged to be a nominal and collusive transaction intended to delay and defeat the creditors and leave to-insert a paragraph in the petition was prayed for, to the effect that even if the Court should hold that the debts referred to in the sale-deed are true, the transfer would nevertheless be a fraudulent preference which is void as against the Receiver:

Held, that the amendment was permissible. In appropriate cases, leave to amend can be granted even though the amendment was asked for after the expiry of the period of limitation prescribed for the main proceedings. A. I. R. 1933 Mad. 608=144 Ind. Cas. 44.

——S. 9.

It is not competent to the Court to allow a petition by a creditor to be amended after the expiry of 3 months from the act of insolvency. A.I.R. 1932 Mad. 112=61 M.L.J. 544=34 L.W. 799=1932 M.W.N. 164=135 Ind. Cas. 613.

2. Appeal.

——S. 9—Appeal—Petition of several creditors for adjudication rejected—Who can appeal.

It is not necessary for an appellant to make other creditors, who joined with him in the original petition for adjudication, parties to the appeal if the debt which he states is owing him, is more than Rs. 500. 109 Ind. Cas. 578=A.I.R. 1929 Lah. 72.

——S. 9 — Appeal by creditor — Insolvent, if necessary party.

In an appeal by a creditor from an adjudication order the insolvent is a necessary party. 80 Ind. Cas. 482=26 Bom. L. R. 432=A.I.R. 1924 Bom. 472.

3. Applicability of section.

——S. 9.

A Hindu joint family firm can be adjudicated insolvent. A.I.R. 1940 Sind 141=I.L.R. (1940) Kar. 375=13 R. S. 62=190 Ind. Cas. 293 (D.B.).

——S. 9.

The law is that there must be a debt of Rs. 500 or upwards existing not only at the time when the petition for insolvency was presented, but at the time of the hearing of the petition and at the moment of time immediately prior to the making of an order of adjudication. A I.R. 1939 Cal. 35=I.L.R. (1938) 1 Cal. 13 =181 Ind. Cas. 251.

——S. 9—Motive of creditor—Relevancy.

The creditor has a right to have his debtor adjudicated insolvent, if he satisfies the conditions imposed by the Act for filing a petition for adjudication. The question as to the motive of the creditor or whether adjudication was likely to benefit him is immaterial. A.I.R. 1935 Mad 589 (2)=69 M.L.J. 184=(1935) M.W.N. 551=42 L.W. 427=158 Ind. Cas. 966. (D.B.).

——S. 9—Assets less than liabilities—If ground for adjudication.

A person cannot be adjudicated an insolvent on the mere ground that his assets are less than his liabilities. A.I.R 1930 Rang. 147.

4. Burden of proof.

——S. 9—Creditor's petition on pro-note—Pro-note admitted—Burden of proof.

Where a creditor files a petition for adjudication of the debtor on a promissory note executed by the latter and on the debtor stating that he did not receive the full consideration under it, the creditor replies that the entire amount was paid in cash, the burden of proof lies on the debtor to prove that he did not receive that sum; although the initial onus of proving that the debtor owed Rs. 500 or more lay on the creditor, the moment he produces the note and its execution is admitted by the debtor, then the burden is shifted to him.

A mere admission that the actual consideration was different from that described in the contract does not shift the burden of introducing evidence. A.I.R. 1936 Nag. 130=I.L.R. (1936) Nag. 142=164 Ind. Cas. 740.

——S. 9.

Where the Court places the onus on the creditors, in an insolvency petition, of proving that certain occupancy holdings were not capable of being sold and that they should not be included in the insolvent's assets, the Court commits an error. A.I.R. 1933 Lah. 582=150 Ind. Cas. 651.

5. Conditions for adjudication.

——S. 9.

A creditor can present an application for insolvency of his debtor who transfers all his property to his children and a presumption of fraud arises in such case. A.I.R. 1936 Rang. 498=166 Ind.Cas. 116.

——S. 9.

A person cannot be adjudged insolvent at the instance of his creditors on an act of insolvency not relied on in the application against him. A I.R. 1935 Pesh. 168=159 Ind.Cas. 529.

——S. 9.

Section 9 prohibits a creditor from making an application for insolvency **inter alia** where the debts do not amount to Rs. 500 or more. It does not follow that if the debts exceed that amount, a creditor is necessarily entitled to make an application for insolvency. The condition required by S. 7 must also be fulfilled. That section provides that if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by a debtor. It follows that the second condition which must be present before an application made by a creditor for insolvency can be entertained is that the debtor committed an act of insolvency. A.I.R. 1935 All. 416= 1935 A.L.J. 487=1935 A.W.R. 505=157 Ind. Cas. 47.

——S. 9.

A petition for insolvency cannot be maintained under S. 9 where the amount in question is not a 'debt' within the meaning of that section and there is no relation of debtor and creditor between the parties. A.I.R. 1932 Oudh 107=9 O.W.N. 102=138 Ind. Cas. 627 (1).

6. Creditor's petition.

——Ss. 9, 82 (b) and 83 (2)—Competency of creditor's petition.

The assignee at a decree, during pendency of his **darkhast**, also filed an application in insolvency against the judgment debtor who was an agriculturist. The question to be decided was whether it was not competent to the creditor opponent to present an insolvency petition against the judgment-debtor:

Held, that although initially there is the bar of S. 82 (b), Prov. Insol. Act, Ss. 344 to 359 of the old Civil P.C., being repealed by operation of S. 8, General Clauses Act and S. 83 (2), Prov. Insol. Act, references to the old Civil P.C., must be construed as applying to the provisions of Pro. Insol. Act. The references in Chap. IV of the Deccan Agri. Relief Act, are thus references to the whole law of insolvency. The power of the creditor to make application in insolvency must be regarded as saved by the present provisions of the Insol. Act and the decreeholder was, therefore, entitled under S. 9 to present an insolvency petition against the judgment-debtor. A.I.R. 1945 Bom. 374=47 Bom. L. R. 352=I.L.R. (1945) Bom. 518.

——S. 9—Secured creditor—Petition for adjudication.

A mortgagee-creditor can, under such circumstances as these, bring a petition for the adjudication of the mortgagor by valuing his security and deducting its value from the total amount of the debt due and then treating the balance as an unsecured debt due to him by the mortgagor. A.I.R. 1937 Rang. 189=170 Ind. Cas. 942.

——S. 9—Application by partner of firm for adjudication of debtor Maintainability.

Where a person was indebted to a firm and one of the partners of the firm, describing himself as the managing partner applied for the adiudication of the debtor as an insolvent, but the petition was not in the firm name or in the name of all the members of the firm nor signed on behalf of the firm or its members by the petitioner:

Held, that the petition could not be regarded either in form or in substance as a petition by the creditor-partners and was, consequently, unsustainable. A I.R. 1932 Mad. 112=61 M.L.J. 544=34 L.W. 799 =1932 M.W.N. 164=135 Ind. Cas. 613

——S. 9—Inability to pay—Proof by petitioning creditor—If necessary.

It is not necessary in the case of a creditor, as it is in the case of a debtor, to prove that the debtor is unable to pay his debts while petitioning for adjudication. 109 Ind. Cas. 578=A.I.R. 1929 Lah. 72.

——S 9—Essentials.

It is sufficient that the petitioners should be creditors at the time the petition was filed. It is not necessary that they should be creditors at the time the order of adjudication is passed. 99 Ind. Cas. 536=50 Mad. 396=24 M.L.W. 858=1926 M.W.N. 946=A.I.R. 1927 Mad. 153=51 M.L.J. 680.

——S. 9—Creditor consenting to composition—Right to apply for adjudication on the ground of the composition.

A creditor who is a consenting party to deed of arrangement executed by the debtor for the benefit of all the creditors cannot apply for the adjudication of the debtor as an insolvent on the basis of that deed. 84 Ind. Cas. 281=20 M.L.W. 681=1924 M.W.N. 813 =48 Mad. 294=A.I.R. 1924 Mad. 839=47 M.L.J. 495.

——S. 9—Creditor after transfer—Right to plead transfer an act of insolvency.

A release deed was executed by a Hindu of his share in joint family property in return for consideration. The deed was registered later on when also a schedule of the properties was attached to the release deed although it was dated with the date of the release deed. In the meanwhile a certain person became the creditor of the transferor.

Held, that the transfer was completed on the date on which the release deed was executed and the creditor was not entitled to apply for the adjudication of the transferor relying on the release deed as an act of insolvency committed by him. 61 Ind. Cas. 756= 13 M.L.W. 141=A.I.R. 1921 Mad. 62.

——S. 9—Contents of petition.

Where in a creditor's petition for adjudicating the debtors as insolvents, the allegations made against them consist of an incomprehensible mixture of Cls. (b) and (c) of S. 6, and the petition is so framed that it cannot be ascertained whether it alleges that the applicants had made a transfer of part of their property with intent to defeat or delay their creditors jointly, or whether they had made a transfer of property which would be void as a fraudulent preference, if they were adjudged insolvents, the petition should be dismissed, A.I.R. 1937 Rang. 189=170 Ind. Cas. 942.

——S. 9—Necessary parties — Death of one creditor—Procedure.

It is not necessary for a petitioning creditor to implead all the creditors as parties. But if a creditor has once been impleaded as a party, it is necessary to implead him in the appeal and if he dies, to bring his representatives as parties.

If a party is dead, the record stands so far as the living parties are concerned and any disposal of the case notwithstanding the death of one of the parties would be valid subject to its being vacated at the instance of the legal representatives of the person who had died.

Whether in such a case the appellant should be permitted to amend the appeal memorandum by removing the name of the deceased party or should be given extension of time to bring the representatives on record depends on the particular circumstances of each case. A.I.R. 1933 Lah. 642=34 P.L.R. 827=145 Ind. Cas. 474.

——Ss. 9 and 19 (1)—Madras H. C. Rules, R. 21 (3)—Application by creditor—Notice sent to creditors and insolvent—Order of adjudication—Intervening amendment of R. 21 (3)—Notice prescribed for transferee also—Amendment if retrospective.

The petitioning creditor filed an insolvency petition under S. 9 of the Provincial Insolvency Act on 10th December, 1943 In accordance with the High Court R. 21 made under S. 79 of the Act, notices of the date fixed for hearing of the petition under S. 19 (1), were sent to all the creditors and to the debtor within the prescribed time. The date fixed for the hearing of the petition was 9th February, 1944; but for some reason or another the actual hearing was postponed until 24th March, 1944, when an order of adjudication was passed. In the meantime, on 29th February, 1944, an amendment to R. 21, sub-R. (3), had been made to the effect that notices of the date fixed for the hearing of an insolvency petition must be served not only on the creditors and the debtor but also on the transferee where that act of transfer is alleged to be an act of insolvency. The order on the petition having been made in the absence of the alienee he preferred an application in the appeal transferred by the insolvent for being added as a party. The District Judge held that he was not only entitled to notice but that he was entitled to contest the petition and in that view remanded the petition to the lower Court for fresh disposal.

Held, in revision, that the amendment to R 21 (3) was not retrospective and that the order of the lower Court remanding the petition for fresh disposal was incorrect and should be set aside 225 Ind. Cas 344=1946 M W.N. 72=A.I.R. 1946 Mad. 262=(1946) 1 M.L J. 59.

7. Debt.

——S. 9—Dower debt.

The husband's liability under the Mahomedan Law for the deferred dower of his wife is a "debt" within the meaning of S. 9 (1) (b), Prov. In ol. Act, and can, therefore, be the basis for an insolvency petition. A I.R. 1941 Nag. 167=1941 N.L. J. 181=I. L. R. (1942) Nag. 518=195 Ind. Cas. 706.

——S. 9—Debt—What is.

A "debt" for the purposes of S. 9 must be a liquidated sum. Where an employee in a Post Office embezzles certain amount, the claim by the Government in respect of this amount is in the nature of unliquidated damages. There is no contractual relationship between the parties and the amount claimed cannot be described as "debt." A.I.R. 1940 Lah. 273=190 Ind. Cas. 633.

——S. 9—Debt—What is.

Where, at the time when the insolvency petition was presented, the value of the crops had not been ascertained and the debt was not at that time a liquidated suit:

Held, that the petitioning creditor was not entitled to rely on this debt. A.I R. 1937 Nag. 60=I.L.R. (1937) Nag. 485=168 Ind. Cas. 212.

——S. 9—Liquidated debt, what is.

Where a debt shown in insolvency is the collection of rents of paddy fields and of its mesne profits and it is necessary for the Court to embark on an elaborate enquiry in order to ascertain the net amount due, the debt is not liquidated as referred in S. 9 (1) (b). A.I.R. 1935 Rang. 435=160 Ind. Cas. 367.

——S 9 (1) (b)—(1907), S. 6. (4), Cl. (b)—Debt—Liquidated sum—Rights in respect of mutual contract

Where there are contracts of sale and of purchase between two merchants the practice is to set off the first transaction out of an excess of sales against the equivalent in purchase or vice versa. The difference between the contract rates does give an ascertained sum due in such cases by one party to the other. The difference is a liquidated sum. 13 S. L.R. 187=56 Ind. Cas. 158.

——S. 9—Debts of father.

The mere asking for and obtaining of time for payment will not make a son personally liable for the debts of his father and if he is not personally liable, he cannot be adjudicated for his father's debts. A.I.R. 1940 Mad. 30 50 L W. 581=1939 M. W. N. 1094=I. L. R (1940) Mad. 191=(1939) 2 M. L. J. 728=186 Ind. Cas. 125.

——S 9 (1) (a)—Debt owing by debtor to creditor, meaning of.

Where a decree is obtained by the petitioning creditor against the father and on his death, his son is substituted as judgment debtor, the son is not personally liable and this debt does not entitle the petitioning creditor to present an insolvency petition. A I.R. 1937 Nag. 60=I.L.R. (1937) Nag. 485=168 Ind. Cas. 212.

——S. 9—Debt incurred later.

A creditor who files a petition under S. 9 is not entitled to do so, if the debt on which the petition is founded was not in existence at the date of the alleged act of insolvency but was incurred later. A.I.R. 1936 Lah. 800=38 P.L.R. 285=17 Lah. 580=165 Ind. Cas. 151 (1).

——S. 9—Denial of debt—Power of Court to decide existence of debt.

Even when a debtor denies owing anything to the petitioning creditor the Insolvency Court has jurisdiction to decide whether or not a debt was owing to the petitioning creditor. 90 Ind. Cas. 251=7 L.L.J. 201=26 P.L.R. 501=A.I.R. 1925 Lah. 436.

8. Interpretation—"Liquidated sum".

See also: Note 7.

——S. 9—Liquidated sum, what is.

A sum is "liquidated" if it can be computed with certainty, and, a debt is "liquidated" if it can be readily ascertained on inquiry. A I.R. 1935 Rang. 435=160 Ind. Cas. 367.

——S. 9—Interpretation—"Some certain future time"—Meaning.

Obiter.—The expression "some certain future time" means any time in the future which is capable of being ascertained. 90 Ind. Cas. 596=50 Mad. 396=24 M.L.W. 858=1926 M.W.N. 946=A.I.R. 1927 Mad. 153=51 M.L.J. 680.

9. Powers and duty of Court.

——S. 9—Duty of creditor and Court.

In the cases where a creditor files a petition for adjudication of a debtor on the ground that he has made a fraudulent transfer of a substantial portion of his assets, it is in the first place, the duty of the petitioner to put the Court in possession of facts showing what the debtor's resources really are. It may be that this can be affected by the various processes of discovery before trial; or it may be necessary to search out the facts and fortify them with evidence. It is not sufficient merely to present the transfer to the Court, and to ask it to make an assumption unsupported by evidence.

In insolvency proceedings by creditors, the Court is entitled to implement the creditor's case with evidence furnished by the debtor himself. A.I.R. 1935 Rang. 343=13 Rang. 192=159 Ind. Cas. 217.

——S. 9—Duty of Court.

If insolvency proceedings are initiated or prosecuted not **bona fide** but with a view to extortion or fraud or oppression, it would be a shocking thing for any Court of Justice in a civilized country to be made the instrument of such proceedings. A.I.R. 1934 Rang. 292 =12 Rang. 355=156 Ind. Cas. 345.

——S. 9—Separate suit—Court's discretion to order.

The exercise by Insolvency Court of its power to refer a question for decision in a regular suit under Ss. 9 and 24 is discretionary. A.I.R. 1935 Bom. 80= 36 Bom. L.R. 1236=59 Bom. 161=154 Ind. Cas. 566.

——S. 9—Right of creditor to adjudicate—Reasons for application—Considerations.

It is not the business of the Insolvency Court to see whether or not one of the creditor's reasons in applying for the insolvency of the debtor is to save Courtfee stamp. An Insolvency Court cannot decline to adjudicate upon the right of a petitioning creditor to present an insolvency application and the existence of such a right involves the fact that some debt is due to the creditor. It is the duty of the Insolvency Court to decide such question. There may be cases when having regard to the nature of claim put forward by a creditor the Court may find it inconvenient to adjudicate his right to be ranked as a creditor, but such cannot be said to be the case where there is a registered mortgage deed in favour of the creditor. 31 P.L.R. 700=A.I.R. 1930 Lah. 602.

——S. 9—Procedure.

On an application by creditor for debtor's adjudication as insolvent it is the duty of the Court to enquire whether the debtor owed the petitioning creditor Rs. 500 or more, and also generally to follow the procedure laid down in S. 24. 96 Ind. Cas. 424=A.I.R. 1926 Lah. 638.

——S. 9—Proof of debts—Right of creditor when debt is denied.

The Insolvency Court cannot decline to permit the creditor to prove alleged debts and ask the creditor to prove them by regular suit, when he applies for adjudication of the debtor as insolvent. 68 Ind. Cas. 885=11 L.B.R. 354=1 Bur. L.J. 239=A.I.R. 1923 Rang. 21.

10. 'Res judicata.'

——S. 9—Decision of Insolvency Court in petition for adjudication that certain alienations made by debtor are not fraudulent.

A decision by an Insolvency Court on an application for adjudication as insolvent that certain alienations made by the debtor and relied on in support of the application as acts of insolvency were not fraudulent or intended to defraud creditors is not **res judicata** in a subsequent suit by the creditors to establish that the sales were void as being intended to defraud creditors. A decision on a petition for adjudication stands on a different footing altogether in this respect from a decision under S. 4. A.I.R. 1935 Mad. 634=1935 M.W.N. 547=42 L.W. 7=156 Ind. Cas. 537.

——S. 9—Several applications—Several creditors—Maintainability—Dismissal of one—Res judicata.

Where an application made by a debtor for insolvency was rejected as also the application made by one of the creditors for the adjudication as insolvent of the debtor whereupon another creditor made a similar application:

Held, that the dismissal of the previous application did not operate as **res judicata** in the later proceeding though the second applicant was a party to the first application. 107 Ind. Cas. 842=A.I.R. 1928 Pat. 116.

11. Within three months—Sub. S. (1) (c).

——S. 9 (1) (c)—Applicability.

Per **Dar, J.**—The period of three months given under S. 9 (1) (c), Provincial Insolvency Act to make a petition from an act of insolvency applies to all eight acts of insolvency specified in S. 6 including three acts of transfer and five other kinds of acts and the fact that for one act of transfer specified in S. 6 (c) there is the same period under S. 54 to avoid the transfer as it is for making the petition, is a mere accident and this coincidence furnishes no adequate reason for holding that the period of three months in S. 9 (1) (c), is used in exactly the same sense and is subject to same legal interpretation as in S. 54. A.I.R. 1942 All. 429=1942 A.L.J. 502=I.L.R. (1943) All. 84=1942 A.W.R. 368= 204 Ind. Cas. 1 (F.B.).

——S. 9 (1) (c)—Starting point.

Clauses (a), (b) and (c) of S. 9 lay down the three conditions on which a petitioning creditor is entitled to found his petition. The period of three months mentioned in cl. (c) does not refer to the presentation of the petition but it refers to the act of insolvency on which the petition is to be grounded. Section 6 of the Act lays down what are the acts of insolvency within the meaning of the Act. That action, however, must be read subject to cl. (c) of S. 9. In other words, the acts of insolvency must occur within three months before the presentation of the petition. There is no period of limitation prescribed in the Provincial Insolvency Act within which the petitioning creditor is to present his application. Therefore, petitioning creditor is not entitled to take advantage of it to file his petition for adjudication after the expiry of three months from the date when an act of insolvency is committed. A.I.R. 1939 Cal. 313=69 C.L.J. 84=I.L.R. (1939) 1 Cal. 425 =182 Ind. Cas. 701.

——S. 9 (1) (c)—Computation of period.

Where an insolvency petition is filed on the basis of an act of insolvency, the period of three months within which it is to be filed must be calculated from the date of the commission of the act of insolvency and this is an absolute rule. A.I.R. 1937 Mad. 433=45 L.W. 260=1937 M.W.N. 406=170 Ind. Cas. 65.

——S. 9 (1) (c).

A creditor's petition for adjudicating the debtor as insolvent was presented within three months of the date of the mortgage-deed which was impeached as collusive. The Court returned it to the petitioner and required him to file certain necessary copies. It further gave him time within which to comply with the orders of the Court. The petitioner obeyed the orders of the Court and filed his application within a period of two weeks. The Court dismissed the petition on the ground that the petition had been made more than three months from the date of the deed:

Held, that under these circumstances, the petitioner should not be allowed to suffer from the lax practice to which the Court had recourse while returning the application to the petitioner. The application when made first, was within time and the order which the Court made should not be used by that Court to the prejudice of the petitioner and the presentation of the petition with the necessary copies subsequently must relate back to the date on which the original application had been presented. A.I.R. 1936 Lah. 591=166 Ind. Cas. 553.

——S. 9 (1) (c)—Period of three months - Starting point—Act of insolvency being the execution of a sale deed—Date of execution or date of registration.

Where the alleged act of insolvency is the execution of a sale deed, the period of three months provided for by S. 9 (1) (c) of the Provincial Insolvency Act has to be counted from the date of registration of the sale deed and not from the date of execution of the same. I.L.R. (1947) A. 623=1947 A. L. J. 408=1947 A L.W. 158=1947 A.W.R. (H.C.) 318=A.I.R. 1947 A. 383.

——S. 9 (1) (c)—Within three months—Starting point.

For purposes of S. 9, sub-section (1), cl. (c) time is to be reckoned from the date of the registration of the transfer deed, where a registered instrument is necessary for the transfer, which is alleged to constitute the act of insolvency. A.I.R. 1944 Cal. 370=48 C.W.N. 714.

——S. 9 (1) (c)—Starting point.

Limitation under S. 9 runs from the date of registration. (1939) 41 P.L.R. 655.

——S. 9 (1) (c)—Starting point.

When a petition is presented alleging that a debtor has committed an act of insolvency by deed registered, the period of limitation prescribed by sub-section 1 (a), S. 9, runs from the date of its registration. A.I.R. 1935 Lah 565=16 Lah. 735=38 P.L.R. 191=158 Ind. Cas. 226 (2) (F.B.).

——S. 9 (1) (c)—Starting point.

A petition for insolvency filed within three months after the registration of the mortgage-deed which constituted the alleged act of insolvency, but more than three months after the execution of the deed is within time A.I.R. 1935 Lah. 55=158 Ind. Cas. 226 (1).

——S. 9 (1) (c)—Starting point.

For the purposes of S. 9 (1) (b) or (c) of the Provincial Insolvency Act, the date of registration of the document is the starting point of limitation and not the date of execution. (1935) 158 Ind. Cas. 413.

——S. 9 (1) (c)—Starting point.

Where a sale-deed is executed by a person on a certain date and registered on a subsequent date, the period of three months within which an application can be made to adjudicate him as an insolvent on the ground that the sale was an act of insolvency runs from the date on which the deed was registered and not from the date on which it was executed. A.I.R. 1934 Mad. 617=1934 M.W.N. 784=67 M. L. J. 380=40 L.W. 413=58 Mad. 166=151 Ind Cas. 1034.

——S. 9 (1) (c)—Starting point.

The date of Registration of the deed of transfer and not that of execution is the starting point of limitation for the purposes of S 9 (1) (c), Provincial Insolvency Act. A.I.R. 1934 Nag. 171=17 N. L J. 14=150 Ind. Cas 834.

——S 9 (1) (c)—Starting point.

A petition by a creditor must, therefore, be made within three months from the date of the sale and not from its confirmation. A.I.R. 1938 Lah 819=40 P.L.R. 841=179 Ind. Cas. 367.

——S. 9 (1) (c)—Starting point of limitation.

When an application is filed for adjudication of the applicant as insolvent, the act of insolvency is committed by the filing of the application and a petition by a creditor to adjudicate him as insolvent must be filed within three months from that date, when such petition is founded on that act of insolvency. The date of dismissal of the application is immaterial.

Where the act of insolvency on which a creditor bases his application for adjudication of the debtor as insolvent is a sale in execution of certain properties of the debtor, the application should be filed within three months from the date of the sale and not from the date of confirmation of the sale A. I. R. 1933 Cal. 564=37 C. W. N. 537=57 C. L. J. 148=145 Ind. Cas. 429.

——S. 9 (1) (c)—Starting point.

In the case of a transfer by means of a deed, it is the deed which confers the title on the alienee. A mutation does not by itself confer any title; it merely purports to record a transaction which has already taken place. That transaction may be an oral transaction or it may have been by means of a deed.

Where a debtor transferred some of his agricultural land and applied for mutation, and within three months of mutation which was on different date a creditor applied to get transferor declared insolvent on account of the transfer:

Held, that the date of transfer was the date of act of insolvency and the petition was incompetent. A. I. R. 1936 Lah. 923=39 P. L. R. 359=169 Ind. Cas 32.

——S. 9 (1) (c)—Limitation — Starting point — Date of transfer.

The transfer is said to have "occurred" within S. 9 (1) (c) on the date when the actual transaction takes place and not the date of mutation of names. 90 Ind. Cas. 254=7 L. L. J. 201=26 P. L. R. 501=A. I. R. 1925 Lah. 436.

——S. 9 (1) (c)—Oral gift—Date of act of insolvency.

Under Hindu law as well as the customary law, a gift is not valid unless it is accompanied by delivery of possession of the subject of the gift from the donor to the donee.

Where therefore, creditor makes an oral gift of all his property, in order to defeat or delay the creditors, an act of insolvency occurs on the day when possession of the property is handed over to the donee and not when the debtor makes a report of the gift to the patwari. A. I. R. 1939 Lah. 35=41 P. L. R. 355=182 Ind. Cas. 456.

——S. 9 (1) (c)—Period of three months—Whether period of limitation—Limitation Act. Ss. 5 and 14— Whether applicable.

The period of three months perscribed under S. 9 (1) (c) of the Provincial Insolvency Act, is not a period of limitation but is a condition precedent to the filing of the insolvency petition itself and consequently, where the alleged act of insolvency had taken place more than three months perior to the presentation of the petition, it could not be set up as a ground for adjudication. The creditor is not entitled to the benefit of Ss. 5 and 14 of the Limitation Act under the provisions of S. 78 of the Provincial Insolvency Act. I. L. R. (1948) Nag. 523=A. I. R. 1948 Nag. 385=1948 N. L. J. 589.

——S. 9 (1) (c)—Extension of time—Applicability of S. 29, Limitation Act.

Per Iqbal Ahmad, C. J. and Plowden, J. Dar, J. contra—If a special or local law is a complete code in the matter of "limitation" or if the phraseology of the sections enumerated in S. 29 (2), Limitation Act makes those sections inapplicable to proceedings under a special or local law, the application of those sections to the special or local law must be deemed to have been expressly excluded by the Legislature.

The Provincial Insolvency Act is a "special law" within the meaning of S. 29 (2), Limitation Act.

But the Provincial Insolvency Act is a self-contained Act in the matter of "limitation" with respect to proceedings contemplated by the Act and S. 29 (2), Limitation Act has therefore, no application to that Act.

The very phraseology of most of the sections specified in S. 29 (2), Limitation Act except S. 12 of that Act makes those sections wholly inapplicable to the petitions for insolvency under the Provincial Insolvency Act and therefore, the application of those sections must be deemed to have been expressly excluded by the Legislature.

A petition for insolvency is not a "suit, appeal or application" within the meaning of Cl. (2) of S. 29, Limitation Act. In ordinary parlance, the words "petition" and "application", no doubt, cannote the same meaning but the Legislature has used the word "petition" in the Provincial Insolvency Act with reference to matters relating to acts of insolvency, and the word "application" has been used with respect to motions other than those that have direct reference to acts of insolvency. It follows that petition for insolvency either under S. 9 or S. 13 of the Provincial Insolvency Act is not an "application" and hence cannot attract S. 29 (2), (a) of the Limitation Act. The provisions of the Limitation Act have no reference to a "petition" and as such, those provisions cannot apply to petitions under the Provincial Insolvency Act. Since the Legislature in the Provincial Insolvency Act has made provisions about the applicability of Ss. 5 and 12, Limitation Act to proceedings under that Act, the conclusion is irresistible that the Legislature intended only the enumerated sections and no other section of that Act to apply to proceedings under that statute.

Per **Dar. J.**—The words "expressly excluded" in S. 29 (2), Limitation Act mean that the sections specified in S 29 (2), shall apply unless an express reference is made to those sections in the special law or by that reference they are expressly excluded. The words contemplate exclusion by express words that is by express words of the reference and not exclusion as a result of a logical process of reasoning.

The Provincial Insolvency Act is a special law, and it does not expressly exclude the provisions contained in S. 4, Limitation Act; but S. 29 (2), Limitation Act can only apply for "the purpose of determining any period of limitation prescribed for any suit or application by special law," and if the special law does not prescribe any period of limitation for any petition S. 29 will have no application. The petition of insolvency under S. 9, Provincial Insolvency Act is substantially in the nature of a plaint and the act of insolvency in substance partakes the nature of a cause of action and the condition that the petition should be presented within three months of the act of insolvency substantially provides a period of limitation for the petition so as to attract the provisions of S. 29 (2) and therefore, of S. 4, Limitation Act. A.I.R. 1942 All. 429=1942 A.L.J. 592=I.L.R. (1943) All. 84=1942 A.W.R. 368=204 Ind. Cas. 1 (F.B.).

——S. 9 (1) (c)—Extension of time.

The power to excuse delay in respect of 'applications' given under S. 78 by reference to S. 5, Limitation Act is not applicable to excuse delay in filing a 'creditor's petition' under S. 9. Such a petition filed more than three months after the alleged act of insolvency is barred by limitation.

Applications and petitions distinguished, and differences pointed out. A.I.R. 1932 Mad. 352=1932 M.W.N. 204=35 L.W. 544=63 M.L.J. 152=55 Mad. 766=137 Ind. Cas. 740.

——S. 9 (1) (c)—Extension of time.

A creditor's petition is not an application and hence provisions of S. 5, Limitation Act cannot be invoked to extend the period of 3 months. A.I.R. 1932 Mad 112=61 M.L.J. 544=34 L.W. 799=1932 M.W.N. 164=135 Ind. Cas. 613.

——S. 9 (c)—Computation — Last day a holiday.

Per **Full Bench.**—Section 10, General Clauses Act, applies to a creditor's petition of insolvency filed under S. 9, Provincial Insolvency Act. Hence, if the period of three months prescribed by S. 9 (1) (c), expires on a day when the Court is not sitting, the petition can be validly presented on the next day when the Court is sitting.

A period of limitation is synonymous with a "time limit" for proceedings in a Court of Law. The period of three months prescribed by S. 9 (1) (c) is a period of limitation. A.I.R 1942 All. 429=1942 A.L.J. 592=I.L.R. (1943) All. 84=1942 A.W.R. 368=204 Ind. Cas. 1 (F.B.).

——S. 9 (1) (c)—Three months, whether period of limitation or condition for adjudication—Expiry of period when Court is closed—Effect.

The period of three months fixed by S. 9 (1) (c) is not a period of limitation but constitutes a condition to an adjudication and consequently, where the alleged act of insolvency has taken place more than three months prior to presentation of the petition, it cannot be set up as a ground for adjudication even if the period of three months may be expiring on a day when the Court is closed. A.I.R. 1938 Mad. 898=48 L.W. 239=1938 M.W.N. 844=(1938) 2 M.L.J. 385=I.L.R. (1939) Mad. 24=178 Ind. Cas. 737.

——S. 9 (1) (c)—Extension of time—Three months expiring during vacation—Effect.

The period of three months stated in S. 9 (1) (c) is a condition precedent to the filing of the petition, that is to say, the petitioning creditor must, on the day when he presents his petition have in view some act of insolvency which the debtor has committed within the preceding three months. He has to see on that date, and on that date only what acts of insolvency are available to him and he cannot make use of any act of insolvency which has been committed outside the period of three months as that has ceased to be an act of insolvency. The period is not one of limitation. Section 10, General Clauses Act, cannot be relied on so as to extend the time for presenting the petition on the re-opening of the Court where the period of three months after act of insolvency expires during the closing of the Court. A.I.R. 1935 Mad. 857=1935 M.W.N. 685=69 M.L.J. 283=42 L.W. 330=58 Mad. 794=158 Ind. Cas. 1 (F.B.).

[Overruling A.I.R. 1934 Mad. 294=150 Ind. Cas. 339.]

——S. 9—(1907), S. 6 (4) (c)—Presentation of petition in wrong court—No extension of time.

The time during which an insolvency petition was pending in a court not having jurisdiction cannot be deducted under section 6 of the Pro. Ins. Act. 39 Mad. 74=29 M.L.J. 451=27 Ind. Cas. 144.

——S. 10.

Synopsis.

1. Burden of proof.
2. Conditions for adjudication.
3. Debt.
4. Joint petition.
5. Second petition.
6. Unable to pay debts.
7. Miscellaneous.

1. Burden of proof.

——S. 10—Burden of proof—Existence of assets other than those disclosed—Proof by creditor.

Where the debtor has filed a list of his assets, he cannot be required to prove that he has no other property except the one mentioned in such list. It is for the creditors to prove affirmatively that he has property sufficient to satisfy his debts. 101 Ind. Cas. 624=A.I.R. 1927 Lah. 354.

2. Conditions for adjudication.

——S. 10—Scope.

Where the debtor applies for adjudication as insolvent under the Provincial Insolvency Act, he is only required to furnish such proof as would satisfy the Court that there are **prima facie** grounds for believing that the conditions laid down in S. 10 of the Act existed and if he makes out a **prima facie** case he should be adjudicated as an insolvent. A.I.R. 1932 Cal. 817=36 C.W.N. 698=59 Cal. 1279=55 C.L.J. 356=140 Ind. Cas. 465.

——S. 10—Possession of assets—Whether necessary for adjudication.

A debtor has a statutory right of getting himself adjudicated an insolvent if he satisfies the provisions of S. 10. The possession of assets is not a condition necessary for a debtor to prove before he is adjudicated insolvent. A.I.R. 1932 Mad. 237=62 M.L.J. 234=35 L.W. 148=137 Ind. Cas. 390.

——S. 10—Debtor's right to adjudication.

If a debtor who has applied for being adjudicated as an insolvent gives **prima facie** proof of his inability to pay his debts, the Court should make an order of adjudication. (1931) 132 Ind. Cas. 11=31 P.L.R. 1016.

——S. 10—Proof by debtor.

Where a debtor applies to be declared an insolvent and shows that his assets exceed his liabilities, he must show also that by the sale of his interests or after realization of his assets a sum would not be secured which would enable him to pay his debts in full. 105 Ind. Cas. 569=9 L.L.J. 550=28 P.L.R. 468=A.I.R. 1928 Lah. 202.

——S. 10—Proof by debtor—Procedure.

Under the Act of 1920 it is a condition precedent to the presentation of an insolvency petition by a debtor that he must show that he is unable to pay his debts, and if he fails to satisfy the Court of his inability to pay his debts his petition must under S. 25 (2) be dismissed. At this stage the Court is not required to make a detailed or lengthy enquiry into the alleged inability of the appellant to pay his debts. It is not intended that there should be a regular trial of this matter at the very outset. But at the same time it is necessary that the debtor must make out a **prima facie** case to the satisfaction of the Court as to his inability to pay his debts. The onus of proof of all the essential conditions required under S. 10 lies on him, otherwise he has no **locus standi** to apply and his application must be dismissed. 105 Ind. Cas. 569=9 L.L.J. 550=28 P.L.R. 468=A.I.R. 1928 Lah. 202.

——S. 10—Proof by debtor—Old and New Act.

The words, "unless he is unable to pay his debts" have for the first time been brought in to the Act by the Act of 1920 in S. 10 corresponding to S. 6 of the Act of 1907 and therefore it is necessary for the

debtor to establish first that he is unable to pay his debts and then that either his debts amount to Rs. 500 or he is under arrest or imprisonment in execution of a decree of any Court for the payment of money or an order of attachment in execution of such a decree has been made and is subsisting against his property. Under the Old Act it was unnecessary for a person presenting an application to show that he is unable to pay his debts as the Old Act did not require him to show that he was unable to pay his debts but this is a matter which the Court under the New Act has to investigate and it can only investigate such matters on such materials as are placed before the Court by the party making the application for adjudication of insolvency. 69 Ind. Cas. 622=A.I.R. 1924 Pat. 166.

——S. 10—Joint liability—Debts exceeding Rs. 500—Right to apply.

A person is entitled to present an application for insolvency if he can show that the debts payable by him whether alone or jointly with others amount to more than Rs. 500. 99 Ind. Cas. 524=A.I.R. 1927 Lah. 108.

——S. 10—Debt over Rs. 500—Right to apply.

Where the debtors are jointly and severally liable under a decree for Rs. 500 each can rely on the decree as showing that his debts are Rs. 500. 98 Ind. Cas. 425 =27 P.L.R. 49=A.I.R. 1926 Lah. 235.

——S. 10—(1907), S. 6 (3) (a)—Person jointly and severally liable for Rs. 500—If can apply.

A person jointly and severally liable along with others for Rs. 500 or over under a decree against them all, is entitled to file an insolvency petition under S. 6 (3) (a) of the Act. 9 N.L.R. 91=20 Ind.Cas. 258.

——S. 10—Subsequent arrest—Application presented while not under arrest—If can be continued on subsequent arrest

Subsequent arrest of the petitioner does not give him a right to continue an application which did not lie when it was presented, the petitioner not being under arrest at that date. 98 Ind. Cas. 885=A.I.R. 1927 Lah. 38.

——S. 10—(1907), S. 6 (3) (a) and (b)—Application by debtor.

The right of a debtor arrested in execution of a decree to present a petition of insolvency arises not under S. 6 (3) (a) but under S. 6 (3) (b). 9 Ind. Cas. 632 (Sind).

——S. 10—Failure to keep accounts—Disqualification for adjudication.

It cannot be held that the failure to keep account books must **ipso facto** disqualify a man from being declared an insolvent. 98 Ind. Cas. 900=27 P.L.R. 734 =A.I.R. 1927 Lah. 27.

——S. 10—Fictitious transfer shortly before application for adjudication—If ground of refusal of adjudication

Application for adjudication cannot be rejected on the ground that the debtor has, shortly before applying for adjudication transferred his property fictitiously to another, if his debts amount to more than Rs. 500 and he is in fact unable to pay his debts. 95 Ind. Cas. 297=A.I.R. 1926 Cal. 955.

——S. 10—Adjudication, grounds for.

Where a debtor is unable to pay his debts and the assets are less than the liabilities an order of adjudication should be made. 89 Ind. Cas. 325=6 L.L.J. 306 =A.I.R. 1924 Lah. 724.

——Ss. 10, 25, 27—(1907), Ss. 6 (3) 15, 16 (1)—Application for adjudication of debtor—Inquiry.

Where a debtor's petition alleges facts entitling him to present his petition under S. 6 (3), the court is bound after enquiry to come to a decision as the matters spoken of in S. 15 and to dismiss the petition under that Section or to make an order of adjudication under S. 16 (1). 40 All. 665=16 A.L.J. 703=46 Ind. Cas. 733.

——Ss. 10, 25, 5—(1907), Ss. 6 (3), 15 and 47—Adjudication—Power of Court—Order refusing adjudication—Petitioner able to pay his own debts—Cheating creditors—Irregularity—Revision.

Where a debtor who fulfils either of the conditions laid down in S. 6 (3) of the Prov. Ins. Act presents a petition to be adjudged insolvent the Court cannot dismiss the petition on the ground that the debtor will be able to pay his debts and that the application was really made to defraud his creditors. 27 P.R. 1918= 49 P.W.R. 1918=116 P.L.R. 1918=44 Ind. Cas. 850.

——Ss. 10, 25, 27—(1907), Ss. 6 (3), 15 (1) and 16—Adjudication—Abuse of the process of Court—Fraud.

The words for any sufficient cause, in S. 15 (1) are governed by words 'satisfied by the debtor' therein and the court cannot refuse adjudication if the debtor is entitled to present his insolvency petition under S. 6 (3) unless such petition appears to be an abuse of the process of the court. But nothing short of obvious fraud on the part of the debtor would make his position an abuse of the process of the court. 5 Bur. L.T. 277=6 L.B.R. 146=18 Ind. Cas. 500 (F.B.).

——Ss. 10, 25—(1907), Ss. 6 (3) and 15—Sufficient cause.

Quaere.—In opposing a petition for adjudication by the debtor can the creditor allege and prove bad faith or misconduct or can he only show that the debtor has not proved his right to petition under S. 6 (3). 4 Bur.L.T. 18=9 Ind. Cas. 462.

——Ss. 10, 25 (1907), Ss. 6 (3) and 15—Adjudication—Power of Court.

If the applicant can show the existence of one of the three alternative conditions laid down by S. 6 (3) of the Act, his application cannot be dismissed under S. 15 on the ground that his assets are considerably more than he has in his application admitted. 6 N.L.R. 145=8 Ind. Cas. 1115.

——S. 10—(1907), S. 6 (3)—Interpretation of.

The contingencies mentioned in sub-section (3) of S. 6 are to be taken in the alternative and if any one of them happens the debtor can present an insolvency petition. 15 C.W.N. 244=12 C.L.J. 445=7 Ind. Cas. 691.

——S. 10—(1907), S. 6 (3)—Adjudication—Power of Court.

When an insolvency petition has been put before a Court by a debtor under the Act 1907, the Court can dismiss the application only when it is satisfied that the debtor had no right to present the petition under S. 6 (3). 13 O.C. 94=6 Ind. Cas. 748.

3. Debt.

——S. 10—Debt, what is—Rent decree.

Money due under a rent decree is a "debt" within S. 6 (3) of the Provincial Insolvency Act (III of 1907) and of S. 10 (1) (a) of Act V of 1920. 60 Ind. Cas. 758 =19 A.L. J. 273=A.I.R. 1921 All. 74.

——S. 10—Decree debt—Insolvent liable personally though not stated so—Right to be adjudged.

In order to make a person liable to be declared an insolvent it is sufficient if he is personally liable for the debts though the decrees obtained by the creditors do not make him so liable. 118 Ind. Cas. 494=1929 M W.N. 262=A.I R. 1929 Mad. 573.

4. Joint Petition.

——S. 10—Joint petition—Legality.

The word "debtor" used in S. 10 which lays down the conditions on which the debtor's petition may be presented may, under the General Clauses Act, S. 13, be interpreted in the plural; and if the conditions mentioned in S. 10 aforesaid are satisfied, there is no other provision in the Act in consequence of which a joint petition would not be maintainable. Under S. 5, Provincial Insolvency Act, the powers and procedure of the Court, in proceedings under the Provincial Insolvency Act, are to be the same as in the exercise of its original civil jurisdiction. And the true test to apply is to see whether a joint petition treated as a plaint would be bad for multifariousness, that is to say, for misjoinder of causes of action or of parties.

Consequently, a joint petition by three brothers for adjudication is competent unless the joint petition treated as a plaint would be bad for multifariousness. A.I.R. 1935 Cal 174=60 C.L. J. 248=39 C.W.N. 104 =154 Ind. Cas. 775.

5. Second Petition.

——S. 10—Second application for adjudication—Condition precedent.

It is incumbent upon the Insolvency Judge before granting permission to bring a second application to come to a finding that the conditions of the last part of S. 10 have been fulfilled

A person was adjudged insolvent. He failed to apply for his discharge within the prescribed period and the adjudication was, therefore, annulled He presented another application for adjudication, referred therein to the fact that his previous adjudication had been annulled; but did not specifically ask permission to bring the second application. The contesting creditor raised the point that the insolvent, having had a previous adjudication annulled, was not entitled to bring a fresh application. The question was not considered by the Insolvency Court which again adjudged the petitioner insolvent, referring in the course of the order to the fact that the previous adjudication had been annulled. There was no finding that the conditions in S. 10 were fulfilled:

Held, that as there was no finding that the conditions under S. 10 were fulfilled, it could not be presumed that the Court permitted the second application only because the Court had referred in the order to the annulment of the first application. A.I.R. 1937 Pesh. 85=173 Ind. Cas. 650.

——S. 10—Res judicata—Second application.

The fact that a person was unable to satisfy the Court when he filed an application for insolvency, that he was not able to pay his debts, cannot estop him from proving in a subsequent application that he was unable to pay his debts and was entitled to be adjudicated an insolvent. A.I.R. 1934 Oudh 94=11 O.W.N. 71=148 Ind. Cas. 245.

——S. 10—Fresh application—No discharge on prior adjudication—Fresh application, if lies.

Under the Provincial Insolvency Act once a person has been declared an insolvent, it is not open to him to apply for a second order of adjudication until he has obtained an order of discharge or until his previous adjudication has been annulled. 115 Ind. Cas. 107=6 O.W N. 100=A.I.R. 1929 Oudh 149.

——S 10—First application for adjudication dismissed for failure to produce evidence—Second application if barred.

The dismissal of first petition for being adjudicated an insolvent for failure to produce evidence does not bar the second petition on the general principles of **res judicata** as there is in the case of former application no trial on the merits. 10 A.L.J. 51, Foll. 109 Ind. Cas. 86=A.I.R. 1928 Lah. 374.

——S. 10—Fresh petition—Creditors not taking steps to receive rateable distribution out of the sale proceeds—Insolvent also not applying for discharge—Order annulling adjudication—Application for leave to present fresh insolvency petition—Maintainability.

Where a person was adjudicated an insolvent and was ordered to apply for an order of his discharge within six months and his assets were taken charge of by the Official Receiver, which were sold and the amount was deposited with him but none of the creditors appeared to receive the same, and so he suggested that as the insolvent also had not applied for his discharge as directed by the Court, the adjudication should be annulled, whereupon the District Judge, without giving any notice to the insolvent or to the other parties concerned annulled the adjudication and so the applicant presented an application for leave to present a fresh insolvency petition.

Held, that leave to present fresh petition of insolvency should be granted as the estate of the insolvent was still under administration by the Official Receiver and consequently the insolvent might have been under a reasonable impression that he need not apply till the assets held by the Official Receiver had been distributed to the creditors. 117 Ind. Cas. 237=A.I.R. 1928 Lah. 452.

——S. 10—Second application—Maintainability.

Section 10 (2) implies that, apart from annulment a second petition lies. 101 Ind. Cas. 349=1927 M.W.N. 176=39 M. L. T. 118=A.I.R. 1927 Mad. 579.

——S. 10—Insolvent applying for discharge—Court directing him to renew application six months hence—Failure to apply—Court annulling adjudication — Application under S. 10 (2) refused—Leave to appeal.

Court directed an insolvent, who applied for discharge, to renew his application for discharge "six months hence," but as no application was made within that period the adjudication was annulled under S 43. The insolvent applied under S. 10 (2) on the ground that he misunderstood the meaning of the Court's order. The Court however did not think the excuse as reasonable and rejected the application. The insolvent appealed to the High Court:

Held, that leave to appeal ought, in the circumstances, to be granted under S. 75 (3).

Held, further that the order of the Court was obscure and misleading and offered reasonable excuse so as to enable insolvent to file fresh petition of insolvency. 118 Ind. Cas. 332=A.I.R. 1929 Pat. 184.

6. Unable to pay debts.

——S. 10—Unable to pay debts—Occupancy rights whether assets of insolvent.

Where a person applies for adjudication, the fact that the land has some statutory restrictions is no ground to hold that it is not a realizable asset. Even the occupancy rights under the Punjab Tenancy Act form the assets of an insolvent, unless he showed that he had applied to the landlord and the landlord had refused to consent to the transfer of these rights but it is necessary to determine whether or not the landlords of the petitioner are prepared to consent in writing to the transfer of their occupancy rights. A.I.R. 1935 Lah. 183=37 P.L.R. 82=153 Ind. Cas. 460.

——S. 10—Unable to pay his debts—Occupancy-rights of debtor, whether assets.

As the occupancy rights in land can be sold to a landlord, their value is to be taken into consideration is assessing the assets of the insolvent having occupancy right in land. A.I.R. 1934 Lah. 133=154 Ind. Cas. 365 (2).

——S. 10—Unable to pay his debts, meaning of.

When one of the landlords is willing to purchase the land of an occupancy-tenant the tenant cannot be said to be unable to pay his debts. A.I.R. 1934 Lah. 985=154 Ind. Cas. 605.

——S. 10—Occupancy rights if assets.

The occupancy rights under Punjab Tenancy Act form the assets of an insolvent unless he shows that he had applied to the landlord and the landlord has refused the transfer of these rights. 27 P.L.R. 422, Foll. 115 Ind. Cas. 423=30 P.L.R. 15=A.I.R. 1929 Lah. 392.

——S. 10—Debtor owning only occupancy rights—If proof of inability to pay.

Unless it is shown that the landlords had refused to allow alienation of the occupancy rights, it cannot be said that the debtor possessing those occupancy rights is unable to pay his debts. 99 Ind. Cas. 997=27 P.L.R. 422.

——S. 10—Unable to pay debts, meaning of.

Where the assets of an insolvent consisting of inalienable land and house, if realized by him were worth more than the debts but the difference between the assets and the debts on the most favourable showing was not very large:

Held, that as the debts due were cash debts and the assets of the petitioner-appellant were not immediately realizable and in that sense, he might be said to be unable to pay his debts, he might be declared an insolvent. A.I.R. 1934 Lah. 63=148 Ind. Cas. 48.

——S. 10—Assets and inability to pay.

Where a person applies for adjudication, the fact that he cannot sell his land is no ground to hold that the land is not a realizable asset. 120 Ind. Cas. 173=A.I.R. 1929 Lah. 573.

——S. 10—Restriction on power of alienation—If material.

The fact that the debtor's power of alienation is in certain respects restricted by statute (in this case by the Punjab Alienation of Land Act) is a wholly immaterial circumstance in considering debtor's inability to pay his debts. 105 Ind. Cas. 569=9 L.L.J. 550=28 P.L.R. 468=A.I.R 1928 Lah. 202.

——S. 10—Agriculturist in Punjab owning property five times his debts—No inability to pay.

Section 10 should not be so strictly construed as to provide a means of defeating the provisions of the Land Alienation Act; nor does the section intend that where a sale of the whole of a man's land would be necessary to provide sufficient money to pay his debts, the man should be debarred from seeking the protection of the Insolvency Court.

Where the applicant himself showed the value of his land as five times the total of his debts:

Held, it is obvious that he is not unable to pay them. 89 Ind. Cas. 585=A.I.R. 1925 Lah. 630.

——S. 10—Value of insolvent's property—Test.

In judging the value of the insolvent's property, the market value of the property is the test to be kept in view and not its produce. A.I.R. 1935 Pesh. 168=159 Ind. Cas. 529.

——S. 10—Unable to pay debts—Assets of debtor.

Licences which are personal and not transferable cannot form assets in the insolvency. A.I.R. 1934 P.C. 1=39 L.W. 82=148 Ind. Cas. 858 (P. C.).

——S. 10—Liability to pay—Inquiry into genuineness of debts—Proper stage.

Where a person applies to be adjudicated as an insolvent, if there are prima facie grounds believing that he is unable to pay his debts, the Court should not hold an inquiry for the purpose of determining whether some of the debts mentioned in his petition are real debts or whether there has been fraudulent concealment of his property or whether he has transferred his property benami to defraud his creditors. These are matters to be dealt with upon the debtor's application for his discharge. A.I.R. 1934 Cal. 27=37 C.W.N. 841=148 Ind. Cas. 191.

——S. 10—Inability to pay debts.

Where, even after alienation of some of his properties, the remaining assets of a debtor still exceed the total value of the debts, the debtor cannot be declared an insolvent on the ground of his inability to pay his debts. The alienation made by him cannot amount to an act of insolvency. A.I.R. 1933 Lah. 582=150 Ind. Cas. 651.

——S. 10—Father of insolvent rich—If evidence of ability to pay.

What insolvent has to show is that prima facie his debts are more than Rs. 500 and that he is unable to pay the same. The fact that his father is a rich man, or that his father allows him to cultivate certain land is not sufficient to show that he can pay the debts alleged to be due by him. Insolvency Court must make a full enquiry and take evidence as to the existence of the debts, and as to the capacity of the insolvent to pay or not to pay these debts. 106 Ind. Cas. 574=A.I.R. 1928 Lah. 237.

——S. 10—Inability to pay—Relations rich, if material.

Under S. 10 a petitioner has to prove that he is unable to pay his debts. Therefore, a petition cannot be rejected on the ground that the petitioner's relations are rich and that he would one day succeed to them and be able to pay off his his debts. 99 Ind. Cas. 7=A.I.R. 1927 Lah. 136.

——S. 10—Finding about inability to pay—Question of fact.

A finding that a Judge is not satisfied that the debtors are unable to pay their debts must be a finding arrived at like any other finding by a judicial tribunal in which the reason for so holding is stated in such a way that it may be checked against the evidence and weighed in the balance. It is not enough for a Judge to resort to mere negative and say: "I do not know you may be able or you may not, but I am not satisfied." 80 Ind. Cas. 21=5 L.R.A.Civ. 645=A.I.R. 1924 All. 800.

7. Miscellaneous.

——S. 10—Discretion of District Court.

To grant leave to appeal on an order passed by the District Judge under S. 10, para. 2, is in the discretion of the District Court. The statute does not provide that leave may be granted on questions of fact; nor does it provide that the District Court should not grant leave on questions of fact. 104 Ind. Cas. 613=A.I.R. 1928 Pat. 23.

——S. 10—Residence—Residence as given by debtor not denied or debtor cross-examined—Effect.

A person, especially a person in the financial position of the debtor, may not have any permanent or continuous residence, hence his occasional absence from a district does not affect the question of residence. Where the debtor alleges a particular residence at the time of the petition and files a verified statement and affidavits to that effect and the debtor was never cross-examined on his allegations:

Held, that the residence as given by the debtor must be accepted. 73 Ind. Cas. 74=1923 M.W.N. 328=A.I.R. 1923 Mad. 585=45 M.L.J. 129.

——S. 11—Carrying on business—Landed proprietor letting land to tenants etc., whether carrying on business.

A landed proprietor letting his land to his tenants, making advances to them collecting their crops in payment of his rent and re-payment of advances and selling the produce with the intention of thereby gaining and continuing to gain his livelihood can be said to be carrying on business. A man's business consists of the continuous series of activities which occupy his time, attention and labour and which are carried on with the intention of thereby gaining and continuing to gain his livelihood. A.I.R. 1937 Rang. 128=14 Rang. 758=169 Ind. Cas. 764.

——S. 11—Jurisdiction over person carrying on business through agent.

The jurisdiction of the Insolvency Courts is limited and does not extend to administer the estate of a foreigner who had lived and died in foreign territory, who had committed no act of bankruptcy in British India, and whose estate or the bulk of it was in a foreign territory, merely and solely because he happened to be interested as a partner in a firm carrying on business in British India and thereby bringing the administration of his estate by a British Court in direct conflict with the administration of his estate by the foreign territory. A.I.R. 1936 Sind 175=29 S.L.R. 410=164 Ind. Cas. 1113.

——S. 11—Business through agent—Jurisdiction of Court to adjudicate.

Where a firm carries on business through agents at a particular place the Courts of that place have jurisdiction to adjudicate them insolvents though its principal centre of business may be elsewhere. 83 Ind. Cas. 135=A.I.R. 1925 Sind 153.

——S. 11—Insolvent residing in different places—Application to the Court in which his ancestral property is situated—Presentation if proper.

In order that proceedings may be vitiated on the ground of presentation to the wrong Court, two matters must co-exist; the objection must be taken at the earliest possible opportunity and there must be a consequent failure of justice. The presentation of the petition is not to the wrong Court where the insolvent has been residing in different places and his ancestral house and lands are within the territorial jurisdiction of the Court in

which the petition is presented. 93 Ind. Cas. 914=1925 M.W.N. 797=23 M.L.W. 353=A.I.R. 1926 Mad. 228.

——S. 11—(1907), S. 6 (2)—Jurisdiction—Applicant, servant in one district and having a holding in another.

A Court can entertain insolvency petition of a person working as a domestic servant within its jurisdiction though he has got property beyond its jurisdiction. 25 Ind. Cas. 41 (Oudh).

——S. 11—(1907), S. 6 (2)—Jurisdiction—Ordinary Residence—Insolvency petition—Forum.

A petition by a creditor to adjudge his debtor insolvent, is not entertainable by a District Court within whose jurisdiction the debtor does not ordinarily reside or personally works for gain within S. 6 (2) of the Act. Mere temporary residence with a relative does not give jurisdiction. 18 C.W.N. 1050=20 Ind. Cas. 370.

——S. 11—(1907), S. 6 (2)—Jurisdiction of Court—Residence.

A temporary residence of a petitioner for insolvency for a time and for a particular purpose within the jurisdiction of the court will give the court jurisdiction to deal with an application for insolvency. 17 C.W.N. 405=15 C.L.J. 457=14 Ind. Cas. 980.

——S. 11—(1907), S. 6 (2)—Jurisdiction—Insolvency—Insolvency debtor arrested or imprisoned—"Or",—Construction of.

A debtor who has been arrested or imprisoned in execution of a decree may present an insolvency petition to the Court having jurisdiction either in the local area where he is in custody or where he resides or carries on business. The word 'or' in S. 6 of the Provincial Insolvency Act is used in the sense of giving the debtor an alternative choice. It does not restrict the debtor to present his insolvency petition only to the Court within whose jurisdiction he is in custody. 5 S.L.R. 259=15 Ind. Cas. 830.

——S. 11—Objection in appeal — Question of jurisdiction—Duty of Court.

An objection on the ground of absence of jurisdiction in the Court which made the adjudication cannot be taken notice of in appeal unless the Court is satisfied that there has been a failure of justice. 86 Ind. Cas. 229=21 M.L.W. 52=A.I.R. 1925 Mad. 483.

——Ss. 12, 18—Scope.

The provisions of Ss. 12 and 18, Provincial Insolvency Act do not convert an insolvency petition into a plaint. They simply make some specific provisions in the Code relating to plaints applicable to insolvency petitions. A.I.R. 1940 Cal. 244=1 L.R. (1940) 1 Cal. 344=71 C. L. J. 316=44 C.W.N. 333=189 Ind. Cas. 667.

——Ss. 12, 24—(1907), Ss. 6 and 14—Act of insolvency—Proof of—Statement of insolvent.

The statement by a debtor in answer to an application by a creditor to have the debtor declared insolvent which shows that he has committed an act of insolvency is ample proof thereof and of the right of the creditor to file the application. 18 Ind. Cas. 729 (All.).

——S. 13—Applicability—Application under S. 55 (4).

The application under S. 55 (4), Civil P. C., for being declared an insolvent need not necessarily be an application containing all the particulars required by S. 13 of the Provincial Insolvency Act. A.I.R. 1931 Bom. 444=33 Bom. L.R. 820=134 Ind. Cas. 718.

——S. 13—Duty of debtor.

Section 13 imposes upon the petitioning debtor the obligation to state the amount and particulars of all his property and of his debts and he is to make a statement that he is unable to pay the debts. A.I.R. 1933 Pat. 43=13 P.L.T. 714=12 Pat. 107=141 Ind. Cas. 223.

——S. 13—Share in joint family—Failure to include in schedule—Effect.

In order to determine whether a person is unable to pay his debts, the value of his interest in the joint family of which he is a member has to be taken into account. Where he does not show such value in the schedule of assets, his failure amounts to non-compliance with the provisions of S. 13 (e), and his petition for insolvency will stand dismissed. A.I.R. 1933 All. 841=1933 A.L.J. 943=147 Ind. Cas. 11.

——S. 13—Inability to pay debts—Onus of proof—Statement of insolvent as witness prima facie **proof.**

The onus of proving inability to pay their debts is on the persons who apply to be adjudicated as insolvents and if they fraudulently suppress any assets, they are criminally liable. Where the insolvent goes into the witness-box and denies any assets other than those given in the list filed, this should be taken as **prima facie** proof unless there is something on the record to the contrary. A.I.R. 1935 Lah. 213=35 P.L.R. 184 (1) =147 Ind. Cas. 679 (1).

——S. 13—Inability to pay—Evidence.

Phillips, Offg. C. J.—The allegation of inability to pay the debts is a substantial part of the debtors' claim to be declared insolvent, and, if that fact is not proved he would not be entitled to present a petition. 108 Ind. Cas. 208=1928 M.W.N. 62=A I.R. 1928 Mad. 394.

——S. 13—Fictitious debts in petition—Dismissal of petition—Legality.

The mere fact that some of the debts entered in the petition are fictitious would not by itself justify an order of dismissal of the petition, though it could be taken into consideration at the time of discharge and other action also could be taken against the petitioner if considered advisable. 126 Ind. Cas. 192=A. I. R. 1930 Lah. 738.

——Ss 13 (1) (d), 25—(1907), Ss. 11 (d), 15.

An application of an insolvent in fact cannot be dismissed merely because of the mention by him of some bogus debts in his schedule. The insolvent can be suitably dealt with by the District Judge under the Act if the insolvent is guilty of any act of bad faith in drawing up his schedule. 26 Ind. Cas. 24 (All.).

——S. 13 (1) (d) (e)—(1907), Ss. 11 (d) (e), 15 (1)—Adjudication—Mis-statement of amounts due value of property, etc.—Effect.

The fact that an insolvent has mis-stated the amount and particulars of all the pecuniary claims against him and has not given a true account of the value and particulars of all his property in his petition does not disentitle him to an order of adjudication. 19 Ind. Cas. 685 (Cal.).

——S. 13 (2)—Petition by creditor—Ability of debtor to pay debt—Onus.

Where an insolvency petition is presented by a creditor, the onus is on the debtor to satisfy the Court that he is able to pay his debts, as the creditor is not required by S. 13 (2) of the Provincial Insolvency Act to aver in his petition that the debtor is unable to pay his debt. A.I.R. 1949 E. P. 359=51 P.L.R. 172.

——S. 13—Acts of insolvency—Time and place of commission—Duty of petitioning creditor to specify.

There is no doubt that it is necessary for the petitioning creditor to allege the acts of insolvency complained of by him in the petition and specify particulars as to the time and place of their commission. A.I.R. 1949 E.P. 359=51 P.L.R. 172.

——S. 13—Contents and amendments.

Adjudication of a debtor as an insolvent at the instance of the creditors involves considerable disgrace and legal disabilities to the debtor, thereforee it is all the more necessary that the act of insolvency alleged to have been committed by him should be clearly and precisely described in the insolvency petition to enable the debtor to meet the charges brought against him and unless the facts alleged bring the debtor's conduct well within the ambit of the statute, the Court should stay its hands both in the matter of adjudication and the appointment of **interim** Receiver. Further no amendment should be allowed except on strong grounds. A.I.R. 1932 Lah. 643=33 P.L.R. 992=14 L. 117=140 Ind. Cas. 275.

——S. 13—Application for adjudication—Contents.

In a petition for adjudication as well as the adjudication order, the exact acts of insolvency together with the dates should be carefully particularised. If the petition does not give exact particulars of the act or the dates, the proper thing to do is to insist on amendment or to throw it out altogether. A.I.R. 1932 Cal. 290=35 C.W.N. 567=137 Ind. Cas. 31.

——S. 13—Contents of petition—Omission to mention that act complained of was done with intent to defeat or delay creditors—Effect.

When there is no allegation that the act complained of was commmitted with intent to defeat or delay the creditors of the alleged debtors, the omission to make the allegation cannot be regarded merely as a formal defect but must be treated as a failure to allege an essential ingredient of the act of insolvency and application for leave to make such an amendment more than three months after the date of the alleged act of insolvency ought not to be granted. A.I.R. 1934 Rang. 87=12 Rang. 150=151 Ind. Cas. 190.

——S. 14—Withdrawal of petition—Principle granting leave.

The principle that a debtor should always be allowed to withdraw his petition for insolvency unless he is guilty of some misconduct in the course of the insolvency proceedings is not the correct principle. The interests of the the creditors also ought to be taken into consideration in deciding the matter. A.I.R. 1939 Lah. 190=41 P.L.R. 76=183 Ind. Cas. 45.

——S. 14—Leave to withdraw petition—Grant of—Notice to all parties concerned necessary.

172 Ind. Cas. 388=39 P.L.R. 182=A.I.R. 1937 Lah. 631.

——S. 14—Non-petitioning creditors — Leave granted to petitioning creditors to withdraw petition—Non-petitioning creditors served with notice under S. 19 but not with one of intention to withdraw petition — Non-petitioning creditors appealing to District Judge—District Judge remanding case for opportunity being given to appellants to object to withdrawal—Legality of order.

The Insolvency Judge permitted certain petitioning creditors to withdraw their petition under S. 14. Certain non-petitioning creditors were given notice under S. 19, but not one of the date of withdrawal or of intention to withdraw. District Judge on appeal by non-petitioning creditors set aside the order permitting withdrawal and remanded case for opportunity being given to appellants before him to object to order of withdrawal.

Held, that the non-petitioning creditors had **locus standi** to appeal, and the order of the District Judge was quite just. 31 P.L.R. 665=A.I.R. 1930 Lah. 749.

——S. 14—Scope for withdrawal.

A petition for insolvency cannot be withdrawn under Section 14 except with Court's permission. 85 Ind. Cas. 303=20 M.L.W. 880=A.I.R. 1925 Mad. 242.

——S. 14—(1907), S. 7.

A petition for insolvency cannot be withdrawn after an order of adjudication has been made. 10 S.L.R. 47=35 Ind. Cas. 539.

——S. 15—Joint petition.

A single petition for adjudication is maintainable against two or more persons liable on joint debt, where each is guilty of acts of insolvency during the continuance of a joint debt. A.I.R. 1931 Lah. 384=130 Ind. Cas. 783.

——S. 15—Consolidation of petitions—Petitions cannot be consolidated before admission.

Section 15 does not empower the Court to pass an order of consolidation of a petition for insolvency before it is admitted and before an opportunity has been afforded to the other parties concerned of showing that the petition is not competent. **Prima facie,** that section refers to consolidation of insolvency petitions after they are admitted and pre-supposes that such petitions are otherwise competent. A.I.R. 1931 Sind 65=130 Ind. Cas. 559.

——S. 16—Object.

The object of S. 16 is to prevent other creditors from being injured by the action of one creditor who by reason of collusion or otherwise, may not diligently prosecute the petition. If it is to be regarded as a

new petition, this object is frustrated, and there is no purpose of having a section of the kind. If the original petition had proceeded up to the adjudication or if another creditor whose debt was not barred by the date of substitution had been substituted, and he had obtained an order of adjudication, the applicant's debt which was not barred by the date of the petition could be proved. A.I.R. 1938 Oudh 206=1938 O.W.N. 871=14 Luck. 164=177 Ind. Cas. 392 (F.B.).

——S. 16—Scope and object.

Where a petitioning creditor, who is a representative of the whole body of creditors comes to an arrangement with the debtor and seeks not to prosecute his application for adjudication of the debtor as insolvent any further, it cannot possibly be said that he is still proceeding with due diligence. On the contrary, there seems to be a failure to proceed with due diligence in the highest degree, and in the ordinary way, it is a case where an order of substitution under S. 16 should be made. If the creditor seeking substitution is left to file a fresh application for the adjudication of the debtors, he will be met with every plea available to them, and the ultimate result of that litigation cannot be foreseen at this stage. A.I.R. 1938 Oudh 101=1938 O.W.N. 230=13 Luck. 757=173 Ind. Cas. 631.

——S. 16—Scope.

Section 16 contemplates a petition that is alive and is not dead, a petition that is proceeding and has not been dismissed. A.I.R. 1933 Rang. 251=11 Rang. 407=147 Ind. Cas. 299 (2).

——Ss. 16 and 9 (1) (c)—Petition under S. 9 (1) (c) dismissed for default—Application by another creditor to substitute—Court has inherent power to restore under S. 151, Civil P. C.

It is desirable that the Court before making an order of dismissal should wait for some time especially as S. 16 provides a special procedure which enables any creditior to have his name brought on record as a petitioner if the original petitioner does not proceed with due diligence on his petition. It is not necessary that the Court should wait indefinitely before passing an order dismissing the application for default. But some intimation by way of a notice on the Court's notice-board that in the absence of any further steps being taken to continue the proceedings the application would be dismissed on a particular date should be given to the parties interested. S. 16 makes a special provision which enables another creditior to be substituted when the original petitioner does not proceed with due diligence on his petition. The object is to serve as a check on the fraud of either the debtor or the creditor who has presented the application for insolvency. Hence under S. 151, Civil P. C., Court has inherent powers to restore an application under S. 9 (1) (c), Insolvency Act, filed by a creditor dismissed for default at the instance of another creditor who applies under S. 16 for substituting his name in place of the petitioning creditor. A.I.R. 1946 Bom. 20=47 Bom. L.R. 441=I.L.R. 1945 Bom. 734.

——S. 16—Substitution of petitioning creditor—Duty of substituted creditor.

The object of S. 16 is to prevent other creditors from being injured by the action of one creditor who, by reason of collusion or otherwise, may not diligently prosecute the petition and it gives the second creditor the benefit of the date of the original petition, no matter how much later may be the date of his own introduction into this case; and there is no reason on principle why a second creditor should not have the benefit of that date not only in regard to the question of whether his own debt is barred by limitation, but in regard to the question of the act of insolvency of the insolvent himself. The mere accident of the fact that the creditor who has filed the petition should turn out not to have been qualified to do so will not prevent a subsequent creditor, who, but for that petition, might well have filed one himself, from taking advantage of its date. The creditor substituted under S. 16 cannot be compelled to prove the qualification of the original creditor to file a petition. A.I.R. 1942 Mad. 172=I.L.R. (1942) Mad. 316=54 L.W. 548=(1941) 2 M.L.J. 778=1941 M.W.N. 994=201 Ind. Cas. 109.

——S. 16—Condition precedent for substitution.

Unless a finding is arrived at by the Insolvency Court that the petitioning creditor is not proceeding on his application with due diligence, no order of substitution can be made, because that is a condition precedent under S. 16. Further, when once a Court grants leave to the petitioning creditor to withdraw his petition without making an order under S. 16, it can be reasonably urged that the Court was satisfied with the conduct of the petitioning creditor and did not suspect any want of diligence on his part. A.I.R. 1940 Lah. 470=191 Ind. Cas. 654.

——S. 16—Substitution of substituted creditor.

The substitution contemplated by S. 16 is that a creditor who has been substituted in place of the original creditor can in his turn, be substituted by another creditor and so on. A. I. R. 1938 Oudh 206=1938 O.W.N. 871=14 Luck. 164=177 Ind. Cas. 392 (F.B.).

——S. 16—Order of substitution by implication.

An express order of substitution is not necessary under S. 16 and substitution can be inferred from the Court continuing proceedings on the application of the creditor applying to be substituted under that section. A.I.R. 1938 Oudh 206=1938 O.W.N. 871=14 Luck. 164=177 Ind. Cas. 392 (F.B.).

——S. 16—Substitution, when not allowed.

After a creditor had filed a petition for the adjudication of the debtor as insolvent, it was intimated to the Court that the petitioning creditors and the insolvents had come to an agreement with regard to the matter; on this intimation the petition was dismissed by the Court. No other creditor was given notice of the application based on the settlement which resulted in the dismissal of the petition. Some months later, another creditor applied to be substituted for the original petitioning creditor:

Held, that with due regard to the meaning of S. 16, the subsequent creditor could not be substituted in the place of the original creditor and that the only course open to him was to file a fresh petition. A.I.R. 1933 Rang. 251=11 Rang. 407=147 Ind. Cas. 299 (2) (D.B.).

——S. 16—Substitution of creditor after three months of act of insolvency, legality of.

Under S. 16, the Insolvency Court has jurisdiction to substitute for the original petitioning creditor any

other creditor even though the application for substitution is not presented within three months of the act of insolvency alleged in the petition for adjudication. A.I.R. 1932 All. 147=1931 A.L.J. 1089=54 All. 72=135 Ind. Cas. 250.

——S. 16—Original petition validly presented—Petitioner not proceeding with due diligence—Rights of other creditors to be substituted.

If the original petition by a creditor to get a debtor adjudicated insolvent is validly presented and the case is one in which the petitioner does not proceed with due diligence on his petition it is open to persons to come in as creditors at any time while the insolvency proceedings are pending and it is open to the Court to substitute them as petitioners for the original petitioner; the effect of such substitution would be that they take the place of the first petitioner **ab initio** and are entitled to prosecute the original petition as if it were there own petition so that no question of the necessity for a fresh act of insolvency could arise. 122 Ind. Cas. 285=7 Rang. 785=A.I.R. 1929 Rang. 291.

——S. 16—Debt barred at date of substitution—Right of creditor.

Where the petitioning creditor does not proceed with the petition, any other creditor can be substituted though the debt due to latter had become barred by the date of substitution, provided it was enforceable on the date of original petition. 110 Ind. Cas. 611=51 Mad. 594=28 M.L.W. 304=1928 M.W.N. 391=A.I.R. 1928 Mad. 608=55 M.L.J. 168.

——S. 16 — Decree without leave — Waiver of objection by party—Validity of decree.

The fact that no leave was obtained does not of itself render the subsequent decree void, but when question of leave was waived by the defence, a decree passed after such waiver cannot be deemed to be a nullity. 98 Ind. Cas. 446=A.I.R. 1927 Mad. 201.

——S. 17—Adjudication order after debtor's death.

Section 17 contemplates an adjudication order even after the death of the debtor. A.I.R. 1944 Cal. 370=48 C.W.N. 714.

——S. 17—Power of Court to adjudicate.

Where a petitioner files an application for adjudging himself as an insolvent and dies before he is so adjudicated, the Insolvency Court has still jurisdiction to adjudicate the petitioner as an insolvent after his death under the Provincial Insolvency Act, as "proceedings in the matter, would include the adjudication of the insolvent after his death subsequent to the presentation of the application. 109 Ind. Cas. 94=51 Mad. 344=1928 M.W.N. 237=27 M.L.W. 437=A.I.R. 1928 Mad. 476=54 M.L.J. 585.

——S. 17—Abatement on death of insolvent.

There is nothing in the Prov. Insol. Act which would justify the view that the death of the debtor or insolvent brings about a complete abatement of the proceeding and there is no right surviving to the heirs of the deceased.

Where an insolvent dies during the pendency of his appeal against the orders on his application against adjudication the appeal does not abate and his heirs can continue the appeal. A.I.R. 1937 All. 435=1937 A.L.J 491=I.L.R. (1937) All. 616=1937 A.W.R. 413=170 Ind. Cas. 535.

——S. 17—Death of insolvent—Automatic termination of proceedings.

Ordinarily, insolvency proceedings will not terminate until there is a discharge of the insolvent. But the matter is otherwise when the insolvent is dead. In such a case, there is an automatic discharge of the insolvent and where the property has been distributed prior to his death, the proceedings must automatically be held to have terminated. A.I.R. 1933 Lah. 997=147 Ind. Cas. 695.

——S. 17—Dismissal of creditors' petition—Appeal—Death of debtor—Abatement.

Where a petition by the creditors to adjudicate the debtor as an insolvent is dismissed and during the pendency of an appeal by the creditors against the order of dismissal the debtor dies, the appeal abates and the proceedings cannot be resurrected against the legal representatives of the debtor. A.I.R. 1932 Lah. 121=32 P.L.R. 809=13 Lah. 396=135 Ind. Cas. 196.

——S. 17—Death while appeal pending—Appeal by creditor against the order of adjudication—Debtor dying during pendency of appeal—Abatement of appeal.

An appeal preferred against the adjudication of an insolvent abates on his death, as such an order is purely personal to the insolvent. The right to sue does not survive within the meaning of O. 22, R. 4, on the death of an insolvent respondent. 69 P.R. 1888, Foll. 107 Ind. Cas. 281=9 Lah. 306=29 P.L.R. 399=A.I.R. 1928 Lah. 119.

——S. 17—Death before adjudication—Procedure.

Under S. 17 an application by a debtor or a creditor for adjudicating himself an insolvent filed while he was alive can be continued and adjudicated even after his death.

A creditor made an application for a debtor being declared an insolvent and the debtor died before the adjudication. The Court ordered the proceedings to be continued in presence of the heirs of the deceased who were to be brought on record for the purpose of realization and distribution of the debtor's assets.

Held, that under S. 17 the order of the Court was a competent order. 34 C. W. N. 445=A.I.R. 1930 Cal. 590.

——Ss. 17, 53, 54—Death of debtor before adjudication but after petition—Official Receiver or creditors, if can apply to set aside voidable alienations—Order of Court not in proper form—Construction of order.

When a debtor against whom a petition in insolvency has been presented dies before adjudication and the proceedings are continued under S. 17, the Official Receiver or creditors can invoke the power of the Court to set aside settlements and alienations voidable under Ss. 53 and 54.

If in such a case, the Court has passed an erroneous order adjudging the estate of the deceased debtor as insolvent instead of the debtor himself under the **bona fide** belief that that is the proper order to be passed

then the order of adjudication should be read, understood and given effect to as if the debtor himself has been adjudicated.

The Prov. Insol. Act does not contain any provision similar to Ss. 108 and 109 of the Presi. Towns Insolvency Act corresponding to S. 130 of the English Bankruptcy Act empowering the Insolvency Court to administer insolvent estates. Therefore, considerations and decisions applicable to that power must not be confused with cases falling within S. 17. A.I.R. 1933 Mad. 25 =1932 M.W.N. 1102=63 M.L.J. 727=37 L. W. 75= 141 Ind. Cas. 822.

——S. 17—Effect of death on Receiver's possession.

On the death of an insolvent whose property has vested in the Receiver, the Receiver is not divested of that property. The heirs of the insolvent can bring a suit to show that the insolvent's debts were tainted with immorality, or were otherwise not binding upon them. But in other respects, the insolvent's death does not affect the insolvency proceedings. 88 Ind. Cas. 558=7 L.L.J. 131=26 P.L.R. 186=A.I.R. 1925 Lah. 366.

—— Ss. 17, 28—(1907)—Ss. 10 and 16—Death of insolvent—Effect of.

The death of an insolvent does not affect the power of the Official Receiver to distribute the assets of the insolvent vested in him by an order of adjudication. 9 Ind. Cas. 633. (Sind).

——S. 17—Death of insolvent—Liability of heirs.

Property of a deceased insolvent vested in the Receiver, although presumed to be ancestral, can be made exempt from sale after the death of the insolvent only if his heirs succeed in showing that the debts of the deceased were tainted with immorality or were otherwise illegal. A.I.R. 1925 Lah. 366, Foll. 31 Punj. L. R. 842= A.I.R. 1930 Lah. 1034.

——S. 17—Continuation of proceedings.

Section 17 applies to a case of a debtor dying before the order of adjudication, whether the petition for adjudication was presented by a creditor or by the debtor. **Ex parte sharp**, 34 W. R. 550, not Appr. 110 Ind. Cas. 167=51 Mad. 495=27 M.L.W. 508= A.I.R. 1928 Mad. 480=55 M.L.J. 235.

——S. 17—Legal representatives—Addition of, on death of insolvent.

By reason of the death of the insolvent, the proceedings in insolvency do not abate.

The Court has power to bring on the record of the insolvency proceedings the names of the legal representatives of the deceased insolvent. 59 Ind. Cas. 51=9 P.L.R. 1921=A.I.R. 1921 Lah. 331.

——S. 17—Legal Representatives—Addition of, on death of insolvent.

There is no law that upon the death of an insolvent who has been adjudicated as such, his legal representatives should be brought on the record in his place. 66 Ind. Cas. 893=3 L. L. J. 5=A.I.R. 1921 Lah. 223.

——Ss. 17, 33—(1907), Ss. 10 and 24 (3)—Rights of representatives.

Where the proceedings in insolvency are continued after the death of the insolvent in the name of his representatives, the court must permit him to be present and cross-examine the creditors in respect of their claims according to S. 24 (3) read with S. 5 of the Act. 57 Ind. Cas. 810 (Cal.).

——S. 18—Date of admission of application.

An insolvency petition was presented on July 3. The Court ordered "check and file emergently." It was checked and was filed and on the same day, the Court further ordered that publication charges should be deposited by July 7. On July 7, notice and publication were ordered:

Held, that the date of admission was July 3 and not July 7. No doubt the order to issue notice may constitute the act of admission in many cases but cannot be a universal rule of law. A.I.R. 1942 Mad. 88=1941 M.W.N. 852=(1941) 2 M.L J. 918=201 Ind. Cas. 238.

——S. 18—Date of admission of insolvency petition.

The date of admission of insolvency petition must be deemed to be at least the date when the Court passed an order requiring the insolvent to furnish security for attendance. A.I.R. 1940 Lah. 166=42 P.L.R. 29=188 Ind. Cas. 833.

——S. 18—Date of admission of petition.

The date on which an applicant is asked to furnish security for his regular attendance in Court can be regarded as date of admission of the insolveucy petition. A.I.R. 1936 Lah. 885=38 P.L.R. 1148=167 Ind. Cas. 837.

——S. 19—Fixing of date after admission.

Section 19 merely provides that the date is to be fixed after the admission of the petition; it does not follow that it is necessary to be fixed at the same time or on the same date. A.I.R. 1936 Lah. 885=38 P.L.R. 1148=167 Ind. Cas. 837.

——S. 19 (1) and Rules framed under the Act, R. 21 (3) (as amended in 1946)—Creditor's petition for adjudication—Notice to transferees of debtor—Necessity.

Under R. 21. Cl. (3) of the Rules under the Provincial Insolvency Act, as amended in 1946 the transferees of a debtor's property are entitled to notice when a petition for the adjudication of the debtor is filed by a creditor. An order of adjudication passed without notice to such transferees is unsustainable. 1950 M.W.N. 82=A.I.R. 1950 Mad. 386=(1950) 1 M.L.J. 113.

——Ss. 19 and 27—Provisions of S. 19 are mandatory—Court not dismissing insolvency petition—Order of adjudication must be made.

Provisions of S. 19, Provincial Insolvency Act, are mandatory and the Court, on admitting insolvency petition, must issue notice to the creditors.

Unless the Court dismisses insolvency petition, it must make an order of adjudication. A.I.R. 1945 Oudh 319=19 5 O.W.N. (C.C.) 298=1945 A.W.R. (C.C), 212=222 Ind. Cas. 128.

——S. 19 (2) — Notice under — Application of S. 86, Civil P.C.

In insolvency proceedings, it cannot be said that the Sovereign himself is directly subjected to any form of legal process. It is true that notice of the hearing of the petition is given to him under S. 19 (2), so that if he wishes to intervene, he can do so and appear at the hearing. If he does not wish to intervene, he is under no obligation to do so and the hearing proceeds. The mere issue of a notice of this kind can hardly be described as legal process so as to attract the application of S. 86, Civil P.C., to the insolvency proceedings. A.I.R. 1940 Cal. 244=I.L.R. (1940) 1 Cal. 344=71 C.L.J. 316=44 C.W.N. 333=189 Ind. Cas. 667.

——S. 19—Absence of notice—Effect.

Where no prejudice has been caused to the petitioner by reason of the absence of the requisite notice under S. 19, there is no valid ground for interference with the order of adjudication. A.I.R. 1935 Lah. 412=158 Ind. Cas. 94.

——S. 19 (2)—Applicability.

There is no authority for holding that Sub-S. (2). S. 19, only applies to the case of a petition by the debtor. 93 Ind. Cas. 903=A.I.R. 1926 Lah. 360.

——S. 19—Notice in Gazette—Legality.

The notification of a petition for insolvency in the local official Gazette is not illegal. 93 Ind. Cas. 903= A.I.R. 1926 Lah. 360.

——S. 19 (2)—(1907), S. 12 (2)—Private notice.

An order of adjudication passed after private notice to all the creditors (without a general notice as required by law) is of no avail and should be set aside. 3 L.W. 495=34 Ind. Cas. 696.

——Ss. 19 (1) (3), 75 (3)—(1907), Ss. 12 (1) (3), 46 (3) —Notice.

There is nothing in S. 12 (3) of the Act to warrant the contention that notice is not necessary to other creditors in a petition by one creditor to adjudge his debtor insolvent and an appeal against an order of adjudication passed on the petition of one creditor will be under S. 46 (3) to the High Court at the instance of another creditor if the Court declined to add him as a party. 1 L.W. 1012=(1914) M.W.N. 899=26 Ind. Cas. 282.

——S. 19—Procedure—Petition by creditor.

It is unfair on the part of the Court to order the debtor in every case to file inventories of his property and list of debts due from them to others, without petitioning creditors having first established their right to present the petition. In the absence of circumstances to justify such an order it is necessary for the Court to proceed under S. 24 by calling upon the petitioning creditors to establish their rights as defined in S. 19 to present a petition before taking any other action against the debtor. 119 Ind. Cas. 753=A.I.R. 1929 Lah. 636.

——S. 20—Appointment on creditor's petition.

On a creditor's application for adjudication unless the Court is satisfied that the applicant for appointment has a fair chance of success, no Receiver should be appointed at his instance. A.I.R. 1932 Lah. 643= 33 P.L.R. 992=14 L. 117=140 Ind. Cas. 275.

——S. 20 — Interim Receiver — When to be appointed.

An **ad interim** Receiver should ordinarily be appointed in cases where the property of the insolvent has to be preserved from destruction or disappearance. 3 L.W. 250=32 Ind. Cas. 897.

——S. 20—Vesting of property in interim Receiver.

Where an **ad interim** Receiver is appointed under S. 20, the property of the debtor does not vest in the Receiver unless the Court makes a further order vesting the property in him. A.I.R. 1931 Pat. 70 (72)=9 Pat. 945=130 Ind. Cas. 38.

——S. 20—Appointment of interim Receiver—Vesting of property.

The order of the appointment of the **interim** Receiver has not got the same effect as the vesting order or the order of adjudication. Its effect is that he will have such of the powers conferrable on a Receiver appointed under the C.P. Code as the Court may direct. 102 Ind. Cas. 444=1927 M.W.N, 245=26 M.L W. 171=A I.R. 1927 Mad. 693=53 M.L.J. 142.

——S. 20—Interim Receiver appointed under—Powers—Insolvency Court if can accord sanction to such Receiver to institute suit against third parties to recover possession of property of insolvents in their hands.

According to the provisions of S. 20 of the Provincial Insolvency Act an **interim** Receiver has such of the powers conferrable on a Receiver appointed under the C.P. Code, as the Court may direct. There is nothing in the Provincial Insolvency Act which prevents the Insolvency Court from according sanction to an **interim** Receiver to institute suits even against third parties for the vindication of the rights of the debtors in respect of whom an insolvency petition is pending. Hence a suit by an **interim** Receiver to recover possession of the property of the insolvents which has passed into the hands of third parties is maintainable. I.L.R. (1946) Mad. 727=59 L.W. 18= 1946 M.W.N. 37=A.I.R. 1946 Mad. 202=(1946) 1 M.L.J. 1.

——Ss. 20, 28—Interim and Official Receiver—Difference in powers of—Attachment of insolvent's property by creditors is not invalidated by appointment of Receiver before attachment.

The powers of an **interim** Receiver are not defined in S. 20 and in the absence of such a definition, he can only be, as provided by the section, entitled to take immediate possession of such of the debtor's property as may be directed by the Court. Once he has taken possession of the property, his powers would be those which could have been conferred on a Receiver appointed under the Civil P. C. It would, therefore, follow that the **interim** Receiver does not derive his power by reason of his appointment but in virtue of his taking possession of the property under the orders of the Court. His appointment has not the same effect as the effect of the appointment of an Official Receiver after adjudication. It is only after adjudication that an insolvent can be said to be divested of his property. It is only then and not till then that th

property would vest in the Official Receiver but before the adjudication, the debtor continues to be the legal owner of the property. The attachment of the insolvent's property by his creditors cannot therefore, be invalid on account of the appointment of an **interim** Receiver before the attachment. A.I.R. 1939 Mad. 438=49 L.W. 422=1939 M.W.N. 270=189 Ind. Cas. 335.

——**Ss 20, 21 (2)—Appointment of Receiver—** Court should direct which powers are to be exercised by him—Attachment by Receiver of third persons's property acting on information of creditors—Objection —Receiver should stay hands until objection is decided.

Even if an **interim** Receiver is not appointed by the Court at the time of the petition of insolvency, the order of the Court appointing the Receiver subsequently but before adjudication purports to be one under S. 20 and the Court should give direction as to which of the powers ordinarily conferable upon a Receiver appointed under the Civil P. C. should be exercisable by the Receiver.

The Court asked the Receiver to take charge of the property of the insolvent. The Receiver attached certain property which belonged to the third person, on the information of the creditors that it belonged to the insolvent. The third person objected and claimed the property as his own:

Held, that the Receiver should have stayed his hands until the question of whether or not the property was the property of the debtor had been determined by the Court. A.I.R. 1938 Cal. 182=66 C. L. J. 61 =I.L.R. (1938) 1 Cal. 245=176 Ind. Cas. 437.

——**S. 20—Powers of** interim **Receiver—C. P. Code, O. 40, R. 1 (d).**

The word 'and' before Cl. (d), R. 1, O. 40, means 'also' or 'in addition to'; i.e., the powers conferred under Cl. (d) are in addition to all or any of the powers conferred under O. 40, R. 1 (a), (b) or (c). Again in Cl. (d) power can be conferred upon the Receiver to realize property, i.e., to reduce the property into possession. It is obvious that this cannot relate to property of which the Receiver has been put into possession. A.I.R. 1937 Mad. 589=1937 M.W.N. 262 =45 L.W. 771=171 Ind. Cas. 220.

——**S. 20—Status and powers of** interim **Receiver.**

Whatever the Receiver rightly does with regard to the property, he does it simply as the agent of the owner of the property or the person interested in the property.

Where an **interim** Receiver of the insolvent's property appointed under S. 20 is ordered to exercise all powers of the owner under O. 40, R. 1 (d), Civil P. C., and is also expressly empowered to act under O. 21, R. 89, Civil P. C. to set aside the sale of the said immovable property after raising the necessary founds, his appointment divests the insolvent of all control over the property and operates as an injunction restraining him from interfering with the possession of the same or taking any action in regard thereto. The **interim** Receiver is competent to apply to set aside sale under O. 21, R. 89, as the insolvent, would have been competent so to do but for the appointment of the **interim** Receiver. A.I.R. 1937 Mad. 589=45 L.W. 771=1937 M.W.N. 262=171 Ind. Cas. 220.

——**S. 20—"Thereupon," meaning of—Powers of interim Receiver.**

The word 'thereupon' in S. 20 does not mean that he is not clothed with the necessary power to act in relation to the property until he takes possession. On the other hand, it seems to indicate that on a direction being given by the Court empowering him to take immediate possession, he gets clothed with all the powers that are necessary to enable him to get such possession and one of the powers contemplated under O. 40, R. 1 (d) is realization of the property which would also include reduction of the property into his possession. A.I.R. 1937 Mad. 589=1937 M.W.N. 262 =45 L.W. 771=171 Ind. Cas. 220.

——**Ss. 20, 56, 4—Interim Receiver—Powers of——Court's power to remove person in possession.**

Where an **interim** Receiver takes possession of the property belonging to insolvents in possession of the insolvents, not in their own right but as lessees under the mortgagee with whom it had been previously mortgaged with possesison, an Insolvency Court cannot order the delivery of possession to the mortgagee before an order of adjudication is made against the debtors. If the Receiver is willing to discharge the obligation attached to property, the possession should remain with him, otherwise the insolvent tenant shall have to be let in possession.

Principles deducible from the provisions of law contained in Ss. 20, 56, are (a) An **interim** Receiver may be appointed by any Insolvency Court with directions to take immediate possession of the property of the alleged insolvents; (b) The powers to be exercised by an **interim** Receiver shall be determined by the Court with reference to O. 40 of the Civil P. C.; (c) To ensure compliance with its order, the Insolvency Court can remove a person in whose possession such property is, but it cannot remove any person whom the insolvent has not a present right so to remove. It would be evident, therefore, that the only order that a Court can pass within the four corners of law is to direct an **interim** Receiver to take possession of the property and the only manner in which it can enforce its order is to remove the person in possession provided that that person does not come within the purview of the proviso to sub-S. (3) of S. 56. It cannot, therefore, pass any order which may amount to the divesting of any person of the possession of the property who has a present right to retain that possession against the insolvents. A.I.R. 1934 Lah. 1006=36 P.L.R. 205=156 Ind. Cas. 278.

——**S. 20—Status of** interim **Receiver — Receiver,** whether representative of debtor—Objection by Receiver to execution against debtor's property—Second appeal—**Ad interim** Receiver, powers of.

The question whether a Receiver in insolvency is or is not a representative of the debtor for the purposes of S. 47, Civil P. C., depends upon the purpose and nature of the application made by the Receiver. For some purposes, he would be entitled as representing the judgment-debtor to litigate matters under S. 47 of the Code; but where he comes to the executing Court for the purpose of saying that as the judgment-debtor's property now belongs to the Receiver, the Court cannot sell for the judgment-debtor's debt that which is the property of another person because it has vested in the Receiver for the benefit of the creditors, then, for that purpose, the Receiver is not a representative of the judgment-debtor, but a third party making a claim and no second appeal lies from an order made on such an application.

An **interim** Receiver cannot represent the debtor and make an application under S. 47, Civil P. C. A.I.R. 1932 Cal. 203=35 C.W.N. 971=136 Ind. Cas. 593.

——S. 20—Interim Receiver—Powers of.

A Receiver appointed under S. 20 does not have all the powers of a Receiver appointed after adjudication but it is necessary for the Court to make an order under that section in which the Court may in its discretion direct him to take immediate possession of the property or any part thereof. On the other hand in the case of a Receiver appointed under S. 56, the property immediately vests in him from the moment of his appointment. 9 Pat. 945=A.I.R. 1931 Pat. 70=130 Ind. Cas. 38.

——S. 20—Powers of interim Receiver—Application under O. 21, R. 90, C.P.C.

An **interim** Receiver appointed under S. 20, Provincial Insolvency Act, can apply under O. 21, R. 90, C. P. Code, he being a person whose interests are affected by the sale and this is all the more so when the debtor, in charge of whose property he is placed, is later adjudged insolvent. 109 Ind. Cas. 148=1928 M.W.N. 216=A.I.R. 1928 Mad. 454.

——S. 20.

There is apparently no provision under which the Court can make a vesting order before adjudication, but the **interim** Receiver has very much the same rights and liabilities as a Receiver, for S. 56, Insolvency Act, applies its provisions so far as may be to "**interim** Receiver." 109 Ind. Cas. 148=1928 M.W.N. 216 =A.I.R. 1928 Mad. 454.

——S. 20—Applicability of C. P. C.

An **interim** Receiver does not possess the powers of the Official Receiver and has under S. 20 only the powers of a Receiver appointed under the C. P. Code, and is not clothed even with those powers till he takes possession of the debtor's properties. 93 Ind. Cas. 877 =23 M. L. W. 300=A. I. R. 1926 Mad. 432=50 M. L. J. 665.

——S. 20—Interim Receiver—Applicability of O. 21 R. 89, C. P. C.

The **interim** Receiver by virtue of his appointment under S. 20 of the Provincial Insolvency Act, has no power to act under O. 21, R. 89, C. P. Code, in absence of the Court's order authorising him to so act. 93 Ind. Cas. 271=23 M.L.W. 145=1926 M.W.N. 159 =A.I.R. 1926 Mad. 357=50 M. L. J. 239.

——S. 20—Powers of Court to lease occupancy land.

An Insolvency Court has no power to lease out occupancy land of an insolvent even for the period o one year. A.I.R. 1934 Nag. 231=17 N. L. J. 163= 151 Ind. Cas. 889.

——S. 21 (1)—Fresh security, legality of.

A Court has inherent jurisdiction in cases where Court accepts the security furnished by a petitioner in insolvency but on objections by the other side, finds it insufficient to demand fresh security if it is satisfied that the security which has already been given is not sufficient. It is fair to presume in such cases that a fraud has been committed on the Court or, in any case, that the Court has acted under a misapprehension in accepting the security. A.I.R. 1935 Lah. 148=158 Ind. Cas. 371 (1).

——S. 21 (1) and (3)—Arrest—Order to appear and adjudication in default—Order of arrest—Legality.

When the Court has only ordered the debtor to appear in Court to answer the allegations made against him, the penalty for his not appearing being an adjudication order in the absence of the insolvent, the Court is not justified in issuing a warrant for the arrest of the debtor. Such order cannot be deemed to be under Cl. (1). It can be only be passed under Cl. (3), S. 21. A.I.R. 1929 Lah. 808.

——Ss. 21 (2), 28 (2), 56 (3), 4—Power of Insolvency Court before and after adjudication—Insolvent's property in custody of third persen who sets up title to it—Procedure for recovering possession of such property—Creditor proceeding with Court's permission—Position of—Third party's proceedings to get back property—All creditors, if should be joined.

There is a wide difference between the position and powers of the Insolvency Court before and after adjudication. Before adjudication, the debtor continues in possession of the property and is, subject to the provisions of the Act, entitled to deal with it like any other owner. Therefore, in order to prevent alienations and waste, the Insolvency Court is empowered under S. 21 (2) to order attachment by actual seizure of the whole or any part of the property, provided the conditions laid down in the proviso obtain. But these powers of attachment are limited to the position before adjudication, and they are not as wide as the powers of attachment conferred upon a Civil Court under the Civil P C. nor is it possible to resort to the wider powers of the Civil Courts under S. 5, because that section applies the procedure of the Civil Courts "subject to the provisions of the Act." After adjudication, the position changes entirely. Under S. 28 (2), the whole of the insolvent's property immediately vests in the Court or the Receiver, and when there is no Receiver, the Court is invested with all the rights and is authorised to exercise all the powers conferred on a Receiver by the Act under S. 58. One of these rights is the right to actual physical possession of the insolvent's property by the Receiver, and in order to enforce that right, the Court is empowered under S. 56 (3) to remove any person who is in possession or custody of the insolvent's property, from such possession or custody, subject, however, to the important proviso of that section.

The Court has no powers under S. 56 summarily to direct a third person to deliver up possession of property of which he is in possession if he sets up a title however flimsy, to it. The only power the Court has in such circumstances is to try the issue whether the insolvent is entitled to the property or not under S. 4. But before that can be done, a proper application has to be presented by the Receiver, when there is one, or by such one of the creditors or other person interested in preserving the insolvent's estate as the Court authorises to act when there is not. But the person who proceeds is either the Court or the Receiver and not a creditor. Even when a creditor is authorised to act, he is acting as an agent of the Court and has no right or title to the property itself, not even a right to possession. If he succeeds, the

property passes to the Court and not to the creditor who conducted the proceedings. Cases may arise in which the Court or the Receiver, enters into possesion without obstruction because the person claiming the right to the property is not present to object or because for some other reason, he has omitted to do so, and then he is obliged to institute proceedings for the recovery of possession. In such a suit, the whole body of creditors need not be joined.

It is a cardinal rule of justice that no party should suffer for an error or omission of the Court when a duty is cast on the Court itself for acting or refraining from acting. A.I.R. 1939 Nag. 10=1938 N.L.J. 384=I.L.R. (1941) Nag. 696=179 Ind. Cas. 943.

——S. 21 (2)—Attachment, nature of— Duty of Court.

Section 21 (2) contemplates an order of attachment which is analogous to an attachment before judgment and the provisions of Civil P.C. apply to such attachments by virtue of the provisions of S. 5, Provincial Insolvency Act. There is, however, an important proviso to S. 21 under which the Court has to be satisfied first as to whether the necessary conditions for making an order under S. 21 are present or not. A.I.R. 1938 Cal. 182=66 C.L.J. 61=I.L.R. (1938) 1 Cal. 245=176 Ind. Cas. 437.

——S. 21—Object—Attachment — Property not included in assets by debtor—Claim by debtor's wife —No adjudication into claim—Order for attachment, legality of.

Where the creditor applied for the attachment of a house not included in the schedule of assets filed by the debtor, but the debtor's wife claimed it as her own, and the Court ordered attachment before any adjudication into the claim made by the wife:

Held, that the order of attachment should be set aside.

The summary powers conferred on the Courts by S. 21 are intended to prevent the the debtor from making away with what is his property, documents and books of account which might be used against him, property that he might run away with and take away out of the reach of the creditors. A.I.R. 1933 Cal. 76=36 C.W.N. 741=59 C. 1338=56 C.L.J. 307=142 Ind. Cas. 72.

——S. 21 (3)—(1907), S. 13 (3)—Attachment under S. 13 (3) —Objection—Duty of court—Whether alleged owner bound to wait for appeal under S. 22.

A court is bound to investigate an objection of an alleged owner of the property attached under S. 13 (3). An attachment under S. 13 (3) is analogous to an attachment before judgment under C. P. C., Or. 38 Rr. 5—12. It is open to an objector of the attachment under S. 13 (3), to wait and appeal under S. 22 but he is not bound to do so and can question the order of attachment itself. 36 All. 65=12 A.L.J. 24=24 Ind.Cas. 752.

——S. 21—Deposit by debtor — Insolvency proceedings pending — Deposit by debtor—Right of petitioning creditor to withdraw amount.

Where money is deposited in Court by the debtor during the pendency of Insolvency proceedings against him, it ought to be kept in Court and the petitioning creditor should not be allowed to withdraw it during continuance of Insolvency proceedings. A.I.R. 1929 Rang. 338.

——S. 21—Discretion.

The powers under Ss. 21 and 22 are entirely in the discretion of the Court and the High Court should not in second appeal interfere with that discretion. 93 Ind. Cas. 903=A.I.R. 1926 Lah. 360.

——Ss. 21, 28 (2) (b)—(1907), Ss. 13 (4) and 16 (2) (b)—C.P.C., S. 55.

If a prisoner under arrest neglects to apply to be declared an insolvent and is committed to prison under S. 55 of the C.P. Code he cannot obtain his release simply on the admission of his subsequent petition of insolvency under S. 13 but only upon the adjudication thereon under S. 16 (2) (b). 4 S.L.R. 47 =11 Cr.L.J. 501=7 Ind. Cas. 606.

——S. 22—Applicability—Powers of Court.

The Insolvency Court has power to issue such processes as prohibition and injunction in order to prevent alienation of his property by the debtor.

The debtor is not liable under S. 22 on the credior's petition at least until he has due notice of the same. A.I.R. 1936 Nag. 237=I.L.R. (1937) Nag. 185=38 Cr.L.J. 230=166 Ind. Cas. 303.

——S. 22—Applicability—Debtor's duty to produce account books.

The first part of S. 22 does not apply to a case when an order has been made on a creditor's petition. Althougb, owing to the bad drafting of the section, the first part of the section may seem to apply to both classes of orders, it was never intended to be applicable to the case of an order made on a creditor's petition. The second part of the section applies to both classes of cases and to all stages of the proceedings that follow the order admitting the petition leaving it to the Court or the Receiver to make the requisition at the appropriate stage. The use of the word 'debtor' and not the word 'insolvent,' does not suggest that the section was meant to be operative only up to the order of adjudication. The expression "generally do all such acts and things in relation to his property as may be required by the Court" is sufficiently wide to include the production of account books in respect of the business. A.I.R. 1934 Cal. 409=35 Cr.L.J. 937 =38 C.W.N. 642=61 Cal. 537=149 Ind. Cas. 352.

——S. 22—Debtor's application — Procedure to be followed—Account books, production of—Statements of petitioning debtor—Duty of Court.

It is incumbent upon the petitioning debtor under S. 22 when his petition is admitted, to produce all his books of account. The statements in the petition by themselves, if merely repeated formally in the evidence are not sufficient **prima facie** grounds for believing such statements.

It is the duty of the Court to be satisfied **prima facie** and after following the necessary procedure and making the necessary investigation to come to a conclusion that the statements by the debtor are true. A.I.R. 1933 Pat. 43=13 P.L.T. 714=12 Pat. 107=141 Ind. Cas. 223.

——S. 23—Applicability—Debtor under arrest by Revenue Court.

Since the revenue officer is not a "Court" and an arrear of land revenue is not the amount of a "decree', it follows that a debtor who is under arrest or imprisonment by reason of the order of a revenue officer made under the provisions of S. 45, Land and Revenue Act, is not "under arrest or imprisonment in execution of the decree of any Court" and that the provisions of S. 23 (1) Insolvency Act, have no application to the case of such a debtor. Therefore, the Insolvency Court has no jurisdiction to order the release of respondents under that section. 109 Ind. Cas. 145=5 Rang. 806=A. I. R. 1928 Rang. 81.

——S. 23—Person arrested under Sec. 10, Sind Encumbered Estates Act.

Where a person is arrested under the orders of the Manager, Encumbered Estates, under the provisions of S. 10 of the Sind Encumbered Estates Act read with S. 157 of the Bombay Land Revenue Code, the Insolvency Court has no jurisdiction to grant him an interim order of protection as he is not under arrest in execution of a decree of any Court for payment of money. 99 Ind. Cas. 930=7 A. I. Cr. R. 345=28 Cr. L. J. 194=A.I.R. 1927 Sind 123.

——S. 23—Effect on maintenance order under S. 488, Criminal P. C.

Order under S. 488, Criminal P. C.—Person failing to comply—Magistrate sentencing him—Subsequent insolvency and order under S. 23 (1), Prov. Insol. Act—Order under S. 23 (1) or the insolvency is not conclusive of the fact that there is sufficient cause for non-compliance with order under S. 488, Criminal P. C.—The question is one of fact which the Magistrate has to decide himself. Magistrate cannot, only on this ground, set aside his own order of sentence. A.I.R. 1940 Mad. 697=1940 M. W. N. 237=(1940) 1. M. L. J. 868=51 L. W. 718=I. L. R. (1940) Mad. 692=41 Cr. L. J. 785=189 Ind. Cas. 692.

——S. 23—Ad interim protection order.

Where, pending an application for adjudication, a warrant for arrest of the alleged insolvent was issued in execution of a money-decree but actual arrest was not affected and he applied to the Insolvency Court for an order of protection:

Held, that the Court had no power to pass an **ad interim** protection order. A.I.R. 1934 Lah. 113=148 Ind. Cas. 975.

——Ss. 23, 31—Power to grant protection order before adjudication.

The Court has no power to grant protection to an insolvent before his adjudication though after adjudication it has power to do so under S. 31, and before adjudication under S. 23, the Court may, if he is under arrest in execution of the decree of any Court, order his release. A.I.R. 1932 Rang. 51=10 Rang. 71=33 Cr. L. J. 435=137 Ind. Cas. 36.

——S. 23—Right to protection — Before adjudication.

Before adjudication insolvent has no right to be protected unless he is arrested in execution of a decree. 80 Ind. Cas. 938=20 M. L. W. 870=1924 M. W. N. 836= A.I.R. 1924 Mad. 893=47 M.L.J. 530.

——S. 23—Re-arrest.

With respect to the statements made prior to the insolvency and those made afterwards an order for re-arrest can be made. 1934 M. W. N. 1144.

——S. 23—Refusal to release—Reasons.

Th provisions of the section are not mandatory but the Court is bound to record its reasons in writing for refusing to release the petitioner. 83 Ind. Cas. 877=3 Pat. 543=6 P.L.T. 203=A.I.R. 1924 Pat. 559.

——S. 24.

Synopsis.

1. Appeal
2. Enquiry by Court
3. Examination of debtor—Sub-S. (2)
4. 'Res judicata'
5. Miscellaneous.

1. Appeal.

——Ss. 24, 25, 19, 75 (2)—Creditor's petition—Omission to verify—Mere irregularity—Petition struck off—Legality—Order, whether amounts to dismissal—Right of appeal.

After a notice under S. 19 has been issued to the other parties concerned and they have appeared before the Court, the only final orders that the Court can pass are either to adjudicate the debtor an insolvent or dismiss the petition. An order refusing permission to verify the petition and striking off the petition after notice has been issued amounts to an order dismissing the petition for insolvency and is appealable A.I.R. 1932 Lah. 28=133 Ind. Cas. 626.

2. Enquiry by Court.

——Ss. 24, 25—Debtor's petition—Proof by creditor that debtor is able to pay his debts—Dismissal of petition.

When the Court dismisses a debtor's petition, on proof being supplied by the creditor that the debtor has assets which he has not mentioned in the petition, which can be utilized in paying debts, the Court does not exceed its jurisdiction with reference to S. 24. 1946 O.W.N. (H.C.) 97=1946 A.L.W. 105.

——S. 24 (2)—Procedure—Examination of parties' witnesses.

Section does not say that debtor must be examined after the examination of creditor's witnesses. Creditors can prove their right to present petition even by examination of the debtor, examination of creditor's witnesses before the debtor's examination is not necessary. 1942 N.L.J. 409.

——S. 24 — Enquiry, nature of — Genuineness of debts—Some debts fictitious—Effect.

In the summary enquiry under S. 24, it is not proper to go into the question whether the debts mentioned are real debts but the Court has to see whether **prima facie** the person applying to be adjudicated insolvent is unable to pay his debts; the mere fact that some of the debts entered in the petition are fictitious would not, by itself justify an order of dismissal of

petition, though it could be taken into consideration at the time of discharge. A.I.R. 1938 Lah. 490=40 P.L.R. 316=I.L.R. (1938) Lah. 535=177 Ind. Cas. 217.

——S. 24 — Powers of Court in matters of evidence.

In insolvency proceedings, at the stage of adjudication, the Court is enabled to deal summarily with the opposition by the creditor, that is to say, the Court must listen to such evidence as the debtor may care to adduce and the debtor may be cross-examined, and if the Judge is satisfied after such hearing, he may refuse to hear any further evidence and may grant the adjudication. But if the Court is inclined to hear any evidence presented by the creditor, he is entitled to hear such evidence. He may, if he likes, hear the evidence and may hear as much evidence as he may think fit in the circumstances which will vary, of course, according to the difficulty of the case. A.I.R. 1936 Pat. 18=16 P.L.T. 833=2 B.R. 172 (2)=15 Pat. 177=160 Ind. Cas. 153 (F.B.).

——S. 24—Enquiry—Duty of Court—Dismissal of petition for withholding accounts—Legality.

No elaborate enquiry is required at the initial stage of bankruptcy proceedings when the petitioner is a debtor. It has to be seen whether the petitioner has made out a **prima facie** case for adjudication which requires proof of the following two facts: 1. That his debts exceed Rs. 500; and 2. That he is unable to pay these debts. The fact that the petitioner is acting **mala fide** by keeping back account books does not arise at this stage at all. Where the petition is dismissed merely because the Court suspects that there were account books which the petitioner has not produced before it, the Court commits a material irregularity and the order is open to be interfered with in revision. A.I.R. 1936 Pesh. 102=162 Ind. Cas. 273.

——S. 24—Debtor's application—Consideration—Concealment of accounts.

On a debtor's application to be adjudicated insolvent only two questions arise, namely, whether his debts amount to Rs. 500 or over and whether he is unable to pay his debts, and on consideration and determination of these two points, the application of debtor succeeds or fails. The fact of the debtor's having concealed his accounts is not a ground on which the application can be dismissed. A.I.R. 1933 Lah. 330=34 P.L.R. 69=142 Ind. Cas. 690.

——S. 24—Debtor's petition—Court's duty to take creditor's evidence.

Where a debtor applied to be adjudicated an insolvent, and the creditors contended that though the debtor had been arrested once in execution, yet there was no reason to believe that he was unable to pay his debts, or anything more than unwilling to pay his debts, although the Court under S. 24 (1) (a), is not bound to do so, yet it is entitled to hear further evidence. In fact under such circumstances, the Court is bound to take the evidence tendered to it and to pass orders refusing to adjudicate the petitioner if necessary. A.I.R. 1936 Rang. 108=161 Ind. Cas. 588.

——S. 24—Enquiry—Court's power to direct separate suit.

Where a creditor presents an application, and the debtor challenges the creditor's right to apply, the Insolvency Court, under S. 24, will ask for proof from the creditor as to his right to apply and is entitled to go into that question. But it does not follow therefrom that the Insolvency Court must decide every question connected with it or which may incidentally arise from it, and cannot refer the parties to a regular suit in any case if it is of opinion that a complicated question of fact or law arises therein. A.I.R. 1935 Bom. 80=59 Bom. 161=36 Bom. L.R. 1236=154 Ind. Cas. 566.

——S. 24—Powers of appellate Court.

Where an insolvent has admitted the debt due to the creditor petitioner and the lower Court has not considered it necessary to frame an issue and call for further proof, it is open to the District Judge in appeal to frame an issue on the point and to remand the case for further evidence if he thinks fit to do so. But he is not justified in dismissing the petition without giving the petitioner an opportunity to produce proof of his debt. A.I.R. 1934 Lah. 128=148 Ind. Cas. 910.

——S. 24—Debtor's inability to pay—Proof.

Where an application for adjudication as insolvent is made before adjudicating an applicant to be an insolvent, the Court is required to be satisfied that he is not in a position in fact to pay his debts. The Court is not bound to accept the statement of the petitioner but is required to investigate the facts for itself. The duty of the court is to be satisfied, **prima facie**, that is, after following the necessary procedure and making the necessary investigation to come to a conclusion that the statement by the debtor is true. A.I.R. 1934 Pat. 97=12 Pat. 866=15 P.L.T. 271=147 Ind. Cas. 842 (2).

——S. 24—Enquiry—Duty of Court.

Under the Provincial Insolvency Act, though it is not necessary to hold an elaborate enquiry as to the debtor's inability to pay his debts before an order o adjudication, the Court would not be justified in refusing to examine any of the witnesses for the creditors in support of their allegation that several of the debts were fictitious. A.I.R. 1933 Lah. 629=144 Ind. Cas. 102.

——S. 24—Prima facie case—Debtor (Petitioner) swearing to correctness of his debts and want of other property—Sufficiency of proof of inability.

Under S. 24, the only proof that is required from the petitioner, when the debtor is the petitioner, is **prima facie** proof of his right to present the application. In a case the petitioner (debtor) gave such proof by swearing to the correctness of the debts mentioned by him in the schedule and by swearing that he had no other property:

Held, that the petition should not be dismissed for want of such proof because if he would have other property besides that mentioned in the schedule it would be liable to be seized by Official Receiver. 127 Ind. Cas. 720=A.I R. 1930 Lah. 75.

——S. 24—Statement by debtor of inability to pay.

Where a person applied to be adjudicated an insolvent and deposed to his inability to pay his debts and the Court did not disbelieve him:

Held, that he had established **a prima facie** case and that the application should not be rejected. 100 Ind. Cas. 1004=6 Bur. L.J. 14=A.I.R. 1927 Rang. 329.

——S. 24—Scope of inquiry before adjudication—Not searching.

S. 24 does not contemplate a searching enquiry when the debtor applies to be adjudicated an insolvent.

Under that section only **prima facie** proof of his right to present an application has to be taken. 125 Ind. Cas. 638=A.I.R. 1930 Lah. 644.

——S. 24—Not elaborate.

On the day of the hearing of petition by a debtor no elaborate enquiry should be undertaken into the genuineness of the debts mentioned or the dealings of the petitioner with his property, but only **prima facie** proof of the right of the petitioner to present the petition should be required. 109 Ind. Cas. 552=A.I.R. 1929 Lah. 87.

——S. 24—Prima facie **proof of inability to pay debt.**

According to S. 24 a debtor can only be required to furnish such proof of his inability to pay his debts as to satisfy the Court that there are **prima facie** grounds for believing the allegations of the debtor and the Court when it is so satisfied shall not be bound to hear any further evidence. There is nothing however, in this section to the effect that the Court, if not satisfied with the examination of the debtor can proceed to dismiss the petition without any rebuttal. 114 Ind. Cas. 54=10 L.L.J. 493=A.I.R. 1929 Lah. 49.

——S. 24—Prima facie **proof of inability to pay.**

In summary enquiry it is not proper to go into the question whether the debts mentioned are real debts, but the Court has to see whether **prima facie** the person applying to be adjudicated insolvent is unable to pay his debts. 114 Ind. Cas. 54=10 L.L.J. 493=A.I.R. 1929 Lah. 49.

——S. 24—Prima facie **proof of inability to pay—Enquiry into fictitious nature transfer, if competent.**

Kulwant Sahay, J.—The proviso to sub S. (1) to S. 24 requires the debtor to furnish only such proof as to satisfy the Court that there are **prima facie** grounds for believing that he is unable to pay his debts. If a deed of transfer is produced before a Court such a deed is a **prima facie** evidence of the transfer, and if the party opposing the application for adjudication wants to establish that the transfer is not a real transfer, but a fictitious or benami transfer, it is for him to prove it, and in the absence of such proof the Court is to presume that the transfer is a real transfer. There is no provision in S. 24 to enable the creditors to produce evidence in support of their allegation that the transfer is a benami transfer at the stage of the application for adjudication. Under sub-S. (2) the creditors have the right to question the debtor as regards his conduct, dealings and property; but there is nothing in the section which would empower the creditor to produce substantive evidence as regards the concealment of property by the debtor. It is only at the stage of making the order of discharge that the question as regards the concealment of property or the question of the debtor being guilty of any fraud or fraudulent breach of trust can be raised, and it is only at that stage that the creditors are entitled to adduce evidence on these points. A.I.R. 1927 Pat. 188, Foll. 111 Ind. Cas. 647=7 Pat. 771=9 P.L.T. 444=A.I.R. 1928 Pat. 477.

——S. 24—Not elaborate enquiry.

The Court should not and need not go into an elaborate enquiry as to the validity of or otherwise of the debts. It is sufficient if the Court is satisfied that there are **prima facie** grounds for thinking that the debtor is unable to pay his debts. 97 Ind. Cas. 463=A.I.R. 1927 Cal. 69.

——S. 24—Enquiry into concealment of property, if competent.

At the stage of the application for adjudication no very careful inquiry is necessary with regard to the inability to pay debts. If the Court is satisfied that a **prima facie** case is established by the debtor, the Court will adjudicate him to be an insolvent; and the consideration of the further question as to whether there has been a concealment of property and as to title to property such as an inquiry into the benami character of a transaction or the jointness or separateness of a family is deferred till the stage when the discharge is applied for. 101 Ind. Cas. 445=8 P.L.T. 184=A.I.R. 1927 Pat. 188.

——S. 24—Evidence.

It is not necessary in order to establish the petitioner's inability to pay his debts to prove that the value of his assets is less than his liabilities. 109 Ind.Cas. 552=A.I.R. 1929 Lah. 87.

——S. 24—Mere possession by debtor of large properties or acts attracting penal provisions or suppression of property—If relevant.

Court has to satisfy itself whether debtor is unable to pay his debts and if he has asserted, or if his property cannot be converted in to money, the statement of the debtor must be accepted as true unless the Court has reasons to think that all his debts are fictitious debts and that he is making the application with the ulterior motive. Mere facts that the debtor has large properties is no ground to hold that he is able to pay his debts. A.I.R. 1926 Mad. 494, Foll. Acts atiracting penal provisions of the act or suppression of some property are not germane to the inquiry. 113 Ind. Cas. 290=29 M. L. W. 750=A.I.R. 1928 Mad. 1193=56 M.L.J. 597.

——S. 24—Evidence—Enquiry into present value of properties.

Where a debtor applies for adjudication as insolvent the debtor is only required to furnish such proof of his inability to pay his debts as will satisfy the Court that there are **prima facie** grounds for believing the same. In dealing with an application for adjudication of insolvency the Court should enquire into the present value of the properties which are available for meeting the liabilities of the debtor and decide whether having regard to proviso (a) S. 24, the debtor has prove d his inability to pay his debts. 108 Ind. Cas. 433=A.I.R. 1928 Nag. 226.

——S. 24—Present value of property—Enquiry before adjudication.

The Court in dealing with an application for adjudication of insolvency should enquire into the

present value of the properties which are available for meeting the liabilities of the debtor and decide whether having regard to poviso (a) to Section 24 the debtor has proved inability to pay his debts. 72 Ind. Cas. 60=A.I.R. 1924 Cal. 436.

——S. 24—Proof of debt—Power of insolvency court to enquire,

The Povincial Insolvency Act does contemplate an enquiry by the Insolvency Court as to the existence of a debt, hence the dismissal of an insolvency petition on the ground that it cannot be granted until the petitioning creditor had proved his claims in a regular suit, was wrong in law. 99 Ind.Cas. 666= A.I.R. 1927 Lah. 111.

——S. 24—Application by creditor—Procedure.

On an application by creditor for debtor's adjudication as insolvent it is the duty of the Court to enquire whether the debtor owed the petitioning creditor Rs. 500 more, and also genergally to follow the procedure laid down in S. 24. 96 Ind. Cas. 424= A.I.R. 1926 Lah. 638.

——S. 24—Questions of title—Act of insolvency —Single enquiry.

Section 4 is every comprehensive in its term and it is not illegal for a Court to try together the two questions (2) whether A has committed an act of insolvency and (b) whether the property in respect of which the act is alleged th have been committed belongs to A or B. 97 Ind.Cas. 174=A.I.R. 1926 Lah. 679.

——S. 24—Time for further evidence—Grant of.

Whether witnesses are or are not present, it is incumbent on the Court to examine the debtor who applies to be declared an insolvent when it declares its intention of hearing the petition. It is after the examination of the debtor in the presence of the creditors that the Court has to consider whether sufficient cause has been shown to grant time to procure further evidence. 9 A. L. J. 233 Foll. 93 Ind. Cas. 953=A.I.R. 1926 Lah. 506.

——S. 24—(1907)—S. 14—Power of Court under.

Under S. 14 a court is bound to do only two things. It must satisfy itself on the points (a), (b) and (c) in Sub S. (1) and it must examine the debtor in the presence of the creditors and allow the latter to cross-examine the debtor. The court need not inquire whether all the debts entered in the schedule are real or fictitious or whether the debtor has concealed his properties by omitting them from his schedule. Under S. 14 the court can grant time for the production of evidence. The court has power in rare cases to take evidence on and determine other points than those indicated. Such power is inherent and may be based on S. 47 of the Act.

Per **Sundara Iyer, J.**—The debtor or creditor asking for time under Sub-S. 3 of S. 14 must show sufficient cause to induce the Court to extend time. The debtor may show that in a short time he would satisfy all his creditors. It may also be shown by a creditor that the application for adjudication is really a bogus or sham proceeding. 36 Mad. 402=22 M.L.J. 52= 10 M.L.T. 433=(1911) 2 M.W.N. 480=12 Ind. Cas. 618.

3. Examination of debtor—Sub. S. (2).

——S. 24 (2)—Object—Creditor filing petition—Debtor not examined—Subsequent proceedings, whether invalid.

The object of S. 24 (2) is to obtain information at as early a stage as possible of the property and the whole conduct of the debtor in relation to the insolvency proceedings, and failure to examine the debtor when the petition is presented by a creditor does not invalidate the subsequent proceedings unless it can be shown that the debtor has been prejudiced by the omission. Where the debtor files a written statement and gives evidence on his behalf, he obviously is not in any way prejudiced. A.I.R. 1937 Nag. 226=I.L.R. (1939) Nag. 463=174 Ind. Cas. 61.

——S. 24 (2)—Provisions mandatary.

The provisions of Cl. 2, S. 24, are mandatory and the failure to observe them vitiates the order of the trial Court. The section does not distinguish between debtors' and creditors' petitions. A.I.R. 1935 Pesh. 139 =158 Ind. Cas. 259.

——S. 24 (2)—Procedure.

The procedure laid down in S. 24, sub-S. (2) is to be adopted as a preliminary to the decision as to whether to grant the petition or not and therefore, the matters disclosed by that procedure are material to be taken into consideration. A.I.R. 1933 Pat. 43=13 P.L.T. 714=12 Pat. 107=141 Ind. Cas. 223.

——S. 24 (2)—Failure to examine debtor—No prejudice to debtor—Adjudication, if vitiated.

In the case of an insolvency petition, failure to examine the debtor is not one of the facts upon proof of which the Court is bound to dismiss the petition. Unless the debtor is prejudiced, failure to examine the debtor as provided in S. 24 (2), does not **ipso facto** vitiate the adjudication order. A.I.R. 1932 Rang. 67= 10 Rang. 187=137 Ind. Cas. 671.

——S. 24—Petition by creditor—Examination of debtor before adjudication.

In the case of a petition presented by a creditor although the act of insolvency may have been proved it is not open to the Court merely on that fact proved to adjudge the debtor an insolvent. The Court must examine the debtor as to his property, conduct and dealings and his ability to pay his debts. 127 Ind. Cas. 360=A.I.R. 1930 Lah. 855.

——S. 24 (2)—Examination of debtor—Prior to dismissal of petition for adjudication.

The provisions of S. 24 (2) are mandatory and the Court must examine the insolvent with reference to the facts stated in the petition before dismissing his application for being adjudicated an insolvent; 33 Ind.Cas. 1008; 23 P.L.R. 1917 and A.I.R. 1927 Cal. 32, Foll. 126 Ind. Cas. 439=A.I.R. 1930 Lah. 746.

——S. 24—Liability to cross-examination.

It is the duty of a petitioner who is a debtor to put himself in the witness-box and to give a full account of his conduct, dealings and property in the presence of such of his creditors as are present; and such creditors have a right to question him thereon. 109 Ind. Cas. 552=A.I.R. 1929 Lah. 87.

——S. 24 (2).

It is for the Court under S. 24 (2) itself to examine the debtors as to their conduct, dealings and property besides hearing the evidence which the parties wish to produce. 114 Ind. Cas. 54=10 L.L.J. 493=A.I.R. 1929 Lah. 49.

——S. 24 (2)—Failure to examine debtor—Effect of.

Sub-Section (2) is mandatory and if the debtors are present in Court, there is an obligation on the Court to examine them and failure to do so would vitiate the order of adjudication. 97 Ind. Cas. 792=A.I.R. 1927 Cal. 32.

——S. 24 (2).

The provisions of sub-S. (2) are mandatory, but that depends upon the debtor being present and the burden is on the debtor to show that the debtor was present. 87 Ind. Cas. 751=A.I.R. 1926 Cal. 234.

——S. 24 (2)—(1907), S. 14 (2)—Mandatory or directory.

The provisions of S. 14 (2) are mandatory and a debtor must be examined before he is adjudicated whether any thing will be gained by such examination or not. If the adjudication order is passed without examining the debtor the entire proceedings are vitiated. 33 Ind. Cas. 1008 Fol. 21 P.W.R. 1917=23 P.L.R. 1917=39 Ind. Cas. 745.

——S. 24 (2), (3)—Act (III of 1907), S. 14 (2) (3)—Examination of debtor—Absence of witness—Further time.

A court must examine a debtor who has applied to be declared insolvent whether the witnesses are present or not. It is only after examining the debtor in the presence of the creditor that the question of granting further time to produce additional evidence and sufficient cause for the same must be considered. 9 A.L.J. 233=14 Ind. Cas. 416.

4. 'Res judicata'.

——S. 24—Adjudication—Decision tha debt is fictitious, whether res judicata.

The summary enquiry under S. 24 as to whether a debtor is entitled to present a petition has nothing to do with S. 4 of the Act which section only comes into play after adjudication in disputes between the debtor's estate representated by a Receiver and the claims of one or all of his creditors. Hence a finding in an enquiry under S. 24 that a certain debt is fictitious is not final and does not operate as **res judicata** under S. 4 of the Act. A.I.R. 1938 Lah. 490=40 P.L.R. 316 =I.L.R. (1938) Lah. 535=177 Ind. Cas. 217.

——S. 24—Rejection of petition by one creditor—If res judicata against others.

An order of the Court rejecting an insolvency petition on the ground that the petitioning creditor had not proved his right to present the petition would not operate as **res judicata** against other creditors. The other creditors having only the right to question the debtor as to his conduct, dealings and property, it cannot be said that the mere fact that notices are issued to them has the effect of making them parties to the proceedings for all purposes. 110 Ind. Cas. 730 =22 S.L.R. 105=A.I.R. 1928 Sind 121.

5. Miscellaneous.

——S. 24—Creditor's right to contest petition by another creditor.

Where a person presents an insolvency petition claiming to be a creditor of the debtor, it is open to another creditor of the debtor to contest the petition on ground that the petitioner is not a creditor at all. A.I.R. 1936 Lah. 499=38 P.L.R. 729=163 Ind. Cas. 383.

——S. 24—Deposit by debtor, order for—At the time of adjudication—Validity.

There is no provision in the Act empowering the Court at the time of adjudicating a person an insolvent to pass an order requiring him to pay certain amount into Court in payment of his debts. 126 Ind. Cas. 529=A.I.R. 1930 Rang. 236.

——S. 24—Fictitious items in petition—Dismissal of petition—Validity of order.

The mere fact that some of the debts entered in the petition are fictitious would not by itself justify an order of dismissal of the petition, though it could be taken into consideration at the time of discharge and other action also could be taken against the petitioner if considered advisable. 126 Ind. Cas. 192= A.I.R. 1930 Lah. 738.

——S. 24—Inclusion of fictitious items—Refusal of adjudication—Legality.

The fact that the debtor acts **mala fide** and dishonestly in presenting insolvency application inasmuch as he includes some fictitious items both on the side of liabilities and assets is no ground for refusing application if it is found that he is unable to pay his debt. 125 Ind. Cas. 638=A.I.R. 1930 Lah. 644.

——S. 24—Inability to pay—If sufficient for adjudication—Finding as to act of insolvency—Necessity.

The mere fact that the debtors are unable to pay thir debts amounting to more than Rs. 500 is insufficient to justify an adjudication order against them because before adjudicating a person insolvent, Court has to record a definite finding that he has committed an act of insolvency as defined in S. 6. 115 Ind. Cas. 419=A.I.R. 1929 Lah. 239.

——S. 24—Application by firm—Cause-title and signature.

When the debtor is a firm the application for insolvency must be in the name of the firm and must be signed in the manner laid down in rules 19, 22, 24 framed by the High Court under Section 79 of the Act. 72 Ind. Cas. 60=A.I.R. 1924 Cal. 436.

——S. 24—(1907)—S. 14 (2) (3) (4)—No observance of proper procedure — Order of adjudication whether valid.

An order of adjudication passed without observing the procedure laid down in S. 14, sub-sections (2) (3) (4) of the Provincial Insolvency Act is bad in law and inoperative. 22 P.W.R. 1916=33 Ind. Cas. 1008.

——S. 25.

Synopsis.

1. Ability to pay debts
2. Appeal and Revision
3. Creditor's petition
4. Debtor's petition
5. Second petition
6. Miscellaneous.

1. Ability to pay debts.

——S, 25—Ability to pay debts—Onus.

Under S. 25, the burden of proof lies upon the debtors to show that they are able to pay their debts. A.I.R. 1937 Nag. 127=169 Ind. Cas. 846.

——S. 25—Burden of proof—Ability to pay debts.

Under S. 25, on a petition presented by the creditor for adjudicating a debtor as insolvent, it lies on the debtor to satisfy the Court that he is able to pay his debts. 12 L.L.J. 96=A.I.R. 1930 Lah. 592.

——S. 25—Unliquidated assets—Assets realizable at creditor's instance being less than debts due, debtor not willing to pay debts due for long time nor making efforts to liquidate assets—Debtor is deemed to be unable to pay debts.

Although the debtor has assets which, if liquidated, would provide sufficient money to discharge his debts, yet if he has no liquidated assets with which to pay his debts at present, he must be held not to be able to pay his debts and hence liable to adjudication as an insolvent. The mere fact that the "value" of the immovable property owned by the debtor is in excess of his liabilities is not sufficient to prove his ability to pay his debts regardless of all other considerations. What he has to show in each particular case is whether he possesses such realizable assets, as can, within a reasonable time, be made available to meet all his liabilities. Where it is obvious that the assets realizable at the instance of the creditors are much less than the debts due to them, and there is no reasonable prospect of the debtor paying them by voluntary alienation of his land and the debts have been due for a considerable time, but no effort whatever has been made by the debtor to pay off the creditors nor has he any present intention of paying them anything by liquidating any of his assets, it must be held that the debtor is "unable to pay his debts" and that no 'other sufficient cause" has been shown under S. 25 for the dismissal of the creditors' petition. A.I.R. 1939 Lah. 349=I.L.R. (1939) Lah. 408=41 P.L.R. 785=185 Ind. Cas. 489.

——S. 25—Able to pay debts, meaning of.

Although a debtor may have assets, which, if liquidated, would provide sufficient money to discharge his debts, yet, if he has no liquid assets wherewith to pay his debts at present he is not able to pay his debts within the meaning of the section. A.I R. 1937 Nag. 127=169 Ind. Cas. 846.

——S. 25—Ability to pay debts—Proof required of debtor.

The scheme of S. 25 is that a debtor, in order to escape adjudication on a well-founded petition and act of insolvency, must satisfy the Court that he has a present ability to pay his debts. It is not sufficient for him to show that his assets exceed his liabilities and that he will be able to pay in the more or less distant future. A.I.R. 1936 Mad. 275=1935 M.W.N. 1159=43 L.W. 516=161 Ind. Cas. 348.

——S. 25—Inability to pay debts, meaning of—Debtor's petition—Debtor's duty to prove inability to pay debt.

Under the Provincial Insolvency Act, inability to pay debts is made a condition precedent to the presentation of a debtor's petition. Before a debtor can seek the protection of the Insolvency Court, he has to satisfy it that he is unable to pay his debts. If he is unable to prove that he cannot pay his debts, then the Court has power to dismiss his petition under the provisions of S. 25. The expression 'unable to pay his debts', in S. 25 means that the market value of the realizable assets is less than the total amount of his debts. A.I.R. 1933 All. 841=1933 A.L.J. 943=147 Ind. Cas. 11.

——S. 25—Transferee of debtor—Ability of debtor to pay—If material.

The ground that the debtors are not unable to pay their debts is not open to the debtors' transferee but only to the debtors. 109 Ind. Cas. 370=A.I.R. 1929 Lah. 79.

——S. 25—(1907), S. 15 (1)—Ability to pay debts—Effect of petition.

The concluding portion of S. 15 (1) which mentions the ability to pay the debt as a ground for refusing the application applies only to an insolvency petition presented by the creditor and not by the debtor. 13 P.W.R. 1917=39 Ind. Cas. 590.

——S. 25—Debtor's ability to pay debts—Court's duty to give finding.

Under S. 25, Sub. S. (1), in the case of a petition presented by a creditor, the Court shall dismiss the petition if it is satisfied by the debtor that he is able to pay his debts. Consequently, it is essential that the District Court should come to a finding as to whether the debtors are able to pay their debts or not. A.I.R. 1936 Rang. 26=13 Rang. 717=160 Ind. Cas. 109.

——S. 25—Finding on inability to pay—Specific finding based on evidence.

A finding that a judge is not satisfied that the debtors are unable to pay their debts must be a finding arrived at like any other finding by a judicial tribunal in which the reason for so holding is stated in such a way that it may be checked against the evidence and weighed in the balance. It is not enough for a judge to resort to a mere negative and say, "I do not know you may be able or you may not, but I am not satisfied" 80 Ind. Cas. 21=5 L.R.A. Civ. 645 =A.I.R. 1924 All. 800.

2. Appeal and Revision.

——S. 25—Second appeal.

The decision of the question whether the debtor has a right to present the petition for insolvency comes under S. 25 and is subject to only one appeal and

a second appeal against that decision is incompetent under S. 75. A.I.R. 1942 Oudh 80=1941 O.W.N. 1218=1941 A.W.R. 347=196 Ind. Cas. 881.

——S. 25—Creditor's application dismissed—Appeal.

An order under S. 25 dismissing the creditor's application is appealable uncer S. 75 of the Act, (1938) 40 P.L.R. 433.

——S. 25—Order of dismissal, what amounts to.

An order refusing permission to verify the petition and striking off the petition after notice has been issued amounts to an order of dismissing the petition for insolvency and is appealable. A.I.R. 1932 Lah. 28=133 Ind. Cas. 626.

——S. 25—Appeal—Proper order.

An appeal against the order under S. 25, in the District Court is a miscellaneous appeal and the judgment of the District Judge should not be followed by a decree but should be followed by a formal order adjudicating the appellants. A.I.R. 1936 Rang. 26=13 R 717=160 Ind. Cas 109.

——S. 25—Revision.

It is not usual in the High Court to go into the facts in revision even under S. 25. 123 Ind. Cas. 232 —A.I.R. 1930 Sind 282.

3. Creditor's petition.

——S. 25—Dismissal of creditors' petition—Grounds.

Where an application for adjudicating the debtors as insolvents has not been filed for the purpose of having their debtors' assets distributed proportionately amongst their creditors, but with the object of injuring the credit by dragging them into the Insolvency Court and has been persisted in notwithstanding the fact that the Court had permitted the applicants to be paid out of the fund in Court, the action of the petitioning creditors cannot be condemned too strongly as an abuse of the process of the Court and the petition can be dismissed as being **mala fide**. A. I. R. 1943 Mad. 355=56 L.W. 173=1943 - 1 M.L.J. 262=1943 M.W.N. 216=I.L.R. (1944) Mad. 21=210 Ind. Cas. 216.

——S. 25—Scope—Creditor proving act of insolvency of debtor—Debtor alleging his ability to pay—Duty of Court.

The provisions of S. 25 relate to the defence that the debtor may put up even though the petitioning creditor satisfies the conditions required by the Insolvency Act and therefore, it cannot be said that his ability or inability to pay his debts is not a circumstance into which a Court may enter when once the act of insolvency has been proved. It is the duty of the Court to enter into the matter and if satisfied that the debtor is able to pay his debts, must dismiss the creditors' petition. A.I.R. 1939 Lah. 349=I.L.R. (1939) Lah. 408=41 P.L.R. 785=185 Ind. Cas. 489.

——S. 25—Creditor's petition— Conditions for adjudication.

Under the Prov. Insol. Act, the creditor need do no more than prove his right to present the petition and the alleged act of insolvency and then adjudication must follow unless the Court is satisfied by the debtor that he is able to pay his debts. He need not prove debtor's inability to pay his debts. A.I.R. 1938 Mad. 489=1938 M.W.N. 283=47 L.W. 772=177 .Ind. Cas. 627.

——S. 25—Any other sufficient cause—Dismissal for debt having been paid up.

The dismissal of a creditor's petition by the Court upon the statement by the creditor that his debt had been paid and that the petition should be dismissed is one under S. 25 (1) as it comes within the words "for any other sufficient cause" of that section. A.I R. 1938 Mad. 267=1938=2 M.L.J. 179.

——S. 25—"For any other sufficient cause"—Document not in possession or power of creditor—Dismissal on non-production—Whether without jurisdiction.

The words "for any other sufficient cause" in S. 25 cannot be taken to override an express provision of law, especially on question of procedure. Section 5 states that subject to the provisions of the Act, the Court in regard to proceedings under it, shall have the same powers, and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction. Where the documents are not either in the possession or power of the creditor, the Court has no jurisdiction to proceed under O. 11, R. 21, Civil P.C., and if it cannot proceed under that rule, it cannot proceed under the general provisions of S. 25. When the Court dismisses the creditor's petition on this ground, it acts without jurisdiction. A.I.R. 1936 Nag. 130=I.L.R. (1936) Nag. 142=164 Ind. Cas. 740.

——S. 25—(1907), S. 15—'Any other sufficient reason'—Interpretation.

The words 'any other sufficient reason' must be taken along and read with the words 'is satisfied with the debtor' and refer to petitions presented by creditors. U.B.R. (1911) I. 84=11 Ind. Cas. 743.

——S. 25—(1907), S. 15 (1)—'Sufficient cause'—Applicant able to pay.

Under S. 15 of the Act which empowers the court to dismiss a petition for a declaration of insolvency for "any other sufficient cause" the court can dismiss the petition on the ground that the applicant is able to pay of her debts. 4 Ind. Cas 408 (All).

——S. 25—(1907), S. 15—Notice—Court, duty of.

When the petition is by a creditor under S. 15 the Court must be satisfied of notice on the debtor and of the alleged act of **insolvency**. After proving these facts the debtor can show that an adjudication ought not to be made as he can pay his debts, or for any other sufficient cause. 36 Mad. 402=22 M.L.J. 52=10 M.L.T. 433 (1911) 2 M.W.N. 480=12 Ind. Cas. 618.

——S. 25—(1907), S. 15 (1)—Notice to the debtor, service of.

The provisions in S. 15 (1) about proof of the service of notice on the debtor, or of the debtor's ability to pay debts or of any other sufficient cause, refer to cases where the insolvency petition is put in by the creditor. 13 O.C. 94=6 Ind. Cas. 748.

4. Debtor's petition.

——S 25—Enquiry into fraudulent concealment—If competent.

A person has only to make out a **prima facie** case in order to be declared insolvent and if there be any fraudulent concealment of assets the matter can be gone into by the Insolvency Court later on. 98 Ind. Cas. 900=27 P.L.R. 734=A.I.R. 1927 Lah. 27.

——S. 25—Enquiry into bona fides **of debts—If competent.**

When a person presents a petition to be adjudicated an insolvent that petition itself is treated as an act of bankruptcy under the Insolvency Law. And when he says that his liabilities are more than his assets, that must be taken as some evidence that he is unable to meet his liabilities. No enquiry need be made as to whether some of the debts mentioned in his petition are real debts. An enquiry into the **bona fides** of the insolvent should be held when he comes up for discharge and not before. 92 Ind. Cas. 541=24 M.L.W. 219=A.I.R. 1926 Mad. 494.

——S. 25—Procedure.

Section 25 is rather a trap for Judges who do not take pains to understand it. When an act of insolvency is alleged, the learned Judge must first satisfy himself whether the creditor is a creditor for the amount alleged or for a sufficient amount to justify a petition under the Act. The court must then be satisfied of the service on the debtor of the order admitting the petition. It must then be satisfied or express its dissatisfaction, for adequate reasons with the alleged act or acts of insolvency. It must then consider whether it has been satisfied by the debtor that he is able to pay his debts and when the learned Judge has come to all the necessary findings on the issues indicated above and he still finds that there is **prima facie** ground for making an order against the insolvents he must consider whether there is any other sufficient cause why no order should be made. If, on the other hand he has found that the issues have not been made out against the insolvents he will dismiss the petition without considering any other sufficient cause. But he must take either one or the other of those two courses. If when the Act is properly administered, the surrounding circumstances of the case justify an order being made independently of the sufficient cause, then the court of appeal has a right to overrule the finding of the learned judge on the question of sufficient cause even though it is merely a question of discretion. 83 Ind. Cas. 967=46 All. 713=22 A.L.J. 684=5 L.R.A. Civ. 498=A.I.R. 1924 All. 686.

——S. 25—Enquiry as to full and true disclosure by insolvent—If competent Old and New Act—Difference.

The issues whether the petitioner has made a true and full disclosure of his property would not be pertinent at the inquiry under Section 15, provided the petitioner has given the particulars required with regard to his property, as it is not until after the adjudication that it can be ascertained whether the petitioner had made a true and full disclosure.

As a matter of fact there is no material difference between the Act of 1907 and the Act of 1920, with regard to what is required to be proved before it could be decided that the petitioner has a right to present his petition. Under Section 11 (1) of Act III of 1907 the debtor has to state in his petition that he is unable to pay his debts, and if either on the face of the proceedings or on a representation by the opposing creditor the Court is satisfied that this statement is not correct, it can dismiss the petition.

But if the debtor has made a disposal of his property with a view to defraud his creditors who might otherwise have been paid, then the Court is not justified in holding that he is able to pay his debts, but should admit the petition, so that the interests of the creditors may be benefitted by the special powers given to the Court while administrating an insolvent's estate. 67 Ind. Cas. 238=24 Bom. L.R. 292=46 Bom. 757=A.I.R. 1922 Bom. 80.

——S. 25—(1907, S. 15)—Debtor applying to be adjudged insolvent—Pilgrim register allotted to applicant on partition allowed to remain with his brothers—Change of residence—Fictitious debts inserted—False account of income—No ground for dismissal.

A debtor's petition to be adjudged insolvent was dismissed on the grounds: (1) that the applicant allowed the pilgrim register containing the names of pilgrims allotted to him on partition to remain with his brothers; (2) that he removed his place of residence; (3) that he inserted fictitious amounts and dates of some of the debts and (4) that he gave false account of his present income.

Held, that none of these grounds were valid for the dismissal of the application under S. 15 (1) of the Act.

Though S. 5 gives certain discretion to the Court to refuse an application, there must be clearly made out a proper case for the dismissal of the application, namely, an abuse of the process of the Court, or a deliberate attempt on behalf of the debtor to defeat the creditors. 60 Ind. Cas. 848=2 P.L.T. 166=A.I.R. 1921 Pat. 315.

——Ss. 25, 27, and 69 — (1907), Ss. 15, 16 and 43—Debtor's petition—Grounds for dismissal.

If there is reason to think that an applicant for adjudication in insolvency has committed an offence under Insolvency law the proper course is to proceed under S 43 of the Provincial Insolvency Act, after adjudication. Mere suspicion that a petitioner for adjudication is guilty of criminal misappropriation is no ground for dismissing the petition of the debtor. 44 Cal. 535, P. C.; 36 All. 250, Foll. 41 All. 486=17 A.L.J. 565=50 Ind. Cas. 192.

——Ss. 25, 27 — (1907), Ss. 15, 16 — Petition of Insolvency—By debtor—Rejection—Grounds.

The mere fact that an insolvency petitioner has transferred his property to his son is no ground for refusing to declare the petitioner an insolvent. (44 Cal. 535 P. C. Foll.) 52 P.R. 1918=127 P.L.R. 1918=46 Ind. Cas. 435.

——Ss. 25, 27 — (1907)—Ss. 15 and 16 — Adjudication, refusal of—Grounds.

An application to be adjudicated as an insolvent can be rejected only in cases provided by S. 15 (1) of the Prov. Ins. Act. and the fact that the brother of the applicant has not joined in the application is not

a valid reason of rejecting it. 40 All. 75=15 A.L. J. 885=43 Ind. Cas. 160.

——Ss. 25, 27—(1907), Ss. 15 and 16—Insolvency —Right of to adjudication — Misconduct — Debtor's petition.

On an application under S. 5 of the Act, by a debtor to be declared an insolvent, where all the conditions prescribed by the Act have been satisfied he is entitled to an order of adjudication. This does not depend on the discretion of the court, but is a statutory right of which he cannot be deprived by the court on the ground that his petition is an "abuse of the process of court."

Misconduct on the part of the debtor is to be dealt with upon the debtor's application for discharge and is not ground for refusing an order of adjudication. 44 Cal. 535=21 M.L.T. 36=15 A.L. J. 87=(1917) M.W.N. 100=32 M.L.J. 1=19 Bom. L. R. 174=25 C.L.J. 215=21 C.W.N. 497=10 Bur. L.T. 25=44 I.A. 11=39 Ind. Cas. 788 (P.C.).

——S. 25—(1907), S. 15—Dismissal of petition—Power of Insolvency Court—Dishonest conduct of debtor.

An insolvency court can refuse adjudication on the ground of an abuse of the process of the court; but adjudication cannot under the Act be refused if there are considerable debts, and dividend can be paid by due administration of assets.

The fact that a debtor is a dishonest man is not itself a ground for refusing adjudication under the Act, but disclosure of such fraudulent conduct as carrying on business through the aid of Insolvent Court should be seriously considered by court at the time of the application for his discharge. 37 Ind. Cas. 391 (All.).

——Ss. 25, 27—(1907), Ss. 15 and 16—Adjudication, order of—Grounds, value of debtor's statements.

In Insolvency proceedings an order of adjudication based on the debtor's denying statements alone is not proper without an opportunity to a creditor to prove his assertion that the insolvent and his sons possessed large properties not shown in the schedule as members of a joint Hindu family. 3 O.L.J. 507=37 Ind. Cas. 109.

——S. 25—(1907), S. 15—Adjudication—Power of Court—Petition for insolveney not bona fide— **Inherent power of court to dismiss.**

A Court has inherent power to dismiss a petition for insolvency if it is found that it is not presented with the **bona fide** view of obtaining an adjudication, but for an inequitable and collateral purpose. 10 S.L.R. 28=35 Ind. Cas. 541.

——S. 25—(1907), S. 15 (1)—Adjudication—Petition by debtor—Dismissal without enquiry—Illegal.

The concluding portion of S. 15 (1) refers only to cases in which the application has been made by the creditor and is opposed by the debtor. A court acts with material irregularity in dismissing an insolvency petition presented by a debtor under S. 15 (1) on the ground that the petitioner has been guilty of bad faith in having given undue preference to some of his creditors. 32 All. 645; 12 C.L.J. 400; 12 C.L.J. 445, Foll. 28 P. R. 1915=34 P.L.R. 1916=29 Ind. Cas. 361.

——S. 25—(1907), S. 15 (1)—Adjudication petition for—Dismissal—Grounds.

The Court must pass an order of adjudication if the debtor establishes a **prima facie** case. It can only decline to interfere in the debtor's behalf when it is satisfied that to grant the petition would he an abuse of the functions of the Court. 32 All. 645, Foll. 82 P.L.R. 1916.

——S. 25—(1907), S. 15 (1)—Applicability to—Debtor's petition.

S. 15 (1) deals entirely with a creditor's petition and does not apply in any way to a debtor's petition. The court is bound to adjudicate a debtor insolvent on his own petition unless it amounts to an abuse of the process of the court. 36 All. 250=12 A.L.J. 355=23 Ind. Cas. 4.

——S. 25—(1907), S. 15 (1)—Adjudication—petition for—Dismissal—Ground.

An endeavour on the part of an applicant to be declared insolvent to keep back a portion of his property or to pretend that property belonging to him is not his, is not a good ground for dismissing an application for insolvency. (15 C.W.N. 990, 32 All. 645 Foll.). 10 A.L.J. 188=17 Ind. Cas. 92.

——S. 25—(1907), S. 15—Discretion.

It is a matter for consideration when a Judge finding from the facts before him that the applicant is not insolvent, ought to declare him an insolvent. 16 C.W.N. 853=16 Ind. Cas. 470.

——S. 25 — (1907), S. 15—Insolvency petition — Dismissal—Grounds for.

An application by a judgment-debtor to be declared an insolvent cannot be dismissed simply because the evidence on the other side shows him to be a man of sufficient means. 32 All. 645; 7 Ind. Cas. 691, Fol. 14 Ind. Cas. 224 (All.).

——S. 25—(1907), Ss. 15, 16—"Act of bad faith" if ground for refusal of adjudication.

An order of adjudication cannot bo refused on the ground that the debtor has committed acts of bad faith. U.B.R. (1911) I 86=11 Ind. Cas. 745.

——S. 25—(1907), S. 15—Bad faith—Proof.

Where a large portion of the debt was incurred for litigation undertaken on behalf of the wife to recover property left by her former husband and the creditors lent money with eyes open it could not be said the petitioners had no reasonable prospect of being able to repay the loan. 4 Bur. L.T. 18=9 Ind. Cas. 462.

——Ss. 25, 27—(1907), Ss. 15 and 16—Conditions of order of adjudication—Right of debtor to order adjudication.

The expression "for any other sufficient reason" in S. 15 (1) of the act applies only to the case of an insolvency petition presented by a creditor.

Irregular accounts is not relevant to the question of adjudication. It is material only when an application for discharge is made.

When the Court finds that a person has a right to present a petition under S. 6 (3), (4), and that he has committed an act of insolvency in presenting it, and that he is unable to pay his debts an order of adjudication should be made. 9 Ind. Cas. 632 (Sind).

——S. 25—(1907), S. 15—Sufficient cause.

Allegation by a creditor that the debtor has ample means wherewith to pay his debts is 'sufficient cause' to justify dismissal of the petition. 4 Bur. L. T. 17=9 Ind. Cas. 461.

——S. 25 — (1907), S. 15 — "Sufficient reason".

The fact that the mother of the applicant is possessed of large property to which he is sole heir is not sufficient reason for dismissing the application. 9 Ind. Cas. 633 (All).

——S. 25 — (1907), S. 15—Adjudication—Refusal of grounds.

The only ground on which a debtor's application can be refused under S. 15 is that the Court is not satisfied with the proof of the right to present the petition. The other ground on which a petition may be dismised under that section apply to petitions by creditors. The words "or that for any other sufficient cause no order ought to be made" in S. 15 (1) are governed by the words "is satisfied by the debtor". 6 N.L.R. 145=8 Ind. Cas. 1115.

——Ss. 25, 27—(1907), Ss. 15 and 16—Adjudication—Petition for—Dismissal of—Grounds—Power of Court—Inherent power.

S. 15 exhausts the grounds on which the Court can dismiss an insolvency petition which has been admitted. The Court has no power to dismiss an insolvency petition by a debtor on the ground that he has suppressed his accounts or contracted debts recklessly or continued to trade after knowing himself to be an insolvent or on any similar ground. The last words of subsection (1) of S. 16 refer only to the case of an insolvency petition presented by a creditor. The words "that for any sufficient cause" are governed by the words "satisfied by the debtor" (i.e.), the cause referred to is a cause to be shown by the debtor. The words "satisfied by the debtor" govern the whole of the remainder of the sub-section. English Law considered.

Semble: The insolvency court has inherent power to dismiss an insolvency petition if it is presented with an inequitable or collateral purpose or if it is an abuse of the process of Court. 32 All. 645=7 A.L.J. 835 =7 Ind. Cas. 39.

——Ss. 25, 27, 41—(1907), Ss. 15 and 16—Adjudication, refusal of—Act of bad faith by petitioner—No ground for dismissing petition at preliminary stage.

Whether a petitioner in insolvency has committed acts of bad faith is to be determined by the Court not at the preliminary stage when the order of adjudication has to be made under Ss. 15 and 16 of the Provincial Insolvency Act but at the final stage when the application is made for an order of discharge under S. 44. A petition in Insolvency cannot therefore be dismissed under S. 15 on the ground that the conduct of the petitioner is not satisfactory and that he had made a false statement in his petition as he has mentioned the name of certain person as creditor in whose favour fictitious debt was created. 15 C.W.N. 213=12 C. L. J. 400=7 Ind. Cas. 394.

——Ss. 25, 41—(1907), Ss. 15 and 44—Adjudication, petition for—Dismissal—Grounds.

Under S. 15 of the Act the Court should not dismiss the petition because the petitioner had improperly alienated a portion of his property in lieu of dower. The question of bad faith or improper dealing with the property of an insolvent arises for consideration at a much later stage of the proceedings when the debtor applies to the Court for an order of discharge under S. 44. 15 C.W.N. 244=12 C.L.J. 445=7 Ind. Cas 691.

——S. 25—(1907), S. 15—Fraudulent concealment of documents—Effect.

Obiter.—Where the applicant is found to conceal documents, which would disclose the state of his assets, and to understate the amount of assets the Court should not declare him an insolvent. 32 All. 547=7 A. L. J. 602=6 Ind. Cas. 870.

5. Second petition.

——S. 25—(1907), S. 15—Adjudication, petition for—Dismissal of petition for default—Fresh application.

The dismissal an of application for restoration of an application for adjudication dismissed for default is no bar to the presentation of a fresh application for insolvency. 49 Ind. Cas. 229 (Cal.).

——S. 25—(1907), S. 15—Adjudication petition for omission to disclose dismissal of previous application—Effect.

The mere omission to disclose in an application for adjudication that a previous application by the same applicant has been dismissed is not a sufficient reason within the meaning of S. 15 for dismissing the application. 15 A. L. J. 572=40 Ind. Cas. 445.

6. Miscellaneous.

——Ss. 25 and 9—Order of adjudication based on compromise—Validity.

A proceeding in insolvency is a proceeding **in rem** which binds not merely the parties to the proceeding but third parties as well and it is extremely doubtful whether an adjudication order can be grounded entirely on a petition of compromise filed on behalf of the petitioning creditor and the debtor. At the most, it can be said that the petition of compromise can be looked upon as withdrawal of objection by the debtor to the application for insolvency presented by the creditor. On such petition being filed, the proceeding can take the shape of **ex parte** proceeding, but even then evidence must be adduced before the Court, and the Court must be satisfied upon such evidence that the conditions required by law for adjudging a debtor insolvent were fulfilled. I.L.R. (1948) 1 Cal. 131.

——S. 25—No evidence of sufficient property—Order of adjudication.

Where there is no evidence on record to the effect that the debtor is possessed of sufficient property with

which he might be considered to pay off his debts, an order of adjudication should be passed. 5 O.W.N. 776, Foll. 114 Ind. Cas. 126=5 O.W.N. 964.

——S. 25 —Adjudication regarding father's debt.

A Hindu son can be adjudicated insolvent in respect of his fathers' debt. 92 Ind. Cas. 603=49 Mad. 217=22 M.L.W. 617=1926 M.W.N. 63=A.I.R. 1926 Mad. 133=49 M. L. J. 697.

——S. 25—(1907), S. 15—Adjudication, object and scope of—Dismissal of petition—Grounds to be indicated in judgment.

An adjudication in insolvency ensures the distribution of the assets, if there are any, according to the equitable arrangement for which provision is made in the Insolvency Act. If there are considerable assets, it would be most disadvantageous to the general body of creditors that there should be an adjudication. A Judge in dismissing a petition for adjudication should indicate one of the grounds set forth in S. 15 of the Act as that on which he purports to act. 15 C.L.J. 631=15 Ind. Cas. 870.

——S. 25—(1907), S. 15—Order of adjudication if bars question of final discharge.

An order of adjudication under the Pro. Insolvency Act will not bar the question whether the petitioner shall have his final discharge. 12 Ind. Cas. 403 (Mad.).

——S, 26—Applicability.

To attract the application of S. 26, it is not necessary that at the time of dismissal under S. 52 (1), the Court should be satisfied that the petition was frivolous or vexatious. The Court may consider the matter on a seperate application subsequently put in even though it did not do so at the time of the dismissal of petition under S. 25 (1). A.I.R. 1938 Mad. 267=(1938) 2 M.L.J. 179.

——S. 26—Frivolous or vexatious petition, what is not.

A creditor in whose favour a Hindu father had executed a promissory note presented a petition for adjudication as insolvent against the father and his two sons. Four months subsequently on the creditor's statement that his claim was satisfied, the insolvency petition was dismissed under S. 25 (1). The sons claimed compensation under S. 26. It was found on evidence that the debt was one binding on the family for which the sons' share could be made liable and that within ten days after service of notice demanding payment of the debt, the sons, to gether with their father, had set about alienating a large portion of the family properties and that they had no ready money to pay the debt:

Held, that the creditor had reasonable cause to suppose that fraud was being attempted by the sons and therefore it could not be said that the petition of the creditor against the sons was frivolous or vexatious and hence no compensation was recoverable. A.I.R. 1938 Mad. 267=(1938) 2 M.L.J. 179.

——S. 26—'Debtor' meaning of.

The word "debtor" in S. 26 means a person against whom an insolvency application has been presented by a creditor. The person applying for compensation under that section need not, in fact, be a debtor. A.I.R. 1938 Mad. 267=(1938) 2 M.L.J. 179.

——S. 27.

Synopsis.

1. Adjudication order
2. Appeal
3. Extension of time fixed for discharge
4. Miscellaneous.

1. Adjudication order.

——S. 27—Duty of Court.

An order declaring a person as an insolvent involves a certain amount of disgrace and harassment to the party and the provisions of the Insolvency Act should be strictly observed before the stigma is placed upon a person. A.I.R. 1940 Pat. 187=7 B.R. 123=5 C.L.T. 69=190 Ind. Cas. 665.

——S. 27—Ex parte order of adjudication passed on last clearance day—Propriety.

The orders and circulars issued by the High Court should be followed by the lower Courts and the Court should not hear the case **ex parte** on the last clearance day and pass an order of adjudication. A.I.R. 1940 Pat. 58=20 P.L.T. 768=6 B.R. 270=185 Ind. Cas. 857.

——S. 27—Conditional adjudication—Legality.

A conditional order directing an insolvent to pay fixed amount monthly out of his salary as a condition precedent to his being adjudged insolvent is illegal by virtue of the provisions of S. 60 (i), C. P. Code. Proper course would be to take steps against insolvent under S. 69. 125 Ind. Cas. 565=11 P.L.T. 693=9 Pat. 304=A.I.R. 1930 Pat. 326.

——S. 27—Validity of order—Order of adjudication without specifying time for applying for discharge.

Section 27 is imperative. The period within which the debtor should apply for his discharge must be mentioned along with the order of adjudication. An order, specifying the period within which the debtor is to apply for his discharge, passed more than two years after the order of adjudication under Cl. (1). S. 27, contravenes S. 27 (1). 107 Ind. Cas. 830=7 Pat. 375 =9 P.L.T. 329=A.I.R. 1928 Pat. 338.

——S. 27—Lunatic—Lunatic whether can be adjudged insolvent.

Per **Cornish, J.**—Whether a lunatic can be adjudged an insolvent is still an open question. 1930 M.W.N. 651.

——S. 27—Right to adjudication—Conduct of insolvent if material.

Where a petitioner has obviously brought his case within the four corners of the Act, he is entitled to an order of adjudication as a matter of right where there is no question of abuse of the process of the Court. It may be that when the petitioner applies for discharge, his conduct during the time which will elapse between the date of the adjudication and the date of the application for discharge will have to be scrutinized and scrutinized carefully and whether an order for discharge should be eventually made or not must depend on various circumstances which are independent

of the circumstances brought to the notice of the Court by the insolvent when he filed his application for being adjudicated as insolvent. 51 C.L.J. 545=A.I.R. 1930 Cal. 576.

——S. 27—(1907), S. 16 (1)—Debtor's petition—Court bound to adjudicate him insolvent.

On presentation of a petition by a debtor to be declared an insolvent, the Court is bound to adjudicate him as such, unless the petition amounts to an abuse of the process of the Court. S. 15 (1) deals only with a creditor's petition. 32 All. 547; 25 M.L.J. 545, Dis. 36 All. 250=12 A.L.J. 355=23 Ind. Cas. 4.

——Ss. 27, 69, 22—(1907), Ss. 16, 43—Order of adjudication—Duty of Court.

A court is bound to make an order of adjudication if it is satisfied that the applicant is insolvent and that the provisions of S. 6 are complied with. U.B.R. (1911) 186=11 Ind. Cas. 745.

——S. 27—(1907), S. 16 (1)—Adjudication petition for—Court, duty of.

Where the debtor has a right to present the petition the Court under S. 16 (1) must make an order of adjudication. It is only when the debtor applies for an order of discharge that questions relating to alleged bad faith or fraud on the part of the debtor arise for decision. 13 O.C. 94=6 Ind. Cas. 748.

——S. 27—(1907), S. 16—Adjudication—Firm—Administration of joint and separate estates.

At the time of making an order of adjudication against the partners of a firm the Court need not make any order as to the course of administration in insolvency with reference to the joint estate of the firm and the separate estates of the partners. That is a matter that must be considered and determined during the course of the insolvency proceedings. 55 Ind. Cas. 186 (Cal.).

——S. 27—Effect of adjudication—No order for vesting of property—Effect.

Where a District Court has not made an order vesting the property of the insolvent in the Official Receiver it is not the Receiver but the Court in whom such property vests, but where before an order vesting the property in the Receiver has been made the Receiver purports to sell the property and the Court subsequently makes an order vesting the property in the Receiver, the vendee's title to the property becomes complete either on the principle of ratification or under Section 43 of the Transfer of Property Act. 85 Ind. Cas. 439=20 M.L.W. 946=A.I.R. 1925 Mad. 249=47 M. L. J. 749.

2. Appeal.

——S. 27—Appeal—Second appeal—If lies.

An appeal lies to the High Court from an appellate order of a District Judge upholding the order of trial Court passed under S. 27 of the Provincial Insolvency Act (1920). 91 Ind. Cas. 144=22 M.L.W. 542=A.I.R. 1926 Mad. 123=49 M. L. J. 595.

——S. 27 (2)—Order rejecting application for extension—If appealable.

No appeal lies against an order rejecting an application made under S. 27 (2) for extension of period for application of discharge. 89 Ind. Cas. 959=A.I.R. 1926 Oudh 186.

3. Extension of time fixed for discharge.

(a) **Application after expiry of time originally fixed.**

(b) **Who can apply.**

(c) **Miscellaneous.**

3 (a). Extention of time fixed for discharge—Application after expiry of time originally fixed.

——S. 27 (2)—Extension of time fixed for discharge.

A Court has jurisdiction to extend the time originally fixed under S. 27 for an application by the debtor for dicharge, after the expiry of that time but before an order of annulment is passed under S. 43. A.I.R. 1941 Oudh 308=1941 O.W.N. 587=193 Ind. Cas. 776.

——S. 27 (2)—Extension of period for discharge.

A Court has jurisdiction to extend the time originally fixed under S. 27 of the Provincial Insolvency Act, for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43 of the Provincial Insolvency Act. A.I.R. 1938 Oudh 122=1938 O.W.N. 377=14 Luck. 40 =174 Ind. Cas. 607 (F.B.).

[Overrules:

(1) A.I.R. 1928 Oudh 376=111 Ind. Cas. 903.

(2) A.I.R. 1927 Oudh 506=105 Ind. Cas. 912.]

——S. 27 (2)—Extension of time for discharge.

Under S. 27 (2), the Court has power to extend the time for discharge even after the expiry of the period allowed to the insolvent for applying for his discharge. A. I. R. 1937 All. 686=1937 A. L. J. 773=1937 A. W. R. 654=I. L. R. (1937) All. 855=171 Ind. Cas. 594.

——S. 27 (2)—Extension of time for discharge.

The Insolvency Court is competent to extend the time for a discharge even after expiration of the time originally fixed. A.I.R. 1933 All. 230=1933 A. L. J. 117=55 A. 241=145 Ind. Cas. 668.

——S. 27 (2)—Extension of time for discharge.

Where, on the date fixed for applying for discharge of an insolvent, the Judge was absent and the insolvent did not, therefore, apply for discharge and the case being posted to another date, the insolvent applied for discharge on that date, but the Judge rejected the application as being belated and on the ground that he had no power to extend the time:

Held, that the Court could have granted extensionof time and considered the application. A.I.R. 1933 Rang 133=144 Ind. Cas. 869.

——S. 27 (2)—Application for discharge—Extension of time—Creditors' right to apply.

S. 27 (2) authorises a Court to extend the time for an application for discharging an adjudicated insolvent even

if an application for extension of time is made after the period specified for making the application for discharge has expired.

It was not the intention of the framers of the Provincial Insolvency Act, that the debtor should derive advantage from his failure to apply for dischage. Therefore, an application to extend time for discharge made by a creditor should be granted if the annulment of the adjudication is calculated to prejudice the creditor. A. I. R. 1932 Nag. 22=27 N. L. R. 374=136 Ind. Cas. 873.

——S. 27 (2)—Extention of time—Court's powers.

Whenever the effect of the insolvent's failure to apply for discharge within the time prescribed is to prevent an inquiry into allegation of fraudulent conduct, the Court can take hold of the fact and extend the time for applying for discharge. A.I.R. 1930 Mad. 389, Foll. 1930 M.W.N. 673=32 L.W. 446=A.I.R. 1931 Mad. 10=59 M. L. J. 710.

——S. 27 (2)—Application to extend time not filed within time specified—Power of Court to extend.

If the order of discharge is not applied for within the specified period the adjudication as to insolvency is to be annulled and on such annulment the consequences stated in S. 37 are to follow. A debtor, in respect of whom an order of adjudication made under the Act has been annulled owing to his failure to apply for his discharge within the time fixed, is entitled to make a fresh application, but this application can only be granted, if he succeeds in obtaining the leave of the Court for doing so after showing good cause for his not having been able to apply in time. No discretion is given to the Court to extend the time granted to the insolvent for his applying to obtain the order for discharge. 111 Ind. Cas. 903=5 O.W.N. 686=4 Luck. 22 =A.I.R. 1928 Oudh 376.

——S. 27 (2)—Civil P. C., S. 148—Application to extend time after expiry of period fixed—Power of Court to extend.

The extension for good reasons, of the period fixed by the adjudication order for an application for discharge is contemplated by S. 27 (2) of the Act. It is not a fatal defect that the application for extension is made after expiry of the fixed date. S. 148 of the C. P. Code establishes this principle and there is nothing repugnant to it in the provisions of the Insolvency Act. 86 Ind. Cas. 115=26 P.L.R. 126=A.I.R. 1925 Lah. 416.

——S. 27 (2)—Extension after fixed period—Powers of Court.

A Court has jurisdiction to extend the time originally fixed under S. 27 for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43, either under S. 5, Insolvency Act, taken with S. 148, C. P. Code, or under S. 27 (2) of the Act. A.I.R. 1928 Pat. 338; A.I.R. 1924 Cal. 777; A.I.R. 1927 All. 418; A.I.R. 1930 Mad. 278, Appr. A.I.R. 1928 Mad. 265; A.I.R. 1926 Mad. 942; **Waller, J.** in 83 Ind. Cas. 955=A. I. R. 1924 Mad. 635, Overruled. 124 Ind. Cas. 61=31 M.L.W. 365=53 Mad. 288= A.I.R. 1930=Mad. 389=58 M. L. J. 369 (F.B.)

——S. 27 (2).

Per **Venkatasubba Rao, J.**—It is open to the Insolvency Court under S. 27 (2) to extend the time, on a proper application, to that effect, made at any time before the adjudication is annulled under S. 43. This it can do, even though the application is made after the expiry of the period originally fixed. 122 Ind. Cas. 351=52 Mad. 648=1929 M.W.N. 489=29 M.L.W. 649=A.I.R. 1930 Mad. 278=57 M. L. J. 116.

——S. 27 (2).

The Court can extend the time for applying for discharge even when the time originally fixed by the Court for this purpose has expired: A.I.R. 1925 Lah. 416; A.I.R. 1927 Lah. 763; A.I.R. 1924 Cal. 777; A.I.R. 1928 Pat. 338 (F.B.); A.I.R. 1926 Sind 94, Foll.; A.I R. 1928 Mad. 265; A.I.R. 1928 Oudh 376, not Foll. 117 Ind. Cas. 87=A.I.R. 1929 Lah. 399.

——S. 27 (2).

The annulment of adjudication does not **ipso facto** come into operation without an express order of the Court to that effect under S. 43 of the Act, and the Insolvency Court has therefore power to extend time for discharge even after expiry of the period: A.I.R. 1924 Cal. 777 and A I.R. 1928 Pat. 338 (F.B) Foll. 113 Ind. Cas. 357=A.I.R. 1929 Nag. 11.

——S. 27 (2).

Court has power to extend time limited in the order of adjudication to apply for discharge even after time fixed: A.I.R. 1928 Pat. 338 (F.B.) Foll. 108 Ind. Cas. 803 (Pat.)

——S. 27 (2).

The annulment of adjudication does not **ipso facto** come into operation by the expiry of the period fixed but has to be determined, and until it is so determined the Court has the seisin of the case and has power to extend the time under S. 27, regardless of the expiry of the period originally fixed and of the failure of the insolvent to apply for extension thereof before the expiry of the period originally fixed. A.I.R. 1924 Cal. 777; A.I.R. 1924 Mad. 635 and A.I R. 1925 Lah. 416, Foll. 107 Ind. Cas. 830=7 Pat. 375=9 P.L.T. 329= A.I.R. 1928 Pat. 338 (F.B.).

——S. 27 (2).

The fact that an application by an Insolvent for extension of time within which to apply for his discharge is made after expiry of the time fixed therefor, is not fatal to the application. A.I.R. 1925 Lah. 416, Foll. 100 Ind. Cas. 134=A.I.R. 1927 Lah. 763.

——S 27 (2).

Under S. 27, clause (2), the Court has the power to extend the time originally fixed even after the expiry of the period fixed for applying for an order for discharge. 81 Ind. Cas. 584=51 Cal. 337=A.I.R. 1924 Cal. 777.

——S. 27 (2) — Extension of time — Power of Court.

Although the provisions of S. 43, that if the debtor fails to apply within specified time for annulment of adjudication order, the adjudication shall be annulled

are mandatory, under S. 27 (2), the period within which the debtor shall apply for his discharge, should be extended so that the operation of S. 43 is delayed until the insolvency proceedings have had time to be carried to completion. 91 Ind. Cas. 467=A.I.R. 1926 Sind 94.

——S. 27—Fixing and extension by Receiver—Powers of Official Receiver and Court.

Under S. 27 the Official Receiver to whom a petition of the insolvent is transferred for disposal has power to fix a time for applying for discharge. An application for extention of time nearly two years after the expiry of the period prescribed and only after the creditor applied for annulment of adjudication was not granted where the insolvent failed to carry out the things directed by law, such as handing over properties to the Officer Receiver.

Per **Krishnan, J.**—After the period fixed the Court can extend time.

Contra Waller, J.—Court cannot extend time after the period expires. 83 Ind. Cas. 955=19 M.L.W. 418 =34 M.L.T. 170=1924 M.W.N. 331=A.I.R. 1924 Mad. 635.

[See A.I.R. 1930 Mad. 389=58 M. L. J. 369 (F. B.) **supra**].

3 (b). Extension of time fixed for discharge—Who can apply.

——S. 27 (2)—Extension of time for discharge—Application by creditor.

The Insolvency Court has perfect jurisdiction to extend the period of discharge under S. 27 (2) either at the instance of the creditor, who filed an application for such extension, or of its own motion. The provisions of S. 43 are subject to those of S. 27 (2). Section 27(2) imposes no conditions on the powers of the Insolvency Court to enlarge the time for discharge save the existence or proof of a sufficient cause and a **fortiori** it is open to the Court to extend the time instead of annulling the adjudication, even though the application for discharge may have been made by the insolvent within the time originally fixed by the Court. A.I.R. 1932 Oudh 97=1941 O.W.N. 1190=17 Luck. 271= 1941 A.W.R. 335=199 Ind. Cas. 390.

——S. 27—Application for discharge—Who must apply—Extension of time for application.

Per **Venkatasubba Rao, J.**—From S. 27 and S. 43 read together it is clear that the party who can make the application for discharge is the debtor and no one else. It is equally clear that the Court has power to extend the period and it may be so done not merely at the instance of the debtor but on the application of any body interested. S. 27 (2) merely requires sufficient cause shall be shown, but it does not say, that the debtor alone may apply for extension or shall show sufficient cause. If then before the expiry of the term fixed, an application is made under S. 27 (2), it is obvious that it is not obligatory upon the Court under S. 43 to annul the adjudication. To this extent it is plain that the word "shall" is not imperative. (1895) 1 Q.B. 724, Foll. 122 Ind. Cas. 351=52 Mad. 648= 1929 M.W.N. 489=29 M.L.W. 649=A.I.R. 1930 Mad. 278=57 M. L. J. 116,

——S. 27—Application for extension—Who can apply.

Section 43 is controlled by S. 27 and an application for extension of period can therefore be made by any one interested and is not restricted merely to the debtor: A.I.R. 1930 Mad. 278, Foll. 124 Ind. Cas. 219=1929 M.W.N. 809=A.I.R. 1930 Mad. 342.

——S. 27 (2)—Who may apply.

Either the insolvent or any of the creditors can apply for extension of period of discharge before an order has been passed annulling the adjudication. 113 Ind. Cas. 357=A.I.R. 1929 Nag. 11.

——S. 27 (2)—Extension suo motu—Power of Court.

It is open to an insolvency Court to extend the period specified in the order of adjudication within which the debtor should apply for his discharge on the application of the creditors, or **suo motu**: A.I.R. 1927 Rang. 136, Foll. 107 Ind. Cas. 394=10 Lah. 357=29 P.L.R. 122 =10 L. L. J. 156=A.I.R. 1928 Lah. 82.

——S. 27 (2)—Who may apply.

An application to extend time for discharge is maintainable even at the instance of a creditor. 100 Ind. Cas. 921=6 Bur. L. J. 5=A.I.R. 1927 Rang. 136.

3 (c). Extension of time fixed for discharge—Miscellaneous.

——S. 27 (2)—Notice of extension application—Effect of failure to give notice.

Where no notice of application for extension of period is given to an alienee, though it is desirable that it should be so given, and if it does not prejudice him, it is immaterial. 124 Ind. Cas. 219=1929 M.W.N. 809= A.I.R. 1930 Mad. 342.

——S. 27 (2)—Mode of applying for extension of time.

An application of the insolvent for discharge can also be an application for extension of time although it does not specifically ask for such extension. A.I.R. 1928 Pat. 338 (F. B.), Foll. 117 Ind. Cas. 87=A. I. R. 1929 Lah. 399.

4. Miscellaneous.

——S. 27—Petition under Old Act—Petition for insolvency filed under Old Act—Order passed under New Act—Validity.

An Insolvency petition was put in on the 8th January, 1920, and the petitioner was adjudicated an insolvent on the 4th June, 1920. Meanwhile, Act V of 1920, had come into force on the 25th of February 1920. At the time of adjudication the Court fixed one year as the period within which he should apply for discharge. It was contended in appeal that as the petition was filed under the Old Act the petitioner obtained a vested right to an unconditional order of discharge and the Court had no jurisdiction to impose a condition that discharge must be applied for within one year under S. 27 of the New Act,

Held, that by the mere filing of a petition under the Old Act the petitioner did not acquire a vested right to a particular kind of order which cannot be affected by the New Act. The nature of order to be passed is a matter of mere procedure. (A.I.R. 1924 Mad. 368, Foll.) 91 Ind. Cas. 144=22 M.L.W. 542=A.I.R. 1926 Mad. 123=49 M. L. J. 595.

——Ss. 27, 56, 59, 58—(1907). Ss. 16, 18, 20 and 23 —Power of Court to direct debtor of insolvent to pay money into court before adjudication.

Where a debtor presents a petition for adjudication as an insolvent the Court has no power without making an order for adjudication or appointing a Receiver, to order a debtor of the insolvent to pay into Court any money which he owes to the insolvent. 44 Ind. Cas. 537 Nag.

——Ss. 27 and 28—(1907), S. 16—Provable claim—Damages — Forward contract — Proof before Official Receiver.

Damages may be claimed before the Official Receiver on the insolvency of a party, they being in the nature of contingent debts, contingent on the non-preformance of the contract by the Official Receiver, and on the rates at the date of delivery being lower than the contract rate. The Receiver should act as a court assessing damages on the expected rates of a future date in the case of an anticipatory breach and the same principles of assessment apply in either cases. In arriving at the rates of the future date of delivery an important factor will be the rate at which at the time of the Receiver's valuation a future contract for that date could be made. 6 S.L.R. 187=19 Ind. Cas. 653.

——S. 28.

Synopsis.

1. Appeal and Second Appeal
2. Applicability of Section
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4. Duty of insolvent—Sub. S. (1)
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6. Foreign Adjudication
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1. Appeal and Second Appeal.

——S. 28—Appeal—Necessary parties.

Where property has vested in the District Judge, the provisions of S. 28, Sub-cl. (2) make it imperative for the appellant creditor to make the District Judge a party respondent to the appeal. It cannot be said that merely because the District Judge is in duty bound to carry out any orders of the High Court, he should not be made a party to the appeal before High Court. For, the order passed by the High Court is not binding upon the estate of the insolvent unless the estate of the insolvent is represented in these proceedings before it. A.I.R. 1942 Pat. 307=23 P.L.T. 35=8 B.R. 789=201 Ind. Cas. 342.

——S. 28—Second appeal—Sale in execution—Judgment debtor adjudged insolvent—Application by Receiver to have sale set aside.

When a Receiver in insolvency applies to have a sale in execution declared null and void, the most important factor to be considered is whether the Receiver represented the judgment-debtor for the purpose of having the property escape execution. The Receiver in whom the property of the insolvent vests after the passing of the order of the adjudication under S. 28, sub-s. (2), does represent both the insolvent and the creditors of the insolvent; and if any application is made to the Court which, on the face of it, was an application made in the interest of the insolvent judgment-debtor, the application can under the law, be treated as an application under S. 47, Civil P. C., made by the Receiver in insolvency, as representative of the insolvent judgment-debtor. The creditors of the insolvent are no doubt interested in the applicant; but that does not take away anything from the legal position of the Receiver representing both the insolvent judgment-debtor whose property has vested in him, and the creditors. A second appeal is, therefore, maintainable. A.I.R. 1935 Cal. 503=39 C.W.N. 424=62 Cal. 457=157 Ind. Cas. 862.

2. Applicability of section.

——S. 28—Applicability—Suits and proceedings under Agra Tenancy Act.

By deleting S. 193 of the old Agra Tenancy Act from S. 264 of the new Act, the bar that prevented the applicability of the insolvency law to revenue matters has been automatically removed. Consequently, the Provincial Insolvency Act must now be held to be applicable to suits and proceedings under the Agra Tenancy Act. A.I.R. 1932 All. 494=1932 A.L.J. 402 =16 R.D. 466=54 A. 616=138 Ind. Cas. 112.

3. Applicability and scope of Sub-S. (2).

——S. 28 (2).

When the **karta** of a joint Hindu Mitakshara family business agrees to pay certain debt and after his death, his son **A** is adjudged an insolvent and **A's** son is sued by the creditor, neither **A** nor the Receiver is a necessary party and S. 28 (2) has no apolication to such a suit. (1937) 166 Ind. Cas. 781=40 C.W.N. 808=63 C. 194.

——S. 28 (2)—Applicability—Notice to creditor—Oudh Chief Court, R. 5.

There is nothing in the provisions of S. 28 (2) making its application dependent on notice of the insolvent's application being given to the plaintiff. The notice provided for by R. 5 of the rules made by the Oudh Chief Court under the Provincial Insolvency Act should be presumed to be notice to all the creditors. A.I.R. 1936 Oudh 236=1936 O.W.N. 52=11 Luck. 731=160 Ind. Cas. 229.

——S. 28 (2)—(1907), S. 16 (2)—Applicability—Prohibition—Effect of.

The prohibition in S. 16 (2) applies only to creditors to whom notice of the Insolvency proceedings have been given and not to persons having claims against the Insolvent to whom no notice has been given. 17 O.C. 267=25 Ind. Cas. 708.

——S. 28 (2)—Applicability.

A person is not entitled to claim exclusion of the period spent by him in the Insolvency Court under either of the Sections 28 (2) and 78 (2) inasmuch as an order of adjudication is a pre-requisite for the applicability of either of the said sections. 121 Ind. Cas. 55=A.I.R. 1931 Nag. 109.

——S. 28 (2)—Scope.

See Provincial Insolvency Act (V of 1920), S. 78 (2). (1947) 2 M.L.J. 572.

——S. 28 (2)—Rights and remedies of creditors.

The provisions of S. 28 (2) do not create any right of suit which does not otherwise exist; they operate as a bar on the rights of creditors in respect of remedies, suits and proceedings otherwise existing. That bar is in itself subject to an exception, namely, that permission of the Court may remove it. But permission of the Court operating as an exception to the bar created by the sub-section cretainly cannot give the creditor any right which he has not apart from this sub-section. A.I.R. 1941 Cal. 298=73 C.L.J. 225=199 Ind. Cas. 412.

——S. 28 (2).

Section 28 bars the remedy of the creditor only during the pendency of the insolvency proceedings but where the sale was confirmed after they were over, the judgment-debtor has no right to ask the Court not to confirm the sale. A.I.R. 1941 Oudh 505=1941 O.W.N. 833=1941 A. W. R. C. C. 234=194 Ind. Cas. 605.

——S. 28.

Section 28 deals with the effect of an order of adjudication. A.I.R. 1940 Rang. 289=1940 Rang. L.R. 544=191 Ind. Cas. 690.

——S. 28—If affects all creditors—Creditor's suit to set aside sale by Receiver in insolvency—Court's leave, if necessary.

The operation of S. 28 affects all creditors, whether they are judgment-creditors or not, or have proved their debts or otherwise. The section clearly enacts that during the pendency of the insolvency proceedings, no creditor shall commence any proceedings in pursuit of a remedy against the property of the insolvent in respect of his debt. A.I.R. 1940 Rang. 289=1940 Rang. L.R. 544=191 Ind. Cas. 690.

——S. 28 (2).

One of the objects of S. 28 (2) is to prevent unnecessary interference with the work of the Insolvency Court and especially with realization of the assets of the judgment-debtor in insolvency. A.I.R. 1940 Rang. 289=1940 Rang. L. R. 544=191 Ind. Cas. 690.

——S. 28 (2).

Section 28 (2) refers only to the property of the insolvent and the prohibition against the institution of legal proceedings without the leave of the Court refers to proceedings with regard to the insolvent property. A.I.R. 1939 Mad. 572=1939 M.W.N. 367=49 L.W. 515=(1939) 1 M.L. J. 889=I.L.R. (1939) Mad. 585=185 Ind. Cas. 159.

——Ss. 28, 29, 52, 51 (3)—Orders made in insolvency—Creditor, how affected—Order of admitting insolvency petition and order of adjudication—Effects—Distinction—Ss. 28 and 29, scope of—Under S. 52, there must be application for delivery and notice of petition—Material date under S. 52.

As regards the effect of the orders made in insolvency on the creditor's remedies, there are two distinct sets-of sections; first, Ss. 28 and 29 dealing with the effect of the order of adjudication, and secondly, Ss. 51 and 52 dealing with the effect of an order admitting the petition. The distinction between these two sets of provisions is this: The effect of S. 28 is when an order of adjudication has been made, to take away the right of a creditor to proceed against the insolvent's property or to commence any suit or other legal proceeding against him except with the leave of the Court and subject to such terms as it may impose. Section 29 relates to pending suits or other proceedings and provides that the Court shall, on proof that an order of adjudication has been made, either stay the proceedings or allow them to continue on such terms at it may impose. Under S. 52, the point of time material is not the date of the order of adjudication but the date of the admission of the insolvency petition. The executing Court, it provides, shall, if two conditions are satisfied direct the insolvent's property, if in its possession, to be delivered to the Receiver. Those conditions are: (1) execution has issued against the property but before its sale, notice is given to the Court that an insolvency petition has been admitted and (2) an application is made to the executing Court for delivery of the property to the Receiver. The point of difference to note is, that whereas under S. 29, on mere proof that an order of adjudication has been made, the executing Court's power is checked, under S. 52 no such result automatically follows from the mere fact that notice of the admission of an insolvency petition has been given to the Court: for in the latter case coupled with that fact, there must be an application to the Court for delivery. That the legislature intended this difference there can be no doubt, for the order of adjudication is sometimes a long way off from the admission of the insolvency petition. Then comes S. 51 which unlike Ss. 28, 29 and 52, deals not with procedure but with substantive rights. It enacts that an execution creditor is not entitled to the benefit of the execution against the Receiver unless the assets are realised before the admission of the petition. The material date under this

provision of law is the date not of the insolvent's adjudication, but of the admission of the insolvency petition. A.I.R. 1936 Mad. 819=71 M.L.J. 170 =44 L.W. 194=1936 M.W.N. 753 (2)=59 Mad. 928= 170 Ind. Cas. 510.

——S. 28.

Section 28 is based on the broad principle that when once a person is adjudicated insolvent, creditors seeking any remedy against him must come to the Insolvency Court to get leave for that purpose. A.I.R. 1935 Mad. 239=68 M.L.J. 148=1935 M.W.N. 37=41 L.W. 167= 156 Ind. Cas. 428.

——S. 28 (2).

The first part of sub. S. (2) of S. 28 deals with remedies against the property of the insolvent and the second part deals with all remedies including the remedy against the person of the insolvent. The Act of 1907 imposed a disability not only as against the property but plso against the person of the insolvent and the Act of 1920 has made the alteration that the disability as against the person of the insolvent may be removed by obtaining leave of the Court. A.I.R. 1931 Pat. 357=12 P.L.T. 345=10 Pat. 422=134 Ind. Cas. 633.

——S. 28 (2)—Scope.

Under S. 4 (1) the powers of the Court of insolvency are very wide, and do not in any way militate against S. 28 (2). 125 Ind. Cas. 28=1930 A.L.J. 989=A.I.R. 1930 All. 552.

——S. 28 (2).

Where the permission to execute under S. 28 (2) was one that was not only not acted upon but on which it was in the circumstances impossible to act:

Held, that such permission was ineffectual to exclude the unfettered operation of S. 78 and that the period between the adjudication and annulment should be deducted from the period allowed for limitation. 88 Ind. Cas. 544=23 A.L. J. 975=6 L.R.A.Civ. 585=A.I.R. 1925 All. 735.

——S. 28—(1907), S. 16 (2) (b)—Decree is not a remedy within S. 16 (2) (b).

A decree is not a remedy for a civil wrong but merely a step towards the remedy within Section 16 (2) (b). The remedy is the benefit accruing to the creditor through the execution of his decree; **i.e.**, the compensation secured to him in execution. That remedy he can secure only through the Insolvency Court by proving his debt. 34 All. 106, Diss. from. 59 Ind. Cas. 710 =2 Lah. 95=3 L.L. J. 126=61 P.L.R. 1921=A.I.R. 1921 Lah. 270.

4. Duty of Insolvent—Sub-S. (1).

——S. 28.

An insolvent is, under S. 28 (1), required to aid the Court "in the realisation of his property". 'Property' here includes moneys received by way of income. The insolvent should be directed to account to the Court in each year for the whole of his income whether for palampat or otherwise. The Court should consider whether any maintenance (bearing in mind earning capacities and the general circumstances of the case) should be allowed and if so, what. If maintenance is allowed and equals the income, then there will be no dividend and the insolvent will remain an insolvent unless and until the insolvency is annulled. A. I. R. 1942 Nag. 83=1942 N.L. J. 246=I.L.R. (1942) Nag. 714= 200 Ind. Cas. 524.

5. Effect of order—Sub-S. (2).

(a) Limitation.
(b) Prior attachment.
(c) Protection of insolvent.
(d) Suit in Foreign State.
(e) Two adjudications.
(f) Vesting of property in Receiver or Court.

5 (a). Effect of order—Limitation.

——S. 28 — Limitation ceases to run after adjudication.

A debt barred by the statute of limitation is not provable in bankruptcy proceedings. But the bar of time ceases to run (or to further run) after adjudication, as the effect of the bankruptcy is to vest the property of bankrupt in the trustee for the benefit of the creditors and all personal remedies against the bankrupt are also thereafter stayed. 66 Ind. Cas. 758=34 C.L.J. 167= A.I.R. 1921 Cal. 456.

——S. 28 (2)—(1907), S. 16 (2)—Limitation.

An adjudication of the defendant as an insolvent does not extend the period prescribed for a suit against him for it is open to the plaintiff to sue the defendant in time with the leave of the Insolvency Court. 42 Mad. 319=36 M.L.J. 104=25 M.L.T. 247=(1919) M.W.N. 698=49 Ind. Cas. 625.

5 (b). Effect of order—Prior attachment.

——S. 28—Attachment—Effect of adjudication.

On insolvency of the judgment-debtor, the attachment falls to the ground. Where the Official Assignee wants possession of the attached property, the claim is to be decided by the Court having custody and not by Insolvency Court. A.I.R. 1944 Mad. 333=1944 M.W.N. 72=1944-1 M.L. J. 116=57 L.W. 128.

——S. 28 — Attaching creditors' priority over Receiver.

Section 28 read with Ss. 51 and 52 of the Act indicates that an attaching creditor of the insolvent's property has no priority over the Receiver in insolvency. The attaching creditor is relegated to the same position as other creditors by reason of the combined effect of S. 28 (2) and Ss. 51 and 52. A.I.R. 1943 Nag. 101=1942 N.L.J. 599=I.L.R. (1943) Nag. 390=205 Ind. Cas. 279.

——S. 28—Effect of adjudication on prior attachments.

If an adjudication takes place in British India, the title obtained by the sale effected by the Official Receiver would have preference over an attachment and sale under the Civil P.C. A.I.R. 1935 Mad. 882=1935 M.W.N. 940=42 L.W. 663=158 Ind. Cas. 776.

——Ss. 28, 58—(1907), Ss. 16 and 23—Attachment of property—Adjudication of judgment-debtor — Effect of.

After an adjudication in an insolvency, an attachment of property though made before the adjudication, ceases to have any effect, as the property of the insolvent vests in the Receiver who is the person to maintain all proceedings. 40 All. 197=16 A.L. J. 32=43 Ind. Cas. 672.

5 (c). Effect of order — Protection of Insolvent.

——Ss. 28 (2) and 39—Debts not included in scheme—Protection.

In case of a scheme, S. 28 (2) has to be read with S. 39 and the protection is taken away by S. 39 in respect of debts not included in the scheme. A.I.R. 1934 Mad. 529=40 L.W. 110=57 M. 1082=67 M.L. J. 843 =153 Ind.Cas. 916.

——S. 28.

When the petition is filed and the debtor is adjudicated, the debtor automatically gets what is equivalent to a protection order on the Original Side. 91 Ind. Cas. 31=22 M.L.W. 202=1925 M.W.N. 612=A.I.R. 1925 Mad. 915 (F.B.).

5 (d). Effect of order—Suit in Foreign State.

——S. 28—Firm in Bombay adjudged insolvent—Suit against it in Kutch—If maintainable.

The fact that a private firm in Bombay has been adjudged insolvent and its property has vested in the Official Receiver at Bombay, is no bar to the owners of the firm who have permanent residence in Kutch being sued in Kutch. In Kutch there is no Insolvency Act and they are not to be treated as insolvents there. A.I.R. 1949 Kutch 5.

——S. 28—Adjudication in British India—Power over foreign immovables—Suit by unsecured creditor against insolvent in Foreign State—Power to issue injunction restraining suit—Exercise of discretion.

While it is true that the law of British India does not govern immovable property in Foreign States, and that an adjudication order made here can only have such effect upon the property as the law of the Foreign State chooses to give it, nevertheless, as between the insolvent and his creditors the property **prima facie** is available to the creditors unless the law of the Foreign State interferes with the operation of the law of British India.

But an Insolvency Judge if asked to restrain a resident in a Foreign State from continuing a suit brought before the adjudication against insolvents who were at that time resident in the Foreign State, might very reasonably insist, before exercising a somewhat delicate jurisdiction to interfere with the nationals of another power upon definite evidence as to the law of the Foreign State and it would not be unreasonable for him to refuse an injunction when he finds not only that there is no evidence before him as to the foreign law, but also that the insolvents have never in fact executed any such transfer in favour of the Official Assignee or of the trustees of the composition of their property in the Foreign State.

Obiter.—In the case of insolvency of the debtor, the Courts never issue an injunction to restrain a foreign crditor suing in a foreign Court in a case in which the creditor was neither personally within the jurisdiction nor had come in and proved in the bankruptcy.

But if the foreign creditor carries on business within British India, the Courts of British India have jurisdiction to issue such an injunction. A.I.R. 1932 Cal. 310 =35 C.W.N. 997=137 Ind. Cas. 299.

5 (e). Effect of order—Two adjudications.

——S. 28—Two adjudications, effect of.

Where two different Courts have passed two orders of adjudication upon the same person, the adjudication order which is prior in time vests the property of the insolvent although the act of insolvency in the second case was prior in time to that in respect of which the first order was made. A.I.R. 1933 Cal. 115=59 Cal. 116=36 C.W.N. 546=56 C.L. J. 152=141 Ind. Cas. 863.

5 (f). Effect of order—Vesting of property in Receiver or Court.

——S. 28 (2)—Date of vesting—Subsequent change in law, effect of.

The question whether the property vested in the Official Receiver would depend upon the position at the date of the adjudication. Any property which has once vested in the Receiver does not re-vest in the insolvent by virtue of some Act enacted subsequently e. g., U.P. Debt Redemption Act. A.I.R. 1944 All. 237 =1944 A.W.R. 180 (1)=1944 A.L.J. 440=1944 R.D. 574=1944 O.W.N. 200=I.L.R. (1944) All. 553=218 Ind. Cas. 407.

——S. 28 (2) and (7)—Date of vesting.

The effect of sub-Ss. (2) and (7) of S. 28, Provincial Insolvency Act read together is, that the whole of the property of the insolvent vests in the Receiver with effect from the date of the presentation of the petition in insolvency. Hence, the Official Receiver can challenge a sale in execution of a decree against the Insolvent held after the date of the petition. A.I.R. 1942 All. 263=1942 A.L.J. 437=I.L.R. (1942) All. 421= 1942 A.W.R-H.C. 162=202 Ind.Cas. 7.

——S. 28 (2)—Date of vesting.

Under the provisions of S. 28, when an order of adjudication is made, the property of the insolvent vests in the Court or the Receiver with effect from the date on which the petition for insolvency is made. A.I.R. 1940 Pesh. 36=190 Ind. Cas. 158.

——S. 28 (2)—Date of vesting.

In execution of a decree, the property of the judgment-debtor was attached. In the meantime he applied to be adjudicated as an insolvent and an **interim** Receiver was appointed who was asked to take charge of his property. Meanwhile the executing Court ordered the property to be sold and on that day the Receiver under S. 52 applied to stop the sale:

Held, that the property vested in the Receiver from the date of the admission of the insolvency petition and the executing Court should hand it over to him.

A.I.R. 1936 Mad. 819=71 M.L.J. 170=44 L.W. 194=1936 M.W.N. 753 (2)=59 Mad. 928=170 Ind. Cas. 510.

——Ss. 28, 59 and 60.

From provisions of Ss. 28, 59 and 60, Provincial Insolvency Act, it is clear that the Receiver derives authority to deal with the property of the insolvent from the order of adjudication and when he proceeds to sell it, he is acting in "enforcement" of that order. A.I.R. 1943 Lah. 19=I.L.R. (1943) Lah. 242=45 P.L.R. 57=204 Ind. Cas. 344 (F.B.).

——S. 28.

Legal consequence of adjudication in bankruptcy is that the ownership of the insolvent in all the property owned and possessed by him on the date of adjudication is divested from him and vested in the Official Receiver. A. I.R. 1941 Mad. 753=1941 M.W.N. 489=200 Ind. Cas. 492.

——S. 28.

The effect of the Provincial Insolvency Act is that the insolvent, as from the date of the petition, is civilly dead and cannot, after the petition, enter into any transaction in respect of his property which will bind the Official Receiver or his creditors. Any person dealing with the insolvent after that date does so at his peril. A.I.R. 1939 Lah. 384=I.L.R. (1940) Lah. 50=42 P.L.R. 367=184 Ind. Cas 330 (F.B.)

——S. 28.

Legally the Receiver and not the insolvent is the owner of the property, which vests in the Receiver under S. 28 on the order of adjudication being passed. A.I.R. 1939 Lah. 346=41 P.L.R. 816=I.L.R. (1940) Lah. 40=187 Ind. Cas. 839.

——S. 28 (2).

Under S. 28 (2), the whole of the insolvent's property immediately vests in the Court or the Receiver and when there is no Receiver, the Court is vested with all the rights and is authorised to exercise all the powers conferred on a Receiver. One of these rights is the right to actual physical possession of the insolvent's property by the Receiver. A.I.R. 1939 Nag. 10=1938 N.L.J. 384=I.L.R. (1941) Nag. 696=179 Ind. Cas. 943.

——S. 28.

Once the judgment-debtor has been adjudicated insolvent, the Court executing a decree has no power to sell his property. The fact that the Official Receiver was given a notice in the execution proceedings does not make him bound by the sale. That is a question of procedure only. Such a sale is inoperative. A.I.R. 1938 Mad. 449=47 L.W. 705=1938 M.W.N. 201=1938-1 M.L.J. 471=I.L.R. (1938) Mad. 1063=178 Ind. Cas. 135.

——S. 28—Receiver not appointed—Court represents insolvent's estate.

In the absence of the Receiver, the property or the sale proceeds would vest in the Court under S. 28. The Receiver is only an Officer of the Court and until he is appointed, the Court is entitled to represent the insolvent's estate for administration. A.I.R. 1937 Nag. 193=I.L.R. (1937) Nag. 249=170 Ind. Cas. 383.

——S. 28.

When a debtor is adjudicated an insolvent at his instance, all his assets which he has at the time of the presentation of the application and all assets which he may require before his final discharge, must come in the hands of the Court in order that the said assets may be administered, and his creditors whose debts can be proved in the insolvency proceedings may get their debts **pro rata** from these assets. When an insolvency proceeding takes place at the instance of the creditor, there is the self-same principle. Therefore an insolvent has no title in the properties in which he had beneficial rights at the date of the presentation of the application or which was acquired subsequently by him at any time before his absolute discharge. All such properties vest in the Court or in the Receiver appointed by the Court. A.I.R. 1936 Cal. 434=I.L.R. (1937) 1 Cal. 127=166 Ind. Cas. 886.

——S. 28.

The effect of the two clauses of S. 28 is that the properties of the insolvent, wherever they may have been and whoever may have been in possession of them, automatically vest in the Court. It is immaterial whether there was, at that time, any Receiver appointed by the Court or not. The vesting of the property of the insolvent in the Court is not dependent upon there being a Receiver. A.I.R. 1936 Pat. 112=2 B.R. 168=17 P.L.T. 313=160 Ind. Cas. 146.

——S. 28—Remedy of decree-holders against insolvent.

Where a creditor has obtained a decree on the understanding that he was getting a decree against certain insolvents, the exclusive remedy is to go to the Insolvency Court and get rateable shares in the assets and not to proceed separately by way of execution and claim priority as against the Official Receiver. A.I.R. 1935 All. 643=1935 A.W.R. 672=1935 A.L.J. 673=155 Ind. Cas. 661.

——S. 28.

Per **Baguley, J.**—On adjudication, the existing property of the debtor vests in the Receiver in insolvency, that is, the property of the debtor. By virtue of the powers given to the Receiver under Ss. 53 and 54, the Receiver is able, sometimes to increase the estate in his hands. It still remains the property of the debtor in the hands of the Receiver in insolvency. A.I.R. 1935 Rang. 328=14 Rang. 63=158 Ind. Cas. 651.

——S. 28—Alienation by insolvent—Legality.

An alienation by an undischarged insolvent of property belonging to him is not void but only voidable at the option of the Receiver or the Court. A.I.R. 1933 All. 449=1933 A.L.J. 475=55 A. 503=143 Ind. Cas. 836.

——S. 28.

On the making of an order of adjudication, all the property of the insolvent vests in the Court or the Receiver and the insolvent ceases to have any right to deal with his property. A transfer made by an insolvent after adjudication is, therefore, a nullity. A.I.R. 1932 Oudh 244=9 O.W.N. 523=8 Luck. 87=138 Ind. Cas. 808.

——S. 28.

As soon as adjudication is made the property vests in the Court or the Receiver and any decree obtained against the insolvent as defendant who ceases to have any right in the property is a nullity. 70 Ind. Cas. 357=A.I.R. 1922 Mad. 335=42 M.L. J. 426.

——S. 28—(1907), S. 16—Effect of order—Subsequent attachment.

Upon a vesting order being made all the properties of the insolvent passes to the Official Assignee and all decrees and other proceedings against the insolvent are ordinarily stayed. After a vesting order has been made, any subsequent attachment of the property of the insolvent is for all legal intents and purposes, a nullity in itself and does not confer any advantage thereby under any of the sections dealing with ordinary execution proceedings under the C. P. Code. 14 Bom. L.R. 511=15 Ind. Cas. 950.

——S. 28 — (1907)—S. 16 (2) — Effect of order—Heirs possessing deceased debtor's assets—Effect of their insolvency.

If before the execution but after the passing of the decree against the assets of a deceased debtor in the hands of his heirs the latter becomes insolvent the deceased's estate vests in the Official Receiver and the creditor must prove his debts like other unsecured creditors. 18 M.L.T. 147=30 Ind. Cas. 256.

——S. 28—Debtor executing power of attorney authorising creditor to realise rent Adjudication of debtor—Revocation of power of attorney.

When a debtor executes an unregistered power of attorney in favour of a creditor authorising him to receive rents from tenants and appropriate the same towards the satisfaction of his debt and by separate letter of the same date, agrees not to cancel this power of attorney, the power of attorney will be treated as revoked on the debtor's adjudication as insolvent. A.I.R. 1932 Mad. 381=55 Mad. 558=35 L. W. 592=63 M. L. J. 37=138 Ind. Cas. 225.

6. Foreign Adjudication.

——S. 28—Adjudication by foreign Court.

When a foreign Court adjudicates a person insolvent the only property in British India which vests in the Receiver is the movable property which the insolvent was free to assign at the date of the adjudication and such property vests by virtue of private international law. The adjudication does not, however, affect the rights of a creditor who has attached before the adjuctication. He remains entitled to the benefit of his attachment. But where the creditor attaches after adjudication, he is not entitled to anything by reason of his attachment and he is left merely with the right to prove his debt in insolvency. A.I.R. 1940 Mad. 47=50 L.W 701=(1939) 2 M.L.J. 859=1940 M.W.N. 195=190 Ind. Cas. 172.

——S. 28—Adjudication in different countries—Effect.

Where there has been an adjudication in different countries, provided the adjudication operates as an assignment of the bankrupt's property in the foreign country, effect will be given in English Courts to the assignment earlier in date. 1935 M.W.N. 1223.

——S. 28—Foreign adjudication orders, effect of.

The British Cantonment in Secunderabad still remains part of Hyderabad state and the property of the Nizam and the administration of justice according to British enactments by the District Court established there does not render the orders of that Court anything but the orders of a foreign Court in relation to the Courts of British India.

An adjudication order by a foreign Court will not be allowed to interfere with any process at the instance of a creditor already pending even though such process is incomplete, provided that at that date, the bankrupts's freedom of disposal was so affected by the process that he could not have assigned the subject-matter of the process to the Receiver. Therefore, where a creditor has attached the debtor's properties, a foreign adjudication order passed at a subsequent date cannot prejudice the attaching creditor' right.

The analogy of a British Indian adjudication order is not applicable to a foreign adjudication order, for a British Indian order operates **vi statuti**, but the foreign adjudication order does not operate in British India **vi statuti** but only under the rule of private international law.

It is settled that no adjudication order is recognised as having the effect of vesting in the Receiver any immovables in another country. A.I.R. 1933 P.C. 134=37 L.W. 576=1933 M.W.N. 374=37 C.W.N. 553=64 M.L.J. 562=35 Bom. L. R. 747=57 C.L.J. 418=56 Mad. 405=1933 A L J 692=60 I.A. 167=142 Ind. Cas. 522 (P.C.).

——S. 28.

Official Receiver in foreign Court cannot take advantage of law applied in British India—Debtor declared insolvent in Secunderabad—Creditor attaching decree in favour of insolvent in execution of his decree—Attachment could not be discontinued. 123 Ind. Cas. 20=30 M.L.W. 531=A.I.R. 1929 Mad. 900=57 M.L.J. 393.

——S. 28 (2)—1907, S. 16 (2)—Jurisdiction — Adjudication—Discharge of debt — Adjudication outside British India—Effect of.

Insolvency does not by itself operate as a discharge in all jurisdictions. Immovable property in British India vests in trustee in the bankruptcy on an adjudication in a foreign territory. 34 Mad 247=8 M.L.T. 120=(1910) M.W.N. 695=7 Ind.Cas. 417.

7. Insolvency of Firm.

——S. 28—Insolvency of firm—Effect.

An order of adjudication against a firm is an order of adjudication against each individual partner of the firm. A.I.R. 1932 Sind 62=138 Ind. Cas. 628.

——S. 28—Adjudication order—Effect of.

A firm is not a legal entity; nor is it a person. A firm's name is merely a short-band form for collectively designating all the partners in the firm. In law, therefore, the adjudication of a firm is an adjudication of each individual as insolvent. And it does not

matter if such firm has applied that the firm and not the individual partners thereof should be declared insolvent. 100 Ind. Cas. 112=A.I.R. 1927 Lah. 234.

——S. 28—Property of individual members vests in Receivers.

A firm is not a seperate and distinct person according to law. A firm-name is merely recognised as a convenient symbol or shorthand form for collectively designating all the partners in the firm just as one may use **a** or **b** in algebraical computations to designate known quantities which would be inconvenient to specify at length. Therefore an order of adjudication passed against the firm is in effect an order against the individual partners in that firm. 89 Ind. Cas. 493=20 S.L.R. 209=A.I.R. 1926 Sind 31.

——S. 28—Insolvency of firm.

Adjudication order—Liability to pay rent of premises occupied by firm adjudicated insolvent as expenses of administration or otherwise and debt provable in insolvency. 51 C.L.J. 392=34 C.W.N. 751=A.I.R. 1930 Cal. 459.

8. Interpretation.

——S. 28—Provisions of other Acts, if can be looked into.

In construing a particular Insolvency Act, the Courts must confine itself to its express provisions and should not be guided by considerations of what the creditor could do under the provisions of the other laws. Cases under Provisions of other Acts depend on different considerations and these decisions are likely to mislead a Court which has to construe a particular Insolvency Act. A.I.R. 1942 Cal. 533=46 C.W.N. 808=I.L.R. (1942) 2 Cal. 413=76 C.L.J. 333=203 Ind.Cas. 154.

——Ss. 28, 51, 52,—Policy of Act—Construction of sections—Principles to be kept in view.

In construing Ss. 28, 51 and 52 two principles have to be kept in view. (1) It is the policy of the law of insolvency that when a debtor commits an act of insolvency, there must be an even distribution of his property among his creditors and no creditor of his should be entitled to receive more than a rateable proportion of the amount realised from the property of the insolvent and available for distribution equally with the other creditors. (2) It is the policy of the law not to frustrate the effort of a diligent execution creditor and deprive him of the fruits of his execution. A.I.R. 1938 Mad. 906=1938 M.W.N. 841=48 L.W. 279=1939-1 M.L.J. 705=182 Ind. Cas 888.

——S. 28.

The decisions of the English Courts on questions of stay of action owing to insolvency are not sure guides for the Courts in India. 59 Ind. Cas. 710=2 Lah. 95 =3 L.L.J. 126=61 P.L.R. 1921=A.I.R. 1921 Lah. 270.

——Ss. 28, 51 (3)—Distinction between "debtor" and "insolvent".

A debtor and an insolvent are, strictly speaking, different persons. An insolvent under the Insolvency Act means a person against whom an order of adjudication has been made and that a debtor is a person who has made himself amenable to adjudication but who has not yet been adjudicated. A.I.R. 1938 Mad. 449=1938 M.W.N. 201=1938-1 M.L.J. 471=47 L.W. 705=I.L.R. (1938) Mad. 1063=178 Ind. Cas. 135.

——S. 28 (1)—'Property' meaning of.

The word 'property' in S. 28 (1) includes moneys received by way of income. A.I.R. 1942 Nag. 83= 1942 N.L.J. 246=I.L.R. (1942) Nag. 714=200 Ind. Cas. 524.

——S. 28 (2).

The son's interest after the severance cannot be said to be the "property of the insolvent" within S. 28 (2). The words "commence any suit or other legal proceedings" must be construed as referring to a suit or other proceeding against an insolvent. A.I.R. 1942 Mad. 327=1942-1 M.L.J. 173=55 L.W. 108=1942 M.W.N. 81=201 Ind. Cas. 782.

——S. 28 (2).

The second part of sub-s (2) of S. 28 is not affected by the doctrine of relation back in Sub-s (7) and the words "and thereafter" refer to the words "on the making of an order of adjudication" in the opening clause of sub-s. (2). A.I.R. 1940 Rang. 234=1940 Rang. L.R. 396=190 Ind.Cas. 751.

——S. 28 (2)—"Suit or other legal proceeding", what is.

"The suit or other legal proceeding" in S. 28 (2) means a suit or other legal proceeding for recovery of a debt referred to in that sub-section. An application to recover a judgment-debt by arrest of the judgment debtor is such a legal proceeding. A.I.R. 1936 Oudh 177=1936 O.W.N. 56=11 Luck. 720=160 Ind. Cas. 33.

9. Joint Hindu Family.

(a) **Insolvency of Co-parcener.**
(b) **Insolvency of Father.**
(c) **Insolvency of Manager.**

9 (a). Joint Hindu Family—Insolvency of Co-parcener.

——S. 28—Hindu co-parcener's insolvency—Insolvency does not effect his separation from joint family—Insolvent's share increased by death in co-parcenary—Increase accrues to Official Receiver in whom that share is vested—Reason why Official Receiver is entitled to increase stated.

The insolvency of a co-parcener does not effect a separation of that co-parcener from the joint family of which he is a member. He continues to be a co-parcener. When a person is adjudged an insolvent his status in the joint family and his rights in the property of the joint family remain unchanged. It, therefore, follows that if by a death in the co-parcenary the share of the insolvent co-parcener is increased the benefit of the increase will accrue to the Official Receiver in whom that share is vested.

The reason why the Official Receiver is entitled to any subsequent increase of the insolvent's share is not because the Official Receiver is a co-parcener in Hindu law, but because by S. 28 (4), Provincial Insolvency Act, he is entitled to all property which is acquired by or devolves on the insolvent, that is to say, it is the insolvent who by Hindu law becomes entitled to the increase of his share and it is the statutory provision of the Provincial Insolvency Act, S. 28 (4), which vests that increase in the Official Receiver. A.I.R. 1946 Mad. 503=I.L.R. (1947) Mad. 44=(1946) 1 M.L.J. 247=1946 M.W.N. 214=59 M.L.W. 175=227 Ind. Cas. 55.

——S. 28—Property vesting in Receiver.

Against all the members of a joint Hindu family, there was a money-decree, in execution of which the decree-holder purchased the joint family property. Some of the members of the family, in the meanwhile, were adjudged insolvents and Receiver sought to sell their interest in the property purchased by the decree-holder:

Held, that the Receiver had the right to sell the interest, if any, of the insolvents in the family property and not the whole of the property purchased by the decree-holder. A.I.R. 1938 Pat. 234=4 B.R. 616=19 P.L.T. 488=175 Ind. Cas. 696.

——S 28—Sale by Official Receiver—Dispute as to member's share—Procedure—Proper stage for ascertaining insolvent's share.

Under the Hindu Law, it is well settled that until partition no co-parcener in a Hindu joint family can be said to have any definite share in the joint family property. Therefore, where a co-parcener is adjudicated insolvent and his mother claims a share in the joint property equal to her sons, it is not necessary to decide this question before the sale of the insolvent's share. The purchaser at the sale will be entitled to claim partition of the property, and when he does so, it will be a matter for consideration as to whether the mother would or would not be entitled to an equal share along with her sons. A.I.R. 1933 Lah. 651=34 P.L.R. 1032=146 Ind. Cas. 840.

——S. 28—Joint promissory note by member of joint Hindu family—Adjudication of some as insolvent—Suit against other in Civil Court—Maintainability.

A, B and **C** were members of a joint Hindu family. **A**, the manager, acting on his own behalf and as guardian of **B** and **C** who was **B**'s brother, executed a joint promissory note. **B** was subsequently adjudicated insolvent. The creditor sued **A** and **C** in the Civil Court:

Held, that though the undivided interest of the insolvent co-parcener would vest in the Receiver for liquidation of his debts, the Receiver cannot legally deal with the joint family property except to the extent of the share vested in him and there was no reason in law why the creditor, who is entitled to recover his debt from the members of the family other than the insolvent, should be debarred from prosecuting the usual remedy of the suit in the Civil Court.

Held further, that since all the executants were independently liable, the suit was not bad though **B** was not and could not be made a party. A.I.R. 1933 Nag. 324=144 Ind. Cas. 117.

——S. 28.

It is doubtful whether the insolvency of one mortgagor of an undivided one-third interest invalidates the mortgage of the other two-thirds part of the other mortgagors who were not insolvents. 32 Bom. L.R. 692=125 Ind. Cas. 695=54 Bom. 487=A.I.R. 1930 Bom. 395.

——Ss. 28, 56, 53—(1907), Ss. 16, 18 and 36—Vesting of property—Sale by three members of a joint Hindu family—Subsequent insolvency of one member.

Where one of three members of a joint Hindu family who executed certain sale deeds was adjudicated an insolvent and steps were taken to have the sales cancelled as not being **bona fide** transactions. **Held**, that the sales could not be set aside in their entirety that the shares of the other two members could not vest in the Official Receiver as they never applied to be declared insolvents and that the District Judge cannot deal with their shares under Ss. 16, 18 and 36. The court can deal with the estate of the insolvent only and the sale in respect of the share of the insolvent alone can be annulled. 20 M.L.T. 334=(1916) 2 M.W.N. 123=4 L.W. 51=32 M.L.J. 284=35 Ind. Cas. 610.

9 (b). Joint Hindu Family—Insolvency of Father.

See also: S. 28-A.

——(as amended by Act XXV of 1948),—Ss. 28 and 28-A — S. 28-A, if retrospective — Father's power of alienation of son's share in joint family properties also vest in Official Receiver after adjudication of father—Institution of partition suit by sons—No right in receiver to act on behalf of sons after suit.

The first respondent obtained a decree against the second respondent and his two sons in 1934. In 1935 the second respondent was adjudicated an Insolvent and in 1936, the Official Receiver took possession of two villages belonging to the joint family. In 1942, the sons instituted a partition suit. The Official Receiver had in his hands an amount which represented the collection of rents from the two villages for the years 1936 to 1945. He had declared a dividend in which the first respondent got his share On the question, whether the first respondent could attach 2/3 share of the amount in the hands of Official Receiver as representing the sons' shares of the income.

Held: After the amendment of the Provincial Insolvency Act, by Act XXV of 1948, which is clearly retrospective, the father's disposing power over his sons' shares vested in the Official Receiver after the father's adjudication. But the position became different after the institution of the partition suit by the sons as it brought about a disruption of the status of the family and terminated the father's power. Hence, the creditor would be entitled to attach only the 2/3 share of the income which represented the collections in respect of the two villages after the institution of the partition suit upto 1945. 61 L.W. 708=A.I.R. 1949 Mad. 216=1948 M.W.N. 732=(1948) 2 M.L.J. 415.

——Ss. 28 (2)—Joint family—Insolvency of father—Father's power to sell interest of sons for antecedent debts—Whether vests in Receiver.

The power of a Hindu father to sell the interests of his sons in the joint family property for the discharge of his antecedent debts which are not tainted with illegality or immorality, vests, on his adjudication as an insolvent under the Provincial Insolvency Act, in the Insolvency Court or the Receiver, appointed by the Court and the Court or the Receiver, as the case may be, has a right to sell the interests of the sons of the insolvent for the satisfaction of the debts of the insolvent. I L.R. (1948) Nag. 85=1948 N.L.J. 82=A.I.R. 1948 Nag. 215 (F.B.).

——S. 28 (2)—Joint family of father and sons—Father insolvent—Official Receiver's sale of immovable property—Right, title and interest of sons if affected.

It is beyond doubt that the Official Receiver in an insolvency under the Provincial Insolvency Act has no power to sell property which is not sole property of the insolvent (the father in this case) and cannot convey the title of all members to the purchaser.

Where a father in a joint family, composed of himself and his sons, became an insolvent and the Official Receiver sold some immovable property, purporting there by to sell the entire interest in the property, the sale cannot affect the right title and interest of his sons. 60 L.W. 794=1947 M.W.N. 739 =(1947) 2 M. L. J. 507.

——S. 28 (2)—Hindu father's insolvency—Effect on shares of other co-parceners.

On the insolvency of a father or manager in a joint Hindu family, the father's or manager's power to sell the shares of the other members of family does not vest in the Official Receiver. A.I.R. 1943 Mad. 652 =56 L. W. 361=(1943) 2 M.L. J. 87=1943 M.W. N. 429=I.L.R. (1944) Mad. 212=211 Ind. Cas. 21.

——S. 28 (2)—Joint Hindu family—Decree against father alone—Insolvency of father—Creditor cannot proceed against son's share without leave of Court.

When the decree obtained by the creditor is in terms against the father alone and the father is adjudicated insolvent, in order to get at the property of the sons, it will be necessary for the creditor to execute his decree by what is really the exercise of the father's power. The power of sale being vested in the Official Receiver as part of the property of the father, there can be no execution under that power without the leave of the Insolvency Court. A.I.R. 1943 Mad. 94=1942 M.W.N 470=207 Ind. Cas. 124.

——S. 28 (2).

When a Hindu father is adjudged an insolvent, all his property including the son's interest vests in the Insolvency Court including the power to alienate his son's interest in the property. A.I.R. 1943 Nag. 101 =1942 N.L.J. 599 =I.L.R. (1943) Nag. 390=205 Ind. Cas. 279

——S. 28 (2)—Right of Receiver to son's share in property.

Quaere.—When a father, who together with his sons, constitutes a Mitakshara joint family, is adjudicated insolvent whether the father's power to make the son's interest liable for his untainted debts vests in Official Receiver under S. 28 (2). A.I.R. 1942 Cal. 533=46 C.W.N. 808=I.L.R. (1942) 2 Cal. 413=76 C.L.J. 333=203 Ind. Cas. 154.

——S. 28 (2)—Receiver's right to son's share in property.

On the insolvency of a Hindu father, the share of the son will not vest in the Official Receiver and it will not be the property of the insolvent within the meaning of S. 28 (2). Though the share of the son does not vest the power of the father to sell the son's interest will vest in the Official Receiver. But that power ceases the moment the severance of interest between the father and the son takes place. A.I.R. 1942 Mad. 327=55 L.W. 108=(1942) 1 M.L.J. 173 =1942 M.W. N. 81=201 Ind. Cas. 782.

——S. 28 (2)—Hindu father adjudicated insolvent—By some reason, he losing power to sell son's interest—Conveyance by Official Receiver, effect of.

If due to some reasons, the insolvent father has lost the power to sell his son's interest in the Hindu family property for his antecedent debts, the conveyance executed by the Official Receiver can have no greater effect, the reason being that the Official Receiver has no greater power than the insolvent. A.I.R. 1939 Mad. 702=I.L.R. (1939) Mad. 853=49 L. W. 460=(1939) 2 M.L.J. 822=1939 M.W.N. 329 =185 Ind .Cas. 562.

——S. 28 (2)—Property vesting in Receiver.

Although the right of an insolvent Hindu father to sell his son's share in the family property to discharge his own lawful debts vests in the Official Assignee or the Official Receiver, the son's share does not vest in him and hence proceedings can be taken in respect of the son's interest in the family property without the leave of the Insolvency Court. The right to sell the son's interest only exists so long as the son's interest in the family property exists. If the interest has been sold or if there has been a lawful attachment, which has the same effect, there exists no property over which the power can be exercised. While the interest of the son remains unsold or unattached, Official Assignee has the right to sell the properties for lawful debts of the insolvent father, but unless he exercises his right, he may lose it and he loses it if the interest of the son is attached by a creditor of the son. A.I.R. 1939 Mad. 572=1939 M.W.N. 367=49 L.W. 515=(1939) 1 M.L.J. 889= I.L.R. (1939) Mad. 585=185 Ind. Cas. 159.

——S. 28.

The father in a joint Hindu family has a disposing power over the shares of the sons which he may exercise for his own benefit and on his adjudication as insolvent the Power to dispose of that property vests in the Receiver who is therefore, entitled to sell the shares of the sons though he is not entitled to dispossess them. In this respect, there is no distinction between the sale of the sons' shares in the standing crops and the share of the sons in the fields. A.I.R. 1937 Nag. 31=I.L.R. (1937) Nag. 512=168 Ind. Cas. 895.

——S. 28 (2)—His power to sell son's share whether his asset.

The word "asset" is sufficiently wide to embrace the father's right to bind his son's share for proper reasons. The power, therefore, of a Hindu father manager of a trading family, to sell his son's share is an asset of the insolvent father. A.I..R. 1937 Mad. 962=46 L.W. 449=1937 M.W.N. 942=(1937) 2 M.L J. 508= I.L.R. (1938) Mad. 426=175 Ind. Cas. 158.

——S. 28 (2)—Receiver's rights to son's share in family property.

When a Hindu father is adjudicated insolvent, the interest of his son or sons in the family property does not vest in the Court or the Receiver, but the Court or the Receiver has power to sell the joint family property including the interest of the minor son or sons of the insolvent for the payment of his antecedent debts not incurred for immoral or illegal purposes. A.I.R. 1937 Pat. 185=18 P.L.T. 1=3 B.R. 329=16 Pat. 60=167 Ind. Cas. 765 (F.B.)

——S. 28 (2).

The word 'property' is comprehensive enough to include the right which a Hindu father has of bringing to sale his son's interest in the joint family property to pay his own legitimate debts and as such it vests in the Court and Receiver. A.I.R. 1937 Pat. 185= 18 P.L.T. 1=3 B.R. 329=16 Pat. 60=167 Ind. Cas. 765 (F.B.)

——S. 28—Property vesting in Official Receiver during administration and in liquidator after termination of insolvency—Distinction, if exists.

No distinction exists between the property of an insolvent which vests in the Official Receiver and the property of an insolvent which, at the termination of his insolvency, vests, by the order of the Court, in a liquidator. A liquidator is vested with the same property as an Official Receiver would get during the administration of the insolvent's estate and that property includes any power which the insolvent father might possess of disposing of the share of his sons. A.I.R. 1937 Mad. 556=45 L.W. 637=1937 M.W.N. 374=171 Ind. Cas. 608.

——S. 28(2)—Son's share, if vests in Receiver.

The power of a Hindu father to sell the joint family property, including the interest of his son, is not "property of the Insolvent" which, by reason of S. 28 vests in the Receiver, and which, by S. 59 he is empowered to sell for distributing among the creditors.

Therefore, the Receiver is precluded from selling the joint family property including the interest of the son which does not vest in him by reason of the adjudication. A.I.R. 1936 Pat. 115=17 P.L.T. 39=2 B.R. 315 =15 Pat. 363=161 Ind. Cas. 167.

——S. 28.

The right of a Hindu father to dispose of the joint Hindu family property in order to satisfy his own debts is property within the meaning of S. 28 and vests in the Receiver. The Receiver is entitled to seize the entire family property and transfer it in order to satisfy the debts of the father. A.I.R. 1935 All. 643=1935 A.L.J. 673=1935 A.W.R. 672=155 Ind. Cas. 661.

——S. 28 (2)—Receiver's right to son's share.

As the Hindu father's power of disposition vests in the Receiver on insolvency of the father, the Receiver is entitled to seize the sons' share and also the right to ask for annulment of the sale of the sons' shares. The Receiver's remedy lies in the Insolvency Court and not in the ordinary Civil Court. A.I.R. 1934 Nag. 271=152 Ind. Cas. 1026.

——S. 28—Receiver's right to son's share in property.

On the adjudication of a Hindu father as an insolvent, the Official Receiver has a right to collect the rents from the shares belonging to the minor sons for the purpose of paying off their father's creditors. A.I.R. 1933 Mad. 73=36 L.W. 581=1932 M.W.N. 1189= 139 Ind. Cas. 838.

——S. 28—Rights of Receiver.

Where property in the hands of the sons can be made available for payment of the Hindu father's debts, the Receiver is entitled to have recourse to the usual process of law, namely. to attach and sell the property but he has no right dispossess the sons of the insolvent from the property in their possession. A.I.R. 1932 All 353=1932 A.L J. 285=137 Ind. Cas. 785.

——S. 28—Rights of Receiver.

On the adjudication of a Hindu father as an insolvent, the Receiver stands in his shoes and has the same dower as the father to sell his sons' share in joint family property for the discharge of such of his debts as are not illegal or immoral.

It is necessary to distinguish in this connection between the father's right to sell his son's interest in the joint family property in certain circumstances and the son's interest as such in that property. It is the former that vests in the Official Receiver, and not the latter.

There is no real analogy between the powers conferred by a deed under the English Law and the right of a Hindu father to dispose of his son's interest in joint Hindu family property; and the power vested in the Official Receiver to sell the son's shares is not affected by the insolvent's death. A..I.R. 1932 Lah. 151=33 P.L.R. 314=13 Lah. 464=135 Ind. Cas. 217.

——S. 28.

The right of the Receiver to enforce the payment of debt by reason of the pious obligation of the Hindu sons is not property which vests in the Receiver under S. 28. A.I.R. 1932 All. 353=1932 A.L.J. 285=137 Ind. Cas. 785.

——S. 28 (2)—Rights of Receiver.

Held by the Full Bench.—When a joint Hindu father governed by Mitakshara Law is adjudicated an insolvent, his joint son's share, assuming that the debt payable by the father is one which it is the pious duty of the son to pay, does not vest in the Receiver.

It is, however, open to the Receiver in insolvency to seize the Hindu son's share and sell it in order to satisfy the debts payable by the father when the debt payable by the father is one which it is the pious duty of the son to pay. A.I.R. 1931 All. 162=1931 A.L.J. 122=53 All. 239=135 Ind. Cas. 119 (F.B.).

——S. 28.

The right of a Hindu father to sell the joint family property including the undivided shares of his sons is property for purposes of insolvency law and vests in the Receiver of the estate in insolvency. A.I.R. 1931 Bom. 50=32 Bom. L.R. 1363=55 B. 110=129 Ind. Cas. 153.

——S. 28—Insolvency of father—Receiver—Power to sell.

Held, that on the insolvency of a Hindu father the Receiver is entitled to sell not merely the share of the father that would fall on him at partition but the entire property in the father's hands belonging to the whole family consisting of himself and his son. 1930 A.L.J. 453=52 A. 493=127 Ind. Cas. 584=A.I.R. 1931 A. 59 (1).

——S. 28—Adjudication of father—Official Receiver—Power to deal with minor son's share.

Though only the estate of the insolvent father vests in the Official Receiver, he stands in the shoes of the insolvent father and can deal with joint property including the shares of the minor sons in the same manner and to the same extent as the insolvent father could and so Official Receiver can attach and sell the interests of the minor sons. 123 Ind. Cas. 286=31 P.L.R. 245=A.I R. 1930 Lah. 645.

——S. 28.

Only the power of the father to sell the shares of the sons passes to the Official Receiver. But the power is subject to the same qualification as it is in the father's hands. 111 Ind. Cas. 505=51 Mad. 342=27 M.L.W. 430=A.I.R. 1928 Mad. 479=54 M.L.J. 674.

——S. 28.

Insolvent's power to sell his son's share for just debts vests in Receiver. A.I.R. 1926 Mad. 994; A.I.R. 1926 Lah. 41 and A I.R. 1926 Lah. 264, Foll. 100 Ind. Cas. 110=9 L.L.J. 30=28 P.L.R. 134=A.I.R. 1927 Lah. 152.

——S. 28 (2)—Power of Hindu father over son's property.

The power of a Hindu father over the family property including son's interest therein must be deemed to be 'property' within S. 28 and, as such, to vest in the Court or the Receiver: A.I.R. 1925 Bom. 416, Diss. from; A.I R. 1923 Mad. 55 and A.I.R. 1924 Mad. 550, held not overruled by A.I.R. 1925 P.C. 18 P.C. 102 Ind. Cas. 266=A.I.R. 1927 Mad. 701.

——S. 28.

The conditional power of a Hindu father to dispose of his sons' interest vests in the Official Receiver: A.I.R. 1926 Mad. 994 (F.B.), Foll. 99 Ind. Cas. 8=50 Mad. 135=38 M L.T. 92=25 M.L.W. 128 =A.I.R. 1927 Mad. 1=51 M.L.J. 529 (F.B.)

——S. 28—Property of insolvent father.

Where a father in a Hindu family governed by the Mitakshara law has been declared an insolvent, the Receiver is entitled to sell not only the share of the father that will fall on him on the partition, but the entire property in his hand belonging to the whole family consisting of himself and his sons: A.I.R. 1922 All. 79 and A.I.R. 1923 Mad. 55, Appl. The expression "property of the insolvent" in S. 28 means the property which the insolvent, as the father of his sons, is entitled to call his own and sell it under certain circumstances and not only that share which goes to the father in the event of a partition between himself and the sons. 94 Ind. Cas. 175=48 All. 400=24 A.L.J. 417=A.I.R. 1926 All. 447.

——S. 28.

Hindu Law—Joint family—Father declared insolvent—Whole family property does not vest in Receiver. A.I.R. 1925 P.C. 18, Foll. 92 Ind. Cas. 309=48 All. 343=24 A.L.J. 323=A.I.R. 1926 All. 262.

——S. 28—Insolvency of Father—Father's right to sell son's share—Vesting of.

Official Receiver in whom the property of an insolvent Hindu governed by the Mitakshara is vested under the Provincial Insolvency Act (V of 1920) is entitled to sell the joint family property of the Insolvent and his sons for his debts where they are neither illegal nor immoral, i.e., such debts as the sons would, on account of their pious obligation, be bound to pay from their joint property. It is the power of sale that vests in him and not the share of the son itself. A.I.R. 1925 Mad. 52, Overruled. This power continues even after the father's death by virtue S. 17. S. 28 by itself is enough to vest the power of disposing whole family property in the Receiver insolvency of a Mitakshara Hindu father. It is not necessary to pray in aid the definition of "property" in S. 2 (d) for this purpose.

Per **Venkatasubba Rao, J.**—The expression 'property' in S. 2 (d) of the Provincial Insolvency Act includes the qualified and restricted power of a Hindu father. 97 Ind. Cas. 825=49 Mad. 849=24 M.L.W. 345=1926 M.W.N. 743=A.I.R. 1926 Mad. 994=51 M.L.J. 269 (F.B.).

——S. 28—Liability of son's share.

Sons being liable to pay father's debts, property acquired by them at partition of ancestral property can be taken possession of by Receiver of their father's estate to satisfy the father's debts unless the sons can show that the debts were tainted with immorality. 1922 A. 79 Foll. 84 Ind. Cas. 790=47 All. 263=22 A.L.J. 1097=6 L.R.A. Civ. 109=A.I.R. 1925 All. 221.

——S. 28—Insolvency of father—Son's share—If vests in the Official Assignee.

On the insolvency of the father of a Mitakshara joint family the whole of the property of which he is manager vests in the Official Assignee irrespective of what portion of the debt is for a binding purpose. But the sons can sue for partition though final decree cannot be passed in such suit until the administration is complete.

Per **Srinivasa Aiyangar, J.**—The proper way of regarding the vesting so far as the sons are concerned would be to regard it as in the nature of a trust for the exercise of the father's power of disposal of the family property for his antecedent debt on the one hand and on the other for the ascertainment and delivery over to sons of the remainder of the property, if any.

Quaere.—Whether it ought not to be held that on the mere making of a vesting order by a Court as regards the father, or as for that matter another co-parcener of the joint family, the indeterminate share possessed by the co-parcener becoming defined and definite, there is not brought about in law a status of partition between him on the one hand and the other co-parceners on the other. 82 Ind. Cas. 438=1924 M.W.N. 807=20 M.L.W. 783=A.I.R. 1925 Mad. 52=47 M.L.J. 487.

[Overruled in A.I.R. 1926 Mad. 994. See **supra.**]

——S. 28—Insolvency of father—The whole co-parcenary property vests in Receiver.

From the date of the adjudication the Receiver takes over all rights in the insolvent's property which the insolvent himself possessed. One of those rights would be to alienate co-parcenary property belonging to himself and his minor sons in satisfaction of antecedent debts incurred by him, provided those debts were not tainted with immorality. For practical purposes, where the father of a joint Hindu family which includes minor sons as well as himself, seeks the protection of the Bankruptcy Court, he must place all his property at the disposal of the Court and of the Receiver appointed by the Court. 64 Ind. Cas. 976=44 All. 316=20 A.L.J. 155=A.I.R. 1922 All. 79.

——S. 28.

The estate of the sons cannot be dealt with by the Receiver where their father is adjudicated an insolvent. 49 Ind. Cas. 348, Foll. 68 Ind. Cas. 179=2 Lah. L.J. 401.

——S 28 (2)—(1907), S. 16, Cl. (2)—Vesting of property—Hindu father, adjudication of—Son's share, if vests.

Where a Hindu father is adjudicated an insolvent his son's shares in the joint family property are not liable to be sold to pay his debts. 49 Ind. Cas. 848 (Pat.).

——S. 28—Father—Insolvency of—Effect.

Where a Hindu co-parcener becomes insolvent and the Official Assignee of his estate subsequently brings a suit for partition and separate shares are allotted also to the sons of the co-parcener without making a provision for the satisfaction of the insolvent co-parcener's debts, the share of the sons of the insolvent Co-parcener do not vest in the assignee. The Receiver cannot take any proceeding against the sons' separate shares where he fails before the partition to obtain an order declaring the sons' share to be liable for the father's debts. A.I.R. 1926 All. 447, not Foll. 123 Ind. Cas. 61=6 O.W.N. 977=5 Luck. 248=A.I.R. 1930 Oudh 36

——S. 28—Father adjudged insolvent—Sons thereafter suing for partition—Their interest if vests in purchaser from Official Receiver.

In a sale by the Official Receiver of an insolvent father's property his son's interest would not vest in the purchaser in sale by Official Receiver where a suit for partition had been filed by the sons against their father after his insolvency: A.I.R. 1928 Mad. 735, (F.B.); A.I.R. 1926 Mad. 994 (F.B.) and A.I.R. 1925 P.C. 18, Foll.

In such a case the plaintiffs (sons) are **prima facie** entitled to a decree for partition though in effecting it regard will be had to the debts which are payable by the father binding on the sons. Where the debts for which the Official Receiver has sold the property are neither illegal nor immoral regard will be had to the equities of the purchaser from the Receiver, to whom they will be allotted on partition, if there are no other intervening superior equities. 114 Ind. Cas. 225 =A.I.R. 1929 Mad. 778.

——S. 28—Adjudication of a father as insolvent—Suit for partition by sons—Effect.

Per **Ramesam and Madhavan Nair, JJ. (contra Phillips, Offg. C. J.)**.—After the adjudication of the father as an insolvent and the vesting of his rights in the Official Assignee, the institution of a partition suit by the sons of the insolvent effects a severance of the joint family status and, therefore, the power to sell their shares by private sale, of the Official Assignee, who steps into the shoes of the father, is extinguished, although the Official Assignee by proper proceedings in the insolvency Court may proceed against their shares. 112 Ind. Cas. 541=51 Mad. 417=1928 M.W.N. 294=28 M.L.W. 109=A.I.R. 1928 Mad. 735=55 M.L.J. 175.

——S. 28—Property acquired by sons after adjudication of father—If vests.

Where joint family property passes out of the family under a genuine transfer before an application to adjudge the father of the joint family an insolvent is made but after the father is adjudged insolvent the property is re-acquired by the sons from their own exertions and is held by them as co-owners with their father. Only the father's share vests in the Receiver. 102 Ind. Cas. 464=29 Bom. L.R. 473=A.I.R. 1927 Bom. 412.

——S. 28.

Where a decree-holder in execution of decree against father and son has attached property belonging to them and the father is subsequently adjudicated insolvent, execution can be allowed to proceed against the right, title and interest of the son in the attached property. A.I.R. 1940 Mad. 222=(1939) 2 M.L.J. 708=50 L.W. 839=1940 M.W.N. 349=189 Ind. Cas. 881.

——S. 28 (2).

Suit against father and son—Attachment before judgment of entire property—Insolvency of father after decree—Father's interest cannot be sold without the leave of the Insolvency Court—But sons' interest cannot be deemed to be the property of the insolvent nor can the Official Receiver, if the sons' interests have been attached before judgment, have any power of disposal of their interest. It is, therefore, competent to the decree-holder to attach and sell the sons' interest without the leave of the Insolvency Court even though he had attached before judgment the entire family property. He can claim rateable distribution in respect of proceeds of sale of sons' interest as against the holder of a decree against the sons who has brought their interest to sale. A.I.R. 1936 Mad. 948=71 M.L.J. 541=44 L.W. 615=1936 M.W.N. 1142=165 Ind. Cas. 664 (2).

——S. 28 (2)—Son's share, if vests in Receiver.

When an attachment has been effected of the son's share before the father's adjudication as insolvent, there is no power of disposal of the son's property which can pass to and vest in the Receiver and the Official Receiver is not entitled to sell the son's share. A.I.R. 1936 Mad. 698=44 L.W. 201=1936 M.W.N. 769=71 M.L.J. 294=164 Ind. Cas. 853.

——S. 28 (2)—Appointment of Receiver—Attachment of sons' shares before appointment—Receiver, whether entitled to sell such shares—Attaching creditor's rights.

When a Receiver is appointed by the Insolvency Court in a petition in which the father of a joint Hindu family is sought to be adjudicated an insolvent the property of that insolvent vests in the Receiver but the shares of the undivided sons do not actually vest in the Receiver but only the father's power to sell such shares; and if the shares of the sons have been attached before the vesting in the Receiver takes place, there can be no vesting of even this power to sell the sons' shares in the Receiver and the attaching creditor is entitled to proceed with the execution of his decree against the sons' shares. A.I.R. 1935 Mad. 427=42 L.W. 295=1935 M.W.N. 1028=156 Ind. Cas. 205.

——Ss. 28, 51—Decree against Hindu father—Attachment of joint family property—Subsequent adjudication of father as insolvent—Sale of property in execution—Decree-holder's rights to proceeds representing shares of sons as against Official Receiver.

A person instituted a suit against a Hindu father and attached before judgment the joint family property of the father and his three sons, as the property of the father. He obtained a decree in 1926 and applied for the sale of the attached property. The judgment-debtor filed an insolvency petition in 1927 and he was adjudicated insolvent. The property which had been attached was sold and the decree holder claimed three-fourths of the sale proceeds. The Official Receiver objected:

Held, that as the petition for adjudication was presented only after the date of the attachment and after the father's power of disposal over the sons' shares had been destroyed by the attachment of the shares, the Official Receiver was not entitled to deal with the sons' shares by reason of the order of adjudication and the decree-holder was entitled to the three-fourths of the sale proceeds representing the sons' shares, subject to the right of the sons to establish that the debt was illegal or immoral and not binding on them.

Held also, that S. 51 had no application to the case, for, in so far as there had been an execution against the shares of the sons, it was not an execution against the property of the insolvent. A.I.R. 1934 Mad. 217=1934 M.W.N. 113=39 L.W. 338=66 M.L.J. 412=148 Ind. Cas. 787.

——S. 28—Insolvency of father—Leave to sue conditional on money realised from property of insolvent being handed over to Receiver—Sale proceeds of sons' shares, whether property of insolvent—Creditor's rights.

One of the creditors of an insolvent applied for leave to sue the insolvent and another and leave was granted with the condition that the money, if any, realised from the insolvent must be handed over to the Receiver for distribution. He sued the insolvent and his five undivided sons obtained a decree and attached three sons' shares in execution. The Receiver subsequently sold the entire family property and the creditor claimed that he was entitled to the 5/6th share of the sons which he had attached to the exclusion of the other creditors:

Held, that though an attachment of the sons' shares would ordinarily deprive the Receiver of his right to sell the sons' shares as assets of the insolvent father and the mere fact that the whole property was sold by the Receiver would not affect the rights of the attaching creditor, yet in the special circumstances of this case, in view of the condition on which leave was granted and the subsequent conduct of the creditor, he was not entitled to any preferential right with regard to the 5-6ths of the sale proceeds.

The father's right to sell the sons' shares is 'property' within S. 28 of the Prov. Insol. Act. A.I.R. 1935 Mad. 255=40 L.W. 904=68 M.L.J. 357=154 Ind. Cas. 449.

——S. 28—Mortgage by Hindu father—Father adjudicated insolvent — Sale of property by Receiver—Sale, if only of father's share or of entire property—Intention.

Although in particular circumstances, the expression "right, title and interest of the father" may include the sons' interest as well, the expression **simpliciter** cannot be interpreted in that comprehensive sense. In each case the particular circumstances which would justify attaching wider import to that expression must be proved.

A Hindu father executed a mortgage affecting the house in suit. He was adjudged an insolvent and a Receiver was appointed with respect to his share in the property. The Receiver applied for annulment of the aforesaid mortgage and succeeded in getting it set aside to the extent of one-third. On appeal, however, the lower appellate Court's order was set aside and the mortgage was upheld in its entirety. During the interval between the first Court's order and the appellate order, the Receiver sold some property including the house in suit subject to the mortgage to the extent of two-thirds share and it was purchased by the appellant by virtue of a sale-deed dated 15th April, 1929. Subsequent to his purchase, the defendant attached two-thirds share in the property as belonging to the insolvent's sons. Only the father was adjudicated an insolvent. The sons were never made parties to the proceedings resulting in the sale in the appellant's favour. The appellant filed a suit for a declaration that he was the owner of the entire property:

Held, theat the order of the Insolvency Court and the Receiver's vague statement as to what he intended to sell militated against any intention to sell the whole property. The fact that the debts were not proved to be illegal or immoral does not make any contribution to the proof as to the intention to sell the whole property. Of course, the evidence as to what the purchaser thought he was purchasing would be admissible and that evidence would be directed to show that the consideration paid represented the value of the whole property and not merely the father's

share. In the absence of such evidence, it could not be said that the whole property was sold. A.I.R. 1935 Nag. 193=18 N.L.J. 255=158 Ind. Cas. 599.

——S. 28.

Annulment of insolvency—In absence of appointment by Court, debtor's property reverts to him to extent of his interest—Joint Hindu family—Father's insolvency annulled—Fund representing son's share would be out of reach of Official Receiver by reason of attachment before re-vesting order begins to operate. A.I.R. 1943 Mad. 94=1942 M.W.N. 470=207 Ind. Cas. 124.

9 (c). Joint Hindu Family—Insolvency of Manager.

——S. 28 (2)—Joint Dayabhaga family—Insolvency of manager—His power to sell interest of other co-parceners for satisfaction of joint debts, if vests in Receiver.

The power of a manager over the joint estate can never be exercised for his own benefit alone. It is exercisable for the benefit of the family as a whole, and it cannot be said that it is a "thing of value" so far as he himself is concerned. The family debts, even if contracted by a manager, must be deemed to be debts incurred by all the members of the family, who occupy the position of debtors under law, and whose interests in the joint estate are liable to be sold for satisfaction of the same. The creditor has his remedy in law against every one of them but there is no warrant or justification for allowing the Receiver in insolvency to seize and sell the share of those co-parceners who have not been adjudicated insolvents, simply because the managing member has been so adjudged. Hence, on the insolvency of the managing member of a joint Dayabhaga family who is not and cannot be the father, his power to sell or mortgage the interest of other co-parceners for satisfaction of joint debts does not vest in the Receiver under S. 28 (2). A.I.R. 1942 Cal. 533=46 C.W.N. 808=I.L.R. (1942) 2 Cal. 413=76 C.L.J. 333=203 Ind. Cas. 154.

——S. 28.

Where one of the brothers, who is a manager of a joint Hindu family is adjudicated insolvent for the debts due presonally from him, the shares of the other brothers do not vest in the Official Receiver. A.I.R. 1938 Lah. 20=177 Ind. Cas. 639.

——S. 28 (2)—Property vesting in Receiver.

Where manager or **karta** of a joint Hindu family firm becomes insolvent, the utmost that can vest in the Receiver is the manager's own share in the family business together with such right as he might have had to dispose of property belonging to the other members of the firm for the purpose of discharging business obligations because the right of manager to dispose of or at any rate to affect with liability joint property in the case of a joint Hindu family firm is to be regarded as a piece of property which ordinarily would pass to and become vested in a Receiver upon the insolvency of the **karta** or managing member in such a way as to afford some advantage to the creditors of the joint family firm. But the powers of the Receiver shall be subject to the same qualifications as it was in the hands of the manager. A.I.R. 1937 Cal. 517=41 C.W.N. 1079=I.L.R. (1937) 2 Cal. 675=66 C.L.J. 315=172 Ind. Cas. 914.

——S. 28 (2).

Some creditors advanced loans to a joint Hindu family firm, and secured attachment of the firm property and obtained decree on their loans subsequently. Another creditor of the firm, acting solely for himself and in his own interest, instituted proceedings in insolvency in the Court of the District Judge. The **karta** was adjudicated insolvent and a Receiver was appointed and the property of the firm became vested in him. The creditors who had obtained decrees on their loans, appealed against the order:

Held, (i) that the power of the **karta** to dispose of the property was subject to the clog created by the attachment of the creditors and upon his insolvency, his power, subject to these limitations, vested in the Receiver. A.I.R. 1937 Cal. 517=41 C.W.N. 1079=I.L.R. (1937) 2 Cal. 675=66 C.L.J. 315=172 Ind. Cas. 914.

——S. 28.

Where a promissory note was drawn in favour of a joint Hindu family carrying on ancestral business and not in the name of the **karta** and on the adjudication of the **karta** as insolvent, the Official Receiver sought to sue on the pro-note through the **karta**:

Held, (Per **Mya Bu, J.**) that as the **karta** could not sue in his own name, the Official Receiver could not derive the right of suit through the **karta** under S. 2 (1) (**d**), Prov. Insol. Act.

Per **Dunkley, J.**—The right to bring a suit on a promissory note executed in favour of the family business will pass to the Receiver on the insolvency of the manager of the family. A.I.R. 1937 Rang. 165=169 Ind. Cas. 856.

——S. 28—Promissory note by manager of joint Hindu family—Insolvency of manager—Debt not proved—Suit against other members of family—Maintainability.

The 1st defendant executed a promissory note to the plaintiff when he was the managing member of the family of himself and defendants 2 to 5. He became insolvent. The plaintiff then instituted a suit against the defendants on the promissory note. The suit was dismissed as against the estate of defendant 1 as the debt was one provable in insolvency but a decree was passed against the shares of the other defendants on the ground that the debt was incurred for family purposes. On appeal:

Held, that though the suit could not be maintained against the estate of defendant 1, a decree could be passed against the shares of the other defendants in the family property. A.I.R. 1934 Mad. 223=66 M.L.J. 277=39 L.W. 347=1934 M.W.N. 622=148 Ind. Cas. 831.

——S. 28 (2)—Co-parceners' shares, whether vest in Receiver—Power of Receiver to attach their shares.

The undivided interests of the co-parceners in the joint family property do not vest in the Receiver upon the adjudication of the manager as insolvent, though the manager's power to dispose of such shares to

satisfy the just and proper debts incurred by him on behalf of the joint family may so vest, and the Receiver cannot attach their shares. A.I.R. 1933 Nag. 150 =29 N.L.R. 159=143 Ind. Cas. 769.

——S. 28.

Per **Devadoss, J., agreeing with Odgers, J.**

Hindu trading family—Debts incurred by manager (not father) for the trade—Manager and adult members adjudicated—His power to sell family property including minors' shares passes to Official Receiver so as to bind the minors' shares. **(Curgenven, J., Contra).** 19 Mad. 74 and A. A. O. 31 of 1925, Foll. 114 Ind. Cas. 345=52 Mad. 246=28 M.L.W. 603= A.I.R. 1929 Mad. 166=55 M.L.J. 721.

10. Leave of Court.

See also: T. P. Act, S. 53.

(a) **Absence of**
(b) **Grant of**
(c) **When necessary**
(d) **When not necessary**

10 (a). Leave of Court—Absence of.

——S. 28 (2)—Suit without leave of Insolvency Court—Effect.

A suit filed without the leave of the Insolvency Court and a decision rendered thereon would not bind the Official Receiver. A.I.R. 1945 Mad. 388=58 L.W. 289=(1945) 1 M.L.J. 472=1945 M.W.N. 745.

——S. 28 (2)—Leave—Effect of absence of.

Prohibition in S. 28 (2), Provincial Insolvency Act, imposes a condition precedent to the commencement of the suit, and if the leave of the court is not obtained, the suit must necessarily be dismissed. A.I.R. 1939 Bom. 344=I.L.R. (1939) Bom. 493=41 Bom. L. R. 583=185 Ind. Cas. 542.

——S. 28.

The object of S. 28 is to secure for the Official Receiver, the unrestricted right to dispose of an insolvent's property and it is to preserve that right that suits and other proceedings aimed at the insolvent's property are prohibited. It cannot be laid down that in all cases in which a suit is filed which offends against the provisions of S. 28 of the Act, the Court has no jurisdiction to entertain this suit. A.I.R. 1936 Mad. 57= 1936 M.W.N. 77=43 L.W. 204=69 M.L.J. 914=160 Ind. Cas. 423 (2).

——S. 28 (2)—Adjudication of some members of joint Hindu family—Suit against all members without leave—Decree, whether void.

Where a person obtained a decree against the members of a joint Hindu family after two of them had been adjudicated insolvents without obtaining the leave of the Court;

Held, that though the suit did offend against the provisions of S. 28, the decree was not entirely void and it was not open to a rival creditor to contend that the decree was not executable even against the property of those members who had not been adjudicated insolvents. A.I.R. 1936 Mad. 57=1936 M.W.N. 77=43 L.W. 204=69 M.L.J. 914=160 Ind. Cas. 423 (2).

——S. 28 (2).

A suit instituted without the leave of the Court during the pendency of insolvency proceedings is non-maintainable and it does not cease to be so even where the insolvency proceedings, after institution of the suit came to an end. 113 Ind. Cas. 550=A.I.R. 1929 Mad. 480.

——S. 28 (2)—Absence of leave—Effect.

A suit brought without permission of Insolvency Court is of no avail and the decision in the suit is not **res judicata.** 65 Ind. Cas. 941=5 N.L.J. 144= 19 N.L.R. 126=A.I.R. 1922 Nag. 108.

——S. 28 (2)—Suit filed without leave—Duty of Court.

Where a suit is brought by a creditor against an insolvent against whom an order of adjudication has been made without leave of the Court, the Court need not dismiss it necessarily but may stay the suit or may allow it to be proceeded with on terms.

In such cases, the plaintiff will be ordered to pay to the defendant costs incurred by the defendant solely caused by the plaintiff's default in obtaining leave. A.I.R. 1932 Bom. 344=34 Bom.L.R. 683=57 B. 623= 138 Ind. Cas. 824.

——S. 28 (2)—Absence of leave—Objection—Proper stage.

Where a defence as to want of leave under a section corresponding to S. 28 is not specifically taken in the lower Court, the proper order is to rule that the objection has been waived and cannot be pressed later. A.I.R. 1936 Lah. 286=37 P.L.R. 787=162 Ind. Cas. 39.

——S. 28 (2)—Omission to take leave—Objection in appeal.

The absence of leave of Court under S. 28 (2) for instituting a suit does not render a decree passed in the suit a nullity. Therefore, where an objection of this nature is not taken in the Court of first instance and a decree has been passed, it must be deemed to have been waived and it is not open to the Official Receiver to raise the point on appeal and contend that because of the failure to obtain leave, the suit ought to have been dismissed on that ground alone. A.I.R. 1933 Mad. 917=38 L.W. 891=146 Ind. Cas. 699.

——S. 28 (2)—Want of leave does not make proceedings without jurisdiction.

The prohibition in S. 16 is directed not to the Court but to the party, and therefore when a party is wholly ignorant of the adjudication he should not be penalized for not bringing to Court's notice a matter of which he was wholly ignorant, but what is required is that a defence by way of a plea for want of leave shall not be denied to the debtor in the suit if he really has been adjudicated insolvent, and if he does raise the defence of want of leave, then the Court shall dismiss the suit or permit it to proceed upon terms; but if he does

not raise the defence, the proper order would be to rule that the objection has been waived and cannot be later pressed. The prohibition is merely a restraint on the exercise of jurisdiction, and is a matter of procedure and there is no inherent want of jurisdiction.

Tiruvenkatachariar, J.—Both under Cl. 12 of the Letters Patent and S. 16 (2), Provincial Insolvency Act 1907, the leave required has to be obtained before the suit is instituted and it is not correct to say that a suit instituted without leave can be validated by obtaining leave subsequently. 119 Ind. Cas. 46=29 M.L.W. 349=A.I.R. 1929 Mad. 323=56 M.L. J. 489.

10 (b). Leave of Court — Grant of.

——S. 28 (2) — Order granting leave ex parte — Force of.

An order granting leave under S. 28 (2), passed without notice to the other party must be regarded to have been passed without prejudice to the interests of those against whom it was passed. A.I.R. 1941 Mad. 577=(1941) 1 M.L.J. 531=53 L.W. 479=1941 M.W.N. 366 =200 Ind. Cas. 366.

——S. 28 (2) — Grant of leave — Notice to insolvent.

There is no rule of law requiring notice to be given to an insolvent before leave to file a suit is granted, and whether it is necessary to issue a notice to the insolvent or not, must be decided on the facts of each particular case. 117 Ind. Cas. 570=6 Rang. 533 =A.I.R. 1928 Rang. 326.

——S. 28 (2) — Granting of leave what amounts to.

Where the plaintiff and other creditors of the debtor opposed the latter's application for adjudication as an insolvent on the ground that a transfer effected by him was fraudulent and collusive and examined witnesses in support of their allegation but the Judge stopped recording further evidence, being of opinion that the transaction having been effected more than two years before the application for insolvency, its genuineness and validity could more appropriately be determined in a seperate suit and accordingly passed an order of adjudication, but in this order he stated specifically that the plaintiff or the other creditors might, if so advised, file a separate suit for having the transfer declared void:

Held, that the permission to sue was granted by the Insolvency Judge, and it was not necessary for the plaintiff to make another application at a later stage for the repetition of the previous order. A.I.R. 1934 Lah. 460=35 P.L.R. 402=15 L. 849=150 Ind. Cas. 888.

——S. 28 (2)—Implied leave.

Where a creditor made an application to a District Munsif sitting as an Insolvency Court under S. 4 praying for a declaration that a certain transaction was **benami** and the Munsif entertained the application, heard it and gave a decision upon it:

Held, that though no formal application had been made for leave under S. 28 and no formal leave had been granted, the fair inference from what took place was that leave of the Court had been granted and the application under S. 4 was not, therefore, barred for want of leave under S. 28. A.I.R. 1935 Mad. 46=67 M L. J. 616=40 L.W. 693=1934 M.W.N. 1034=153 Ind. Cas. 624.

——S. 28 (2) — Grant of leave to sue—Scope of.

The grant of permission to institute a suit does not necessarily cover permission to execute a decree obtained in that suit and therefore the decree-holder cannot execute his decree obtained in such suit against the insolvent's property. 98 Ind. Cas. 525=48 All. 482 =24 A.L. J. 755=A.I.R. 1926 All. 640.

——S. 28 (2) — Proceedings under Insolvency Acts, without leave — Leave subsequently granted — Proceedings, if nullity — Granting of leave after Limitation, effect of.

Under the Insolvency Acts, proceedings taken without leave under S. 28(2), Provincial Insolvency Act, or under S. 17, Presi. Towns Insolvency Act are not necessarily a nullity. It is a matter for the Court to whom an application for leave has been made to decide on all the circumstances placed before it whether or not it should grant leave. If leave has been granted by that Court in regard to a suit commenced without leave, the proceedings are not a nullity and whether leave was granted before the period of limitation had run out on the filing of the suit or afterwards, makes no difference at all. A.I.R. 1942 Lah. 289=I.L.R. (1942) Lah. 517=204 Ind. Cas. 74 (F. B).

——S. 28 (2) — Provisions are mandatory—Leave of Court condition precedent — Subsequent leave, if can validate suit — Leave to continue suit.

Section 28 (2) is mandatory and after an order of adjudication is made, no suit or other proceedings can be instituted against the insolvent or his property without the leave of the Insolvency Court and such leave is a condition precedent to the right of action, and where any suit or other proceeding is pending on the date of the adjudication in any civil Court, such Court, on being apprised of the order of adjudication, can, in its discretion, either stay the suit or proceeding or give leave to continue the same. If leave is a condition precedent, the want of it is a defect fatal to the suit and subsequent leave cannot validate it. Leave to continue the suit filed after order of adjudication without the leave of the Insolvency Court cannot be granted subsequently under S. 29 of the Act, as it applies to suits which are already pending when the order of adjudication is made and as the granting of such leave would render the provisions of S. 28 (2) nugatory. A.I.R. 1937 Mad. 667=45 L.W. 709=1937 M.W.N. 654=(1937) 2 M.L. J. 223=I.L.R. (1937) Mad. 841=173 Ind. Cas. 285.

——S 28 (2) — Declaratory suit against insolvent by creditor — Leave obtained subsequently.

While a stranger to the proceeding can file a declaratory suit against an insolvent without the leave of the Court, a decree-holder of the insolvent or a creditor who has been a party to the insolvency proceedings, cannot bring such a suit without the leave of the Court under S. 28 (2) and failure to obtain leave

before the institution of the suit cannot be cured by obtaining leave subsequently. A.I.R. 1933 Nag. 217= 145 Ind. Cas. 697 (2).

——S. 28 (2) — Permission is condition precedent.

The words S. 28 (2), Provincial Insolvency Act, constitute a condition precedent and leave must be obtained before the institution of the suit. Failure to do so cannot afterwards be cured. 40 Bom. 235, Foll. 105 Ind. Cas. 109=26 M.L.W. 318=1928 M.W.N. 122 =A.I.R. 1927 Mad. 925=53 M.L.J. 412.

——S. 28 (2) — (1907), S. 16 (2) — Leave of Court — After institution of suit whether can be granted — Insolvency — Pendency of.

S. 16 (2) of Provincial Insolvency Act is a bar to a suit for which leave of the Insolvency Court has not been obtained prior to its institution. An insolvency proceeding is not terminated when the insolvent has not appeared to claim his discharge and the record has been sent to the record room. A legal proceeding is pending as soon as commenced and until it is concluded, i.e., so long as the original court can make order in the matters in issue or to be dealt with thereon. 12 S.L.R. 20=47 Ind. Cas. 771.

——S. 28 (2) — (1907), S. 16 (2) — Proceedings against Insolvent — Leave of court after suit or application — Pendency of Insolvency proceedings — Order suspending discharge — Execution proceedings.

Under S. 16 (2) (b) of the Provincial Insolvency Act, leave for commencing a suit or application against an adjudged insolvent can be granted even after such suit or application has been filed, and it will relate back to the date of the filing of the suit or application. 38 Bom. 365, 367, not Foll. When a final dividend is declared and all available assets distributed, the insolvency proceedings is no longer pending so as to operate as a bar under S. 16 (2) (b) of the Provincial Insolvency Act. The fact of the postponement of discharge of the insolvent by order of the Court does not constitute a pendency of such proceedings. 9 S.L.R. 34=30 Ind. Cas. 37.

10 (c). Leave of Court — When necessary.

——S. 28 (2) — Claim for marriage expenses, arrears of maintenance, residence, clothing and for future maintenance.

The claim for (1) marriage expenses, (2) arrears of maintenance, (3) lump sum on account of residence, (4) clothing and even a claim for future maintenance is a claim for debts provable in insolvency. A suit against an insolvent to recover such claims brought without the leave of the Insolvency Court is barred by S. 28 (2). A.I.R. 1940 Mad. 951=(1940) 2 M.L.J. 239=1940 M.W.N. 883=52 L.W. 307=191 Ind. Cas. 670.

——S. 28 (2).

The language of S. 28 admits of no alternative interpretation; a suit cannot be commenced without the leave of the Insolvency Court. Consequently, a suit by the creditor of the insolvent to set aside sale by a Receiver in insolvency is incompetent without the leave of the Insolvency Court. A.I.R. 1940 Rang. 289 (290) =1940 Rang. L.R. 544=191 Ind. Cas. 690.

——S. 28 (2)— Leave of Court — When necessary.

Obiter.—Where a creditor seeks any relief against his debtor by way of suit which is intended to secure, directly or indirectly, the realization of his debt in the insolvency proceeding, leave of the Insolvency Court is necessary before institution of such a suit. A.I.R. 1938 Lah. 856 (858)=181 Ind. Cas. 655.

——S. 28 (2)—Suit by a creditor after adjudication of deceased father without leave—Attachment of sons' shares—Validity.

An adjudication was made after the death of the insolvent and the creditors of the deceased subsequently instituted suits against the son without the leave of the Court for the recovery of the debts due by his father and attached the son's share in the property. The suits against the son were brought as a legal representative of the deceased father and the claim was only against the family property in his hands:

Held, that the suit was really directed against the property of the deceased insolvent in the hands of his son though these properties were family properties in which the son had his own share. The suits were against the provision of S. 28 and the attachment was, therefore, invalid and the son's share vested in the Official Receiver. A.I.R. 1998 Mad. 752=1938 M.W.N. 455=47 L.W. 587=(1938) 1 M.L.J. 824=179 Ind. Cas. 564.

——S. 28 (2)—Application by creditor in insolvency under S. 25, Madras Debt Conciliation Act, without leave of Court—Legality.

The application contemplated in S. 25, Madras Debt Conciliation Act, is an application which is not prohibited by law or in contravention of any statutory provision.

An application to a Debt Conciliation Board is a legal proceeding or at least the initiation of a legal proceeding. Application under S. 25 of the Madras Debt Conciliation Act, comes within the mischief provided against in S. 28 (2).

One of the creditors in insolvency applied under S. 25, Madras Debt Conciliation Act, praying that all further proceedings in the insolvency may be stayed pending disposal of this application to the Debt Conciliation Board. The leave of the Insolvency Court was not obtained for making the application:

Held, that the application to the Debt Conciliation Board was made in contravention of S. 28 (2), and the proceedings in insolvency could not, therefore, be stayed. A.I.R. 1938 Mad. 808=1938 M.W.N. 667= (1938) 2 M.L.J. 43=48 L.W. 246=179 Ind. Cas. 47.

——S. 28 (2)—Suit for recovery of deposit.

Money deposited is debt provable under S. 34 and hence the depositor is forbidden by the provisions of S. 28 (2) from instituting a suit for the money deposited

except with the leave of the Court. A.I.R. 1936 Oudh 236=1936 O.W.N. 52=11 Luck. 731=160 Ind. Cas. 229.

——S. 28 (2)—Execution by arrest of judgment-debtor.

Where the judgment-debtor has become an insolvent the decree-holder can execute his decree by arrest of the judgment-debtor after obtaining leave of the Insolvency Court. A.I.R. 1936 Oudh 177=11 Luck. 720=1936 O.W.N. 56=160 Ind. Cas. 33.

——S. 28 (2)—Application in execution for arrest of debtor—Necessity of leave.

Where a debtor has been adjudicated an insolvent under the Provincial Insolvency Act, his creditor cannot, without the leave of the Court, file an execution application against him with a prayer for his arrest. A.I.R. 1935 Mad. 239=1935 M.W.N. 37=68 M.L.J. 148=41 L.W. 167=156 Ind. Cas. 428.

——S. 28 (2)—Execution of decree against person of insolvent — Limitation— Starting point—Date of obtaining leave of Court—Absence of protection order—Effect.

The concluding portion of S. 28 (2), Provincial Insolvency Act, imposes a disability which debars a creditor from commencing any suit or other legal proceeding against an insolvent debtor except with the leave of the Court, and an application for execution of a decree is the commencement of a legal proceeding within the meaning of the section.

Therefore, where an application for execution of a decree passed after an adjudication is made within the period of limitation from the order granting leave, the application is not barred by limitation, even though it may be more than three years from the date of decree.

The fact that no protection order has been made under S. 31 does not affect the disability imposed by S. 28 (2) as the latter section entitles the decree-holder to apply for execution by arrest of the judgment-debtor only if he obtains leave of the Court to do so. A.I.R. 1931 Pat. 357=12 P.L.T. 345=10 Pat. 422==134 Ind. Cas. 633.

——S. 28 (2)—Arrest of J. D. — Refusal of a final order of discharge—Effect.

The refusal, under S. 42, Provincial Insolvency Act, of a final discharge does not **ipso facto** determine the Insolvency proceedings. It is the order of adjudication which vests the property of the insolvent in the Court or in the Official Receiver. Until and unless that order is annulled, the property continues to vest in Court, and so long as that vesting remains the insolvency proceedings cannot come to an end. It is not therefore open to an execution creditor without the permission of the Insolvency Court to arrest his judgment-debtor for not satisfying his decree debt when the assets of the judgment debtor are not vested in him or under his control, and when the Official Receiver is still holding them for the benefit of the judgment-debtor's general body of creditors. An order of refusal of a final discharge is not in itself necessarily final.

If a Court intends to bring the insolvency proceedings to an end and restore the **status quo ante** the insolvency, it must annul the adjudication. In every case, where an order under S. 42 has been passed, the Court might **suo motu** or on the motion of a creditor annul the adjudication, but until it is annulled the insolvency proceedings are still pending. A.I.R. 1925 Rang. 105 Foll.; A.I.R. 1926 Rang. 2, not Foll 105 Ind. Cas. 165=50 Mad. 977=26 M.L.W. 305=1927 M.W.N. 593=39 M.L.T. 479=A.I.R. 1927 Mad. 919 =53 M.L.J. 422.

——S. 28—Adjudication under old Act—Order for arrest—Leave of court necessary.

The right of an insolvent adjudicated as such under Act 3 of 1907 to have execution proceedings against him stayed, unless the Insolvency Court gives leave to prosecute them, is a substantive right and is not abrogated by Act 5 of 1920, and so an order for his arrest without leave of the Insolvency Court is without jurisdiction. A.I.R. 1923 Mad. 487; A.I.R. 1924 Mad. 368, Foll. 93 Ind. Cas. 3=1926 M.W.N. 281=A.I.R. 1926 Mad. 510=50 M.L.J. 237.

——S. 28 (2).

No proceedings in execution can be started against an insolvent judgment-debtor unless the judgment-creditor has obtained leave of the Insolvency Court to commence such proceedings even when protection order has been refused. 107 Ind. Cas. 608=A.I.R. 1928 Lah. 258.

——S. 28 (2)—Leave for proceedings under S. 4—Implied application for leave.

An application was made under S. 4, Provincial Insolvency Act praying for a declaration that the scheduled property belonged to the insolvent and for a direction that the Official Receiver might sell the property for the benefit of the general body of creditors:

Held, that these proceedings were proceedings which come within the provisions of S. 28 (2), and that, therefore, leave to institute the proceedings must first of all have been obtained and that the application required the previous sanction of the Court before it could be proceeded with:

Held also, that in the particular case, as the Court's attention was brought to the fact that the Official Receiver had, at the request of the appellants, declined himself to take proceedings and he was joined as a party to the application, it could be said that by implication the leave of the Court was really being asked for and it was, therefore, not necessary that a formal request should be made to the Court for leave either to start the proceedings or to continue them in the name of the Official Receiver. A.I.R. 1935 Mad. 809=1935 M.W.N. 549=69 M.L.J. 137=42 L.W. 402=161 Ind. Cas. 732.

——S. 28 (2)—Suit by creditor of insolvent for declaration that property attached in execution of decree is property of insolvent judgment-debtor is covered by S. 28 (2).

A suit by a creditor of an insolvent for a declaration that the property attached in execution of the decree is the property of the insolvent judgment-debtor is covered by S. 28 (2) and leave of the Court is necessary before filing such suit.

Per **Otter, J.**—The C. P. Code cannot of itself establish a right which does not exist under the ordinary law. It is a Code of Procedure only, and not of substantive law, and if, under the terms of the Provincial Insolvency Act (an Act enacting substantive law) a person is barred from filing a suit, the C. P. Code cannot assist him.

Baguley, J.—Although the C. P. Code is a Code of Procedure it gives a definite right, such as the suit under O. 21, R. 63, for a declaration with a period of limitation of its own. But the Provincial Insolvency Act being of a later origin than the Code, it must be regarded as limiting so far as the creditor of the insolvent is concerned, a statutory right that he may have obtained under the Code. 35 Cal. 202 Expl.; A.I.R. 1927 Mad. 201, not Foll. 128 Ind. Cas. 382=A.I.R. 1930 Rang. 317.

——S. 28 (2)—Suit under O. 21, R. 63—Leave of Court is necessary.

A suit by an attaching creditor under O. 21, R. 63 C. P. Code, for declaring that an alienation by the debtor is ineffective against his attachment and that the properties attached belonged to the debtor, when the debtor is insolvent, is a suit in respect of what is alleged to be the property of the insolvent and does come within the meaning of S. 16 though it does not seek any remedy against the property of the insolvent and the leave of the Court should be obtained. 98 Ind. Cas. 446=A.I.R. 1927 Mad. 201.

But see A.I.R. 1929 Mad. 323.

——S. 28 (2)—Suit to set aside transfer.

A suit to set aside transfer by an insolvent, so far as the insolvent is concerned, is not maintainable unless leave to sue him has been obtained under Cl. (2), S. 28. 110 Ind. Cas. 386 (Lah.)

——S. 28 (2)—(1907), S. 16 (2) (b)—Proceedings against insolvent—Leave of Court.

The creditors under S. 16 (2) (b) must apply to the court exercising jurisdiction in the matter, for leave to commence a suit against the insolvent for the property fraudulently transferred. 5 S. L. R. 80=12 Ind. Cas. 622.

——S. 28 (2).

No suit may be brought against an insolvent after adjudication without first obtaining the permission of the Court to bring that suit. A.I.R. 1924 Nag. 300, Diss. from. 102 Ind. Cas. 37=8 Lah. 593=28 P.L.R. 634 =A.I.R. 1928 Lah. 28.

——S. 28 (2)—(1907), S. 16—Proceedings against insolvent—Suit by creditor under S. 53 of the T. P. Act to set aside transfer—Leave of Court.

After the order of adjudication is made it is not open to a creditor of the insolvent to sue under S. 53 of the T.P. Act to set aside a transfer made by the insolvent without first obtaining the leave of the Court under S. 16 (2) of the Provincial Insolvency Act. 42 Mad. 684 =36 M. L. J. 453=9 L.W. 475=26 M.L.T. 90=(1919) M.W.N. 612=52 Ind. Cas. 442.

But see A.I.R. 1946 Mad. 25.

——S. 28 (2)—(1907), S. 16—Proceedings against insolvent—Leave of Court.

A suit against an undischarged bankrupt in respect of a debt mentioned in the list attached to his application and of which notice was duly served on the creditor is not maintainable without the leave of the insolvency court. 20 O.C. 304=43 Ind. Cas. 262.

——S. 28—(1907), S. 16—No attachment and no suit for declaration after judgment-debtor's insolvency.

Neither an attachment of the judgment-debtor's property nor a suit for a declaration in respect thereof is permissible without the sanction of the adjudicating court, after the judgment-debtor's insolvency. 9 L.B.R. 47=10 Bur. L.T. 116=37 Ind. Cas. 803.

——S. 28 (2)—(1907), S. 16 (2)—Suit for rent—Leave of court.

In an ordinary suit for rent against an insolvent the land-lord is in the same position as any other creditor. But he can distrain for his rent in spite of the insolvency of the tenant. A suit for arrears of rent against a tenant declared insolvent and against whom such declaration is in full force and effect, is not maintainable without the leave of the Court. 34 All. 121= 8 A. L. J. 1287=12 Ind. Cas. 927.

——S. 28 (2).

A suit to recover a debt contracted after filing petition but before adjudication is not maintainable without leave of the Court under S. 28 (2) before discharge of the insolvent. After discharge, a suit to recover the debt will be barred by S. 44. A.I.R. 1932 Bom. 511=34 Bom. L.R. 980=141 Ind. Cas. 466.

——S. 28 (2)—Suit after filing petition but before adjudication—Necessity of leave.

The filing of a suit against a debtor prior to the adjudication although after the presentation of an insolvency petition is not to be regarded outside the purpose of the Insolvency Act with reference to the provisions of S. 28 (2). A.I.R. 1935 Mad. 817=42 L.W. 220= 1935 M.W.N. 716=69 M. L. J. 241=58 Mad. 1032= 158 Ind. Cas. 460 (D.B.).

——S. 28 (2) — Proceedings by creditors after discharge—Necessity of leave.

Since the insolvency proceedings do not terminate with the order of discharge of the insolvent, his creditor would be precluded by S. 28 (2) from enforcing his remedy in any other Court or in any other manner, except in the Insolvency Court and in the manner provided in the Insolvency Act. A.I.R. 1939 Nag. 103= 1939 N. L. J. 96=I.L.R. (1939) Nag. 478=182 Ind. Cas. 214.

——S. 28 (2)—Insolvent's discharge refused—Leave to sue him is still necessary.

On the refusal of an insolvent's discharge, his property which vested on adjudication in the Court or a Receiver, does not re-vest in the insolvent; and the insolvent can renew his application for discharge in case fresh circumstances might justify him in doing so and the leave of the Court is necessary before any suit can be brought against the insolvent: A.I.R. 1926 Rang. 2 Not Foll. 109 Ind. Cas. 769=6 Rang. 27=A.I.R. 1928 Rang. 109.

10 (d). Leave of Court—When not necessary.

——S. 28 (2)—Alienation by debtor before adjudication—Suit to set aside—Leave, if essential—Suit for declaration that property standing in name of third party belongs to insolvent—Leave, if necessary.

A suit by a creditor under S. 53, T. P. Act, to set aside an alienation made by the debtor before he is adjudicated an insolvent is maintainable without the leave of the Court. It is only those suits that seek relief against the property of the insolvent and which were admittedly the insolvent's property at the date of the insolvency petition that would require the leave of the Court. A suit for a declaration that the property standing in the name of the third party is really that of the insolvent and not that of the third party is maintainable at the instance of the creditor. This does not come within the rule laid down in S. 28, Provincial Insolvency Act, or S. 17, Presidency Towns Insolvency Act. Such a suit is not a suit against the property of the insolvent and the plaint does not ask for any relief against the property of the insolvent. A.I.R. 1946 Mad. 25=58 L.W. 462=1945 M.W.N. 585=(1945) 2 M. L. J. 318.

——Ss. 28 (2), 34 (1)—Suit for damages for use and occupation or for rent for period subsequent to defendant's adjudication as insolvent—Not barred by S. 28 (2).

Damages for use and occupation are of the nature of unliquidated damages and would, therefore, come within the provisions of S. 34 (1) which prohibits the proving of such debts in insolvency. Where the period for which damages for use and occupation or rent are claimed is one subsequent to the adjudication of the defendant as insolvent, they are not, within the meaning of S. 34 (2), debts and liabilities to which the debtor was subject when he was adjudged an insolvent nor were they debts to which he became subject before his discharge by reason of any obligation incurred before adjudication. Even if such a suit is regarded as one for rent, the liability could not have arisen on the date of the original contract. The suit is not therefore, barred by S. 28 (2) on the ground that no leave of the Insolvency Court was obtained. A.I.R. 1945 Mad. 239=1945 M.W.N. 346 (1)=(1945) 1 M. L. J. 379.

——S. 28 (2).

A creditor is not prohibited from filing a suit even as against a person who is jointly indebted with the insolvent and whose property could not have vested in the Official Receiver. Consequently, where, after the adjudication of the father, there is a severance of status between the father and the son, leave of the Insolvency Court under S. 28 (2) is not necessary for a suit against the son. A.I.R. 1942 Mad. 327=(1942) 1 M. L. J. 173 =55 L.W. 108=1942 M.W.N. 81=201 Ind. Cas. 782.

——S. 28 (2)—Proceedings in respect of son's share in joint family property.

Although the right of an insolvent Hindu father to sell his son's share in the family property to discharge his own lawful debts vests in the Official Assignee or the Official Receiver, the son's share does not vest in him and hence, proceedings can be taken in respect of son's interest in the family property without the leave of the Insolvency Court. A.I.R. 1939 Mad. 572=1939 M.W.N. 367=49 L.W. 515=(1939) 1 M. L. J. 889 =I.L.R. (1939) Mad. 585=185 Ind. Cas. 159.

——S. 28 (2)—Execution proceedings in respect of tenancy holding.

As the tenancy holding is not a property with which the Insolvency Court or the Official Receiver can deal, there can be no bar to the taking out of the ejectment proceedings in execution of his decree for arrears of rent by the decree-holder against the insolvent. A.I.R. 1938 All. 198=1938 A. L. J. 134=1938 R.D. 297=1938 A.W.R. 119=174 Ind. Cas. 892.

——S. 28 (2)—Necessity of leave in mortgage suit.

Per **Cornish, J.**—A suit instituted by a mortgagee to enforce his claim under the mortgage would be outside the Insolvency Act and S. 28 (2) would have no application to it. A.I.R. 1935 Mad. 817=1935 M.W.N. 716 =69 M. L. J. 241=42 L.W. 220=58 Mad. 1032=158 Ind. Cas. 460.

——S. 28 (2)—(1907), S. 16 (2)—Declaratory suit by creditor as to priority of his mortgage.

A suit by creditor of an insolvent with leave of Court under S. 16 (2) for a declaration as to the priority of his mortgage is not barred. 36 Ind. Cas. 1004 (All.)

——S. 28 (2)—Declaratory decree by sons of judgment-debtor—Adjudication of judgment-debtor as insolvent—Holder of decree against father—Appeal by decree-holder—Permission of Insolvency Court not necessary.

The sons of a judgment-debtor sued for and obtained a declaration that certain property was not saleable or attachable under a certain decree against their father. Prior to the passing of the decree, the father was adjudicated an insolvent. The decree-holder appealed to the High Court without obtaining permission of the Insolvency Court:

Held, that in as much as all that the decree-holder wanted was only that a declaratory decree should be set aside making the property attachable under the decree of the appellant decree-holder, it would not be a remedy against the property of the insolvent within the meaning of S. 28, and that, therefore, the appeal was not barred. A.I.R. 1932 All. 382=1932 A. L. J. 361 =54 A. 532=141 Ind. Cas. 146 (1).

——S. 28 (2)—(1907), S. 16 (2)—Declaratory suit —Suit under O. 21, R. 63, C. P. Code.

S. 16 (2) (b) prohibits without leave of the Court a creditor from commencing any suit or other legal proceeding which would by its nature hamper or effect prejudicially the administration of the insolvent's estate by the Insolvency Court in the insolvency proceedings. Unless the suit or other legal proceeding thus interferes with the insolvency proceedings, there is no reason why the Insolvency Court should have control over its institution.

After the adjudication of judgment-debtor as insolvent, a suit by decree-holder under O. 21, R. 63, against a successful objector, who alleged to have purchased the property from judgment-debtor prior to attachment effected before insolvency does not fall within the prohibition in S. 16 (2) (b): 42 Mad. 684, held too broadly stated and Dist. 119 Ind. Cas. 46=29 M.L.W. 349=A.I.R. 1929 Mad. 323=56 M. L. J. 489.

——S. 28—Proceedings instituted before adjudication—Necessity of leave.

A suit or legal proceeding commenced by a creditor of an insolvent before the making of the order of adjudication, whether before the presentation of the petition in insolvency or thereafter is not invalid or incompetent, even if such suit or proceeding were instituted without the leave of the Insolvency Court. A.I.R. 1940 Rang. 234=1940 Rang. L.R. 396=190 Ind. Cas. 751.

——Ss. 28, 33, 39—Composition—Sureties agreeing to pay creditors—Annulment of adjudication—Plaintiff's debt disputed by sureties—Suit in respect of it—Suit, if barred by S. 39—Leave of Court, if necessary for suit.

Under a composition deed settled and approved by the Court, two sureties bound themselves to pay the creditors a dividend at five annas in the rupee, and were to be empowered to reimburse themselves out of the insolvent's estate. The adjudication was annulled under S. 39. The plaintiff submitted claims in respect of two debts one of which was admitted by the sureties and the other was disputed. The plaintiff brought a suit on the disputed claim against the insolvent and the sureties:

Held, that S. 39 presented no obstacle to the suit as the debt in suit was not one proved under S. 33, and that leave of the Insolvency Court was not necessary under S. 28, inasmuch as the suit in itself did not affect the control of the Insolvency Court over the insolvent's assets. A.I.R. 1935 Mad. 929=1935 M.W.N. 825=158 Ind. Cas 592.

11. Power of Court.

——S 28—Inquiry into genuineness of decree—Annulment of adjudication.

When it is alleged that a judgment had been obtained by fraud or collusion, it is the duty of the Insolvency Court to hold an inquiry and come to a finding as to whether the decree represented a real debt or not, and then, if it concluded that the decree had been obtained by fraud or collusion, to annul the adjudication under the provisions of S. 35. A.I.R. 1933 Rang. 268=145 Ind. Cas. 835.

——S. 28—Insolvency Court—Power to alienate.

Court has jurisdiction to mortgage insolvent's land but ordinarily such a course should not be adopted: A.I.R. 1921 Lah. 44, Foll. 92 Ind. Cas. 949 (Lah.).

——S. 28—Insolvency Court—Power to alienate.

It is competent to the Insolvency Court to effect a temporary alienation by way of mortgage of the lands of a member of an agricultural tribe who has become an insolvent. 4 P.R. 1903 and 1 Lah. 192 (F. B), Foll. 61 Ind. Cas. 664=2 Lah. 78=71 P.L.R. 1921=A.I.R. 1921 Lah. 44.

——S. 28 (3)—(1907), S. 16 (3)—Power of Court to order enquiry by Receiver.

The Insolvency Court cannot refer to the Receiver, for final adjudication, the question as to the title to certain promissory notes alleged to be held **benami** for the insolvent. 22 C.W.N. 700=46 Ind. Cas. 335.

——S. 28—(1907), S. 16 (2)—Power of Insolvency Court to release person arrested and sent to jail by the Court executing a decree against him.

An insolvency court has no power under Act III of 1907 to order the release of a person arrested and sent to civil jail by the court executing a decree against him. 83 P.W.R. 1910=81 P.L.R. 1910=7 Ind. Cas. 351.

——S. 28 (2)—(1907), S. 16 (2)—Small Cause Court, if can act under.

A Judge sitting in the Small Cause Court, cannot immediately divest himself of his Small Cause Powers and proceed to act under S. 16 (2) of the Provincial Insolvency Act. 5 L.W. 220=31 Ind. Cas. 15.

12. Proceedings againt insolvent.

See also: Note 10.

——S. 28—Suit on debt—Defendant adjudicated insolvent before or after decree—Sale of defendant's property, when binds Official Receiver.

Where, in a suit by creditor to recover a debt secured or otherwise, the defendant debtor is adjudicated insolvent before decree or thereafter, the plaintiff creditor seeking to sell the defendants's property must either implead the Official Receiver before decree or take necessary steps in execution for the purpose of binding him. Otherwise the sale will not be binding on him as the devolution of interest in such a case is not due to a transfer affected by the doctrine of **lis pendens.** A.I.R. 1943 Mad. 381=1943 M.W.N. 89=I.L.R. (1943) Mad. 703=(1943) 2 M. L. J. 539=56 L.W. 756=213 Ind. Cas. 406.

——S. 28 (2)—Effect of insolvency on rights of creditors.

Under S. 28 (2), the property of the insolvent vests in the Court or Receiver on the making of an order of adjudication, and thereafter, except as provided in the Act, no creditor to whom the insolvent is indebted in respect of any debt provable under the Act shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent. It is only after the making of an order of adjudication that the creditors are prevented from proceeding against the property of the insolvent, and under S. 29, the executing Court may allow the proceedings to continue on such terms as it may impose. A.I.R. 1936 Nag. 117 =I.L.R. (1936) Nag. 41=163 Ind. Cas. 127.

——Ss. 28, 31—Protection of insolvent—Arrest.

S. 28 does not operate as any protection from arrest of a judgment-debtor who has been adjudicated an insolvent. A.I.R. 1932 All. 188=54 All. 416=1932 A.L.J. 168=34 Cr. L. J. 18 (2)=140 Ind. Cas. 150 (2).

——S. 28—Proceedings against insolvent.

Under the existing law a judgment-debtor is not normally immune from arrest or detention in execution of a decree until he has obtained a protection order from the Insolvency Court. 117 Ind. Cas. 373=A.I.R. 1929 Lah. 453.

——S. 28.—Proceedings against insolvent—Warrant of arrest.

As S. 28 of the new Provincial Insolvency Act of 1920 does no longer protect the insolvent from arrest, an

adjudged insolvent has to apply for protection from arrest or detention under S. 31 of the Act and in absence of a protection order, he can be arrested in execution of a decree against him. 118 Ind. Cas. 791=31 Bom. L.R. 206=A.I.R. 1929 Bom. 135.

——S. 28.

Under the Act the creditor can proceed to arrest the judgment-debtor as if no adjudication had taken place unless there is a protection order in his favour. 100 Ind. Cas. 320=49 All. 201=25 A. L. J. 152=A.I.R. 1927 All. 418.

——S. 28—(1907), S. 16 (2)—Execution proceedings against person and property of insolvent.

Cl. 2 (b) of S. 16 absolutely prohibits execution proceedings being taken against the person and property of adjudicated insolvents except with the leave of the Court and the introduction of Act V of 1920 which repealed Act III of 1907 cannot take away the right of the insolvent. 73 Ind. Cas. 213=17 M.L.W. 319=32 M.L.T. 157 =A.I.R. 1923 Mad. 487.

——Ss. 28(2), 69—(1907), Ss. 16(2)(b) and 43—Notice to show cause for arrest.

Before the immunity given by the Insolvency Act to an Insolvent is taken away from him by an order of his arrest a notice must be served upon him to show cause why he should not be arrested. 5 L.W. 220=31 Ind. Cas. 15.

——S. 28—(1907), S. 16 (2) and C P.C. (1908), S. 55 (3) and (4)—Arrest of judgment-debtor in execution.

The mere fact that Insolvency proceedings are pending does not bar the arrest of the debtor by order of the executing court. The object of the provision in Cl. 3 of S. 55 is to give the debtor time to apply but if he has already done so and proceedings are going on there would do no sense in giving him further time. 83 P.W.R. 1910=81 P.L.R. 1910=7 Ind. Cas. 351.

——S. 28—Execution sale—Receiver not brought on record—Effect.

Where during the pendency of insolvency proceedings a property of the insolvent was sold in execution of a decree without bringing the Official Receiver on the record, the sale is void and not binding on the Official Receiver as he had no notice of it. 120 Ind. Cas. 889=1929 M.W.N. 168=A.I.R. 1929 Mad. 609.

——S. 28 — Proceedings against Insolvent—Arbitration.

An award obtained by creditor, during the pendency of an insolvency application by the same creditor in respect of the same debt, without obtaining the leave of the Court, is a nullity and the creditor cannot claim to be a secured creditor on the basis of such award. 109 Ind. Cas. 373=A.I.R. 1928 Lah. 738.

——S. 28—Proceedings against Insolvent.

Where a suit for specific performance of a contract entered previous to his insolvency is brought against an insolvent in a Court other than the Court of insolvency, such a Court has no jurisdiction to determine the question of fraudulent preference. 113 Ind. Cas. 129=1928 M.W.N. 617=A.I.R. 1928 Mad. 860.

——S. 28 — Proceedings against insolvent — Mortgage Suit.

Adjudication of mortgagor—Preliminary decree, without impleading Receiver is not invalid—Application for final decree impleading Receiver is maintainable. 101 Ind. Cas. 78=26 M.L.W. 47= A.I.R. 1927 Mad. 609.

——S. 28—(1907), S 16—Proceedings against Insolvent—Mortgage suit.

The application under Order 34, Rule 6, Civil Procedure Code, is clearly not a new proceeding but a continuation of the original suit, so that it does not come under the bar of Section 16 of the Provincial Insolvency Act as a new proceeding. 59 Ind. Cas. 710=2 Lah. 95=3 L.L. J. 126=61 P.L.R. 1921=A I.R. 1921 Lah. 270.

——S. 28—(1907) S. 16 (2) (b)—Proceedings against insolvent—Mortgage decree—Execution after adjudication—Prohibition.

A mortgagee can execute his mortgage decree even after the adjudication of the mortgagor. 7 S.L.R. 184=24 Ind. Cas. 830.

——Ss. 28 and 29.

Under S. 28 vesting only takes place upon adjudication, and under S. 29 it is not till then that a Court, in which proceedings are pending against a debtor, is bound to stay proceedings against the insolvent. 93 Ind. Cas. 877=23 M.L.W. 300=A.I.R. 1926 Mad. 432=50 M.L. J. 665.

——S. 28—Debt after adjudication—Suit in respect of—Maintainability.

The jurisdiction of a Civil Court to try a suit in respect of a debt or liability incurred by an insolvent after the order of adjudication, is not barred by the Provincial Insolvency Act. Such a debt or liability is not provable under the Insolvency Act. 80 Ind. Cas. 946=22 N.L.R. 118=A.I.R. 1925 Nag. 77.

——S. 28—Proceedings against Insolvent—Pro-forma party.

Father was joined as a necessary party, but no relief was actually sought against him but anly against sons. The plaintiff did not seek relief aginst any of the property which had come into the hands of the Receiver under the insolvency proceedings.

Held, the suit was maintainable. Further, the joining of the Receiver as a party would have been sufficient to cure any irregularity. 75 Ind. Cas. 597= A.I.R. 1923 All. 306.

——S. 28—Proceedings against insolvent—Pending proceeding.

A person against whom a decree had been made **ex-parte** applied to have the decree set aside. Pending the application, the decree-holder was declared an insolvent, but this fact was not brought to the notice of the Court, and the **ex-parte** decree was set aside:

Held, that the order setting aside the **ex-parte** decree was not an illegal order, as the Provincial Insolvency Act contained no prohibition to a creditor going on with a suit or proceeding already pending at the date of the adjudication.

The Court had no jurisdiction to set aside the aforesaid order setting aside the **ex-parte** decree at the instance of a person not a party to the suit. 61 Ind. Cas. 534 (Lah.).

——S. 28 — Proceedings against Insolvent — Creditor not informed.

A firm was adjudicated insolvent, but no schedule of creditors, as required by law, was prepared, nor was notice of the insolvency proceedings served on all the creditors. In a suit by one of the creditors against the insolvents to recover the amount of his debts: **Held,** that the insolvency proceedings were no bar to the suit. 60 Ind. Cas. 588 (Lah.).

——S. 28—Assets realised before order of adjudication—Right of decree-holder.

S. 16 (6) of the Provincial Insolvency Act cannot control S. 34 (1) of the Act. Where after the filing of an application by a debtor to be adjudged an insolvent, but before the making of the order of adjudication, two houses belonging to him were sold in execution of a money decree against him and purchased by the decree-holder. **Held,** that the execution sale having taken place and the assets having been realised before the order of adjudication the ownership of the houses vested in the decree-holder and not in the Receiver, 34 All. 628, Foll. 59 Ind. Cas. 67=42 All. 336=18 A.L.J. 287.

——Ss. 28, 75—(1907), Ss. 16, 46—Proceedings against insolvent—Permission to creditor to execute his decree against concealed property of insolvent.

It is within the jurisdiction of the District Judge to grant permission to a creditor who has proved his debt and got a decree, to execute that decree at his own risk and costs against any concealed property of the insolvent on condition of the creditor handing over to the Receiver all sums got by such execution, for the benefit of the general body of creditors. 37 Ind. Cas. 993 (Cal.).

——S. 28 (2), (4)—(1907), S. 16, Cls. (2) and (4)—Proceedings against insolvent — Receiver—Necessary party.

The defendant purported to have purchased the property of the insolvent in execution of a mortgage-decree which had been fraudulently and conclusively assigned to him without consideration, **Held,** (1) that the purchase of the defendant was not a **bona fide** one and gave him no title to the property; (2) that the judgment-debtor having been adjudicated an insolvent and all his property having vested in the Official Receiver before the sale to the defendant the Official Assignee was a necessary party to all proceedings affecting that property and a sale held without his being brought on the record was not binding and it did not convey any title. 32 Ind. Cas. 489 (Mad.).

——S. 28—(1907), S. 16—Adjudication order after sale in execution of decree—Effect.

The Receiver of the insolvent's estate is not entitled to rateable distribution on behalf of the other creditors, where property is sold in execution of a decree pending the disposal of an application for an order of adjudication but the order is passed before the sale is confirmed. Whether the money was paid to the creditor by set off or was lying in Court awaiting the confimation of the sale, is immaterial. 18 O.C. 268=3 O.L.J. 566=32 Ind. Cas. 429.

——S. 28, 51—(1907), Ss. 16 and 34—Attachment of property before adjudication—Right of attaching creditor—Receiver, appointment of.

An interim Receiver is appointed for the protection of estate of the debtor for the benefit of the entire body of creditors. Cl. (1) of S. 34 of the Prov. Ins. Act restricts the operation of S. 16 cl. (6) thereof. A creditor, who had attached a sum of money due to the insolvent before his estate vested in the Receiver appointed after the adjudication order, is entitled to it exclusively in satisfaction of his debt. 42 Cal. 289=30 Ind. Cas. 82.

——S. 28—(1907), S. 16—Defendant's insolvency—Official Receiver, if necessary party—Decree how far binding on Official Receiver.

Where defendants are adjudicated insolvents on their application, after plaintiff's suit against them for recovery of money due, the insolvency does not effect the devolution of any interest upon the Official Receiver under O. 22, R. 10 and the Official Receiver is not a necessary or even proper party to the suit. Under S. 16 of the Prov. Ins. Act no interference in pending proceedings is contemplated; but the decree could not be executed against the estate of the Insolvents nor be binding on the Official Receiver. 8. S.L.R. 325=29 Ind. Cas. 30.

——S. 28 (2)—(1907), S. 16 (2) (b)—Proceedings against insolvent—Leave of Court.

Once a person is adjudicated an insolvent and his estate vested in the Official Receiver no creditor can apply for any remedy against him without leave of the Court. 27 Ind. Cas. 6 (Mad.).

——S. 28 (2)—(1907), S. 16 (2)—Suit for specific performance—Defendant Insolvent—Execution of document by Official Receiver.

Where pending a suit for specific performance the defendant was declared an insolvent, the Official Assignee was a necessary party and he has to execute a deed in pursuance of a decree, because on insolvency the legal estate vests in the Official Assignee subject to the equities of third persons. (1913) M.W.N. 897=15 M.L.J. 92=21 Ind. Cas. 576.

——Ss. 28 (2), 51—(1907), Ss. 16 (2) and 34—Execution of decree—Proceeds of property attached and sold—Money attached before order of adjudication—Rights of decree-holder.

While proceedings in insolvency were pending, certain immovable property of the insolvent was attached and sold in execution of a decree against him and the proceeds deposited in Court for the benefit of the decree-holder. The decree-holder also attached, certain money which had been paid into Court to the credit of the insolvent but up to the date of the order of adjudication, had taken no

further steps to possess himself thereof. **Held,** that the decree-holder was entitled as against the Receiver to the benefit of the proceeds of execution of his own decree, but not to the money of the insolvent which he had attached. 29 Cal. 428, Foll. 34 All. 628=10 A.L. J. 252=16 Ind. Cas. 183.

13. Proceedings by Insolvent.

——S. 28—Right of insolvent to take action in Court in the insolvency proceedings.

As soon as an order of adjudication is passed, the entire assets of the insolvent vests in the Official Receiver and the insolvent ceases to have any legal interest in the property and he has no **locus standi** in the administration of his estate there-after. No doubt an insolvent has a duty to assist the Receiver to recover property and he may possibly be able to complain if the Receiver takes no action, but he has no power to take action himself. I.L.R. (1947) All. 634=1947 A.L. J. 226=A.I.R. 1948 A. 49=1947 A.W.R. (H.C.) 260=1947 A.L.W. 174.

——S. 28—Foreign adjudication—Suit as administrator of estate of deceased father—Maintainability of—Presidency Towns Insolvency Act, S. 17.

The fact that the person adjudged bankrupt by a foreign Court has not been discharged will not affect his right to file a suit as the administrator of the estate of his father which right does not vest in the assignee in his bankruptcy. Where, however, he has been appointed as administrator by a foreign Court, and his father is a British Indian subject who has not acquired a foreign domicile, the son cannot sue as such administrator in British Indian Court for recovery of immovable property situated in British India.

But where the suit is laid in the alternative as one on behalf of the creditor of the defendant for a claim for money due to the estate of his deceased father, thus making the estate a creditor, and all the heirs-at-law of the deceased are made parties to the suit, the suit can be regarded as one filed on behalf of the heirs of the deceased. A.I.R. 1946 Mad. 25=1945 M.W.N. 585=1945-2 M.L.J. 318=58 L.W. 462.

——S. 28—Insolvent's right to appeal in partition suit pending insolvency.

The plaintiff brought a suit to set aside a partition of property belonging to him and his brothers and to re-partition the property. During the pendency of the suit, the plaintiff became an insolvent and the Official Receiver was added as a supplementary plaintiff. The suit was subsequently dismissed. As the Official Receiver refused to appeal, the plaintiff sought to do so **in forma pauperis**:

Held, that the suit and, therefore, the appeal related to the property of the insolvent and therefore, the appeal by the insolvent was incompetent. A.I.R. 1943 Mad. 662=56 L.W. 387=1943-2 M.L.J. 105=210 Ind. Cas. 114.

——S. 28—Insolvent's right to appeal in suit for damages.

A person who has preferred an appeal claiming a certain amount as damages for wrongful appropriation of crops by the respondent in breach of an agreement is entitled to prosecute the appeal even after his adjudication as insolvent. A.I.R. 1933 Nag. 6=28 N.L.R. 340=141 Ind. Cas. 479.

——S. 28—Right of appeal.

If during the pendency of a suit a party is adjudicated an insolvent, he is not disqualified by reason of his insolvency from appealing. After the annulment of the order of adjudication he is entitled to continue the appeal. 118 Ind. Cas. 252=31 Bom. L.R. 357=A.I.R. 1929 Bom. 202.

——S. 28—Right of appeal.

If during the pendency of a litigation one of the principal parties is adjudicated insolvent that person is not disqualified by reason of his insolvency from appealing. 62 Ind. Cas. 854=13 M.L.W. 616=1921 M.W.N. 535=A.I.R. 1921 Mad. 402.

——Ss. 28 (2) and (1), 44—(1907), Ss. 16 (2) and 45—Execution of decree—Judgment-debtor declared insolvent—Right of appeal.

A judgment-debtor who has been adjudicated an insolvent, cannot maintain an appeal against an order in execution proceedings that certain properties belonging to him were fraudulently concealed by him from his creditors. The only person who can appeal against such a decision is the Official Receiver. 47 Ind. Cas. 152 (Cal.)

——S. 28 (2)—(1907), Ss. 16 (2)—Receiver—Necessary party—Appeal against order of Receiver.

Held, that an appeal by the insolvent against an order refusing to release a house for his residence without impleading the Official Receiver as party must fail, inasmuch as the Official Receiver being in possession of the property of the insolvent was a necessary party. 51 Ind. Cas. 971 (Lah.).

——S. 28.

An Insolvent's property would vest in a Receiver after an order of adjudication and he would not be entitled to institute a suit in regard to the property of which he has been divested by law. But an insolvent is entitled to make an application for execution of a decree obtained by him before an order for his adjudication was passed. A.I.R. 1939 Mad. 196=48 L.W. 807=(1938) 2 M.L.J. 1001=1938 M.W.N. 1247=183 Ind. Cas. 576.

——S. 28—Insolvent's application to have sale in execution set aside, competency.

When the property of the insolvent has vested in the Receiver, after such a Receiver has been appointed by the Insolvency Court, the Receiver completely represents the insolvent under the law in respect of his properties and the insolvent has no **locus standi** to maintain an application under S. 28 (2) for having it declared that a sale in execution of a decree was void, on the ground that the sale having taken place without the leave of the Insolvency Court, could not be allowed to stand. A.I.R. 1935 Cal. 391=39 C.W.N. 366=60 C.L.J. 581=156 Ind. Cas. 401.

——S. 28.

An insolvent cannot file a suit in his own name after the adjudication order has been made and during the pendency of the insolvency proceedings. (1938) 40 Bom. L.R. 956.

——S. 28 (2)—Insolvent's suit after adjudication whether prohibited — Receiver, when proper person to institute suit—Necessity of making Official Receiver party—Suit by insolvent for money lent—Presumption—Suit if can be thrown out—Property of insolvent vesting in Receiver.

Section 28, sub-S. (2) prohibits suits being brought by creditors against the property of the insolvent and also prohibits the commencement of any suit or other legal proceeding by a creditor. But there is no specific provision in the Act, under which a suit by an insolvent after his adjudication is, in express terms, prohibited. Section 59 (d) of the Act, however, empowers a Receiver, by leave of the Court, to institute, defend or continue any suit or other legal proceedings relating to the property of the insolvent. This provision implies that the Receiver is the proper person to institute, defend or continue suits and proceedings relating to the insolvent's property. Where the property in dispute in a suit is admitted to be or is of such a nature that it must vest in the Receiver, a Receiver alone is the proper person to institute suits and proceedings. The suit brought by an insolvent behind the back of the Receiver would be defective. But where a loan was advanced by the insolvent after his adjudication to the defendent, it does not necessarily follow that the sum of money given by the insolvent was property which had vested in the Receiver. The insolvent might be a mere **benamidar** on behalf of an undisclosed principal, in which case he would be entitled to sue even though an insolvent and the suit would, of course, be for the benefit of the real owner. Again, under S. 28 (5), properties exempted by the Civil P.C., or other enactments from liability to attachment and sale in execution of a decree do not vest in the Receiver. Such moneys as are exempted remain the property of the insolvent and if he has lent the money out of such accumulated saving, there would be no bar either to his lending the money to the defendant or to his bringing a suit to recover the amount. At the same time as a Receiver is an officer of the Court acting under the control and direction of the Court and in the interest of the insolvent's creditors, it is the duty of the Court to see that no fraud is perpetrated before its eyes and that the insolvent does not walk away with the moneys which ought to go to the officer of the Court. An appropriate course would seem to be to implead the Official Receiver in the suit or at least give him notice of the action so that when a decree is passed in favour of the plaintiff, the Receiver may be at liberty to take the benefit of the decree and recover the amount due under it, if it can be shown that the property was such as had vested in the Receiver. Such inquiry can easily be made either in the execution department or by a separate suit between the Receiver and the insolvent.

Where an insolvent filed a suit for money lent after adjudication, the defendant who took the money from the plaintiff, should not be allowed to deny that the money belonged to the plaintiff. **Prima facie,** there is no presumption that the money does not belong to the plaintiff. And if the Receiver has not intervened and seized this amount, there is a presumption in favour the plaintiff, that the money was his own. The suit, therefore, cannot be thrown out on the mere ground that the plaintiff is an insolvent.

Where the property in question is property which existed at the time of adjudication or was acquired by or devolved on the insolvent afterwards, it vests in the Official Receiver and he alone is entitled to deal with it. A.I.R. 1935 All. 675=1935 A.L.J. 709=1935 A.W.R. 833=58 All. 132=157 Ind.Cas. 41 (F.B.).

——S. 28—Proceedings by insolvent—Property held as bailee—Right of suit.

Where an undischarged insolvent who had been entrusted with certain precious stones for sale handed them over to the defendant for having them sold and the latter nothaving returned the articles or their value he sued to recover the same:

Held, (1) that the property in the articles did not belong to the insolvent and therefore did not vest in the Official Assignee and that the suit by the insolvent having been filed as a mere bailee was maintainable. 32 L.W. 449=1930 M.W.N. 869=A.I.R. 1930 Mad. 913=54 Mad. 5=59 M.L.J. 629. (F.B.).

——S. 28.

A suit for declaration by plaintiff that his property is not liable to attachment and sale under S. 44 Co-operative Societies Act is not barred by S 28 by reason of his being adjudged an insolvent before the filing of the suit. 103 Ind. Cas. 131=23 N.L.R. 66=A.I.R. 1927 Nag. 217.

——S. 28.

Per **Mullick, J. (Obiter)**—An undischarged bankrupt is entitled to maintain a suit for a debt which has become due since the adjudication order was made against him. 17 M. 21, 2 C.W.N. 372 and 54 Ind.Cas. 699 doubted. 79 Ind. Cas. 56=5 P.L.T. 606 =2 Pat.L.R. 276=1923 P.H.C.C. 287=A.I.R. 1924 Pat. 667.

——S. 28 (2)—(1907), S. 16 (2)—Proceedings by insolvent—Vesting order—Suit by undischarged insolvent.

After adjudication the property of the insolvent vests in the Official Receiver. A suit by an undischarged insolvent after the vesting order is not maintainable in respect of the property involved in the Insolvency Proceedings. Nor can the insolvent appeal from a decree passed in a suit instituted by him. It is the Official Receiver alone that can sue to enforce the rights possessed by the insolvent on the date of the order of adjudication. (1918) M.W.N. 289=7 L.W. 516=45 Ind. Cas. 239.

——S. 28—(1907), S. 16—Effect of order.

The property of an insolvent vests in the Receiver from the date of adjudication and after that date the insolvent cannot sue on a chose in action belonging to him. 22 Ind.Cas. 687. (Mad.).

——Ss. 28, 41—(1907), Ss. 16 and 14—Pro-note suit on negotiable instrument by insolvent.

An adjudicated insolvent who has not obtained either his personal or final discharge may even if all his property has vested in the Official Assignee, sue on a pro-note in his favour, provided that the Official Assignee does not interfere. 6 L.B.R. 174=6 Bur.L.T. 81=19 Ind.Cas. 88.

14. Property acquired by or devolving on insolvent after adjudication—Sub-S. 4.

——S. 28 (4)—Construction and scope—Hindu co-parcener—Insolvency of—Subsequent death of another co-parcener—Increase in share of insolvent by survivorship—If vests in Official Receiver.

Where a member of a Hindu Joint family is adjudged insolvent, his status in the joint family of which he is a member, remains unchanged. If, by a death in the co-parcenary the share of the insolvent co-parcener is increased, the benefit of the increase will accrue to the Official Receiver in whom that share is vested. The Official Receiver is not a co-parcener but under S. 28 (4) of the Provincial Insolvency Act he is entitled to all the property which is acquired by or devolves on the insolvent; when the insolvent, by the Hindu Law, becomes entitled to an increase of his share, S. 28 (4) vests that increase in the Official Reciever. The words of S. 28 (4) are very wide and obviously intended to cover all the ordinary ways in which the estate of the insolvent may be increased from time to time during his insolvency. I.L.R. (1947) Mad. 44=227 Ind.Cas. 55=1946 M.W.N. 214=59 L.W. 175=A.I.R. 1946 Mad. 503=(1946) 1 M.L.J. 247.

——S. 28 (4)—Provident fund money paid over to insolvent vests in Receiver—It ceases to be compulsory deposit within Provident Funds Act (1925), S. 3.

The occurrence of the words "repayable on demand" and "until the happening of some precise contingency" in the Provident Funds Act make it clear that the money is a compulsory deposit only so long as it remains with the institution. Under S. 28 (4) Provincial Insolvency Act, all after-acquired property of the insolvent vests forthwith in the Official Receiver of the Court. Hence once the provident fund money is paid over to the insolvent it falls within the category of property acquired by him after his adjudication, and as soon as it is paid to him it vests in the Receiver. The protection contemplated by S. 3, Provident Funds Act, extends only to a compulsory deposit. Once the money ceases to retain that character the protection comes to an end. A.I.R. 1946 Oudh 11=1945 O.W.N. 284.

——S. 28 (4)—Provident Fund amount.

Where a person makes a petition for being adjudged Insolvent and there after is discharged from his service and receives certain amount due to him from the Provident Fund before an order of his discharge is passed in the insolvency proceedings, such amount becomes the property of the subscriber and does not continue to retain its character of a compulsory deposit under cl. (k) of the Proviso to S. 60 (1), Civil P.C., as such amount becomes payable to the subscriber even during his lifetime on the happening of a contingency provided for in the Provident Fund rules. The property, therefore, becomes the absolute property of the depositor insolvent and vests in the Insolvency Court.

The effect of the insertion of the word "forth with in S. 28 (4) of the present Act has been to sweep away the Court's attempt to postpone the vesting. A.I.R. 1938 Nag. 408=I.L.R. (1939) Nag. 530=178 Ind. Cas. 271.

——S. 28 (4)—Scope of—Property not coming under the section sold by some one having a right to sell it—Effect—Proceeds of sale, whether vest in Receiver.

Section 28 (4) refers to property which the insolvent acquires by his own efforts such as his wages or salary or to property which devolves on him by rule of law, such as by inheritance. The sub-section is not intended to apply to a case where property which does not come under the section is sold by some one who has a right to sell it. Amounts realised by such a sale do not become the property of the insolvent, nor do they vest in the Receiver. A.I.R. 1935 All. 279=1935 A.L.J. 170=1935 A.W.R. 122=156 Ind. Cas. 751.

——S. 28 (4)—After-acquired property—What is.

Held, that sums periodically falling due under a right already acquired, such as an annuity or allowance or instalment due on an instalment bond, could hardly be treated as after-acquired property in respect of instalments falling due after the insolvency; the correct view would be that the right under which the payments were claimed was acquired before the insolvency though some of the instalments fell due after it. A.I.R. 1932 Mad. 250=35 L.W. 161=137 Ind. Cas. 394.

——S. 28 (4).

Where no Receiver has been appointed, the future property which devolves upon the insolvent after the date of the application vests in the Court. A.I.R. 1942 Pat. 307=23 P.L.T. 35=8 B.R. 789=201 Ind. Cas. 342.

——S. 28 (4)—Vesting in Receiver—Date of vesting—Decree for costs.

All property acquired by an insolvent subsequent to the date of adjudication and before his discharge vests in the Official Receiver the moment the acquisition is made. The word 'forthwith' in S. 28 (4) leaves no room for any other interpretation. No actual intervention by the Official Receiver is necessary.

Where, therefore, an insolvent, subsequent to his adjudication but before his discharge, obtains a decree for costs, the decree vests in the Official Receiver the moment it is passed and he is the only person entitled to transfer it and a transfer by the insolvent is, therefore, invalid. A.I.R. 1941 Mad. 713=I.L.R. (1941) Mad. 824=1941 M. W. N. 539=(1941) 1 M.L.J. 834=54 L.W. 758=200 Ind. Cas. 691.

——S. 28—Suit by discharged insolvent for possession of property devolving on him during insolvency.

The plaintiff who was adjudicated insolvent in 1919 had not obtained his discharge by 1929 when, on a widow's death, her husband's estate devolved on him as next reversioner. Subsequently, he was granted an absolute discharge on 15th August 1931. No creditors, however, came forward to prove their debts or take any steps between 1919 and 1929, nor did the Official Receiver take any steps. After absolute discharge in 1931, the plaintiff instituted a suit against the widow's alienees for possession of properties;

Held: that the plaintiff was entitled to maintain the suit. A.I.R. 1941 Mad. 345=1940 M.W.N. 19.

——S. 28—Debtor acquring property after declaring final dividend concluding insolvency proceedings—Right of Receiver.

A debtor had been adjudicated an insolvent by an order made on 30th January 1915, under the provisions of Act III of 1907 which was then in force. Under that Act, there were no provisions such as are to be found in the Act of 1920 either obliging the Court to fix a time within which the insolvent should apply for a discharge or compelling the insolvent himself to apply for an order of discharge. After the adjudication, the Receiver took possession of the estate, realised it and declared the final dividend sometime in 1915. The administration became thereby concluded and the Receiver accordingly sent to the District Court all the concerned papers relating to the insolvency which were subsequently destroyed under the rules of the destruction of records. The insolvent subsequently began to make acquisitions whereby he purchased certain property in 1928 and sold it to another person in 1934. An application was filed by a creditor that the sale conveyed no title to the purchaser as the property became vested in the Official Receiver:

Held, that everybody concerned the insolvent, the Official Receiver and the creditors, all acted on the footing that the insolvency had closed and it was no more open to any them to get behind what must be regarded as a representation made by them, and revive the insolvency, for the purpose of challenging a sale **bona fide** made in the belief that there was no insolvency, a belief contributed to by all of them. A.I.R. 1939 Mad. 273=48 L.W. 788=1938 M.W.N. 1227=1938-2 M.L.J. 1045=183 Ind. Cas. 287.

——S. 28—Rights of Receiver.

When once a trustee in bankruptcy has intervened in regard to after-acquired property of an undischarged bankrupt, that property vests in the trustee and he cannot, by withdrawing his intervention, divest himself of the property and re-vest it in the bankrupt.

The mother of the insolvent brought a suit for the recovery of possession of certain property on the ground that she inherited it as sole heir of her deceased father. The suit was dismissed and she preferred an appeal. During the pendency of the appeal, the mother died and her son the insolvent applied to be allowed to continue the appeal claiming the property in his own right as a reversioner of his grandfather and not through his mother. At this time he was already adjudged an insolvent. The Official Receiver also had applied previously for an order directing that he should be brought on record in the place of the mother but he subsequently withdrew the aplication:

Held, that the application by the Official Receiver for an order making him the appellant in the place of the insolvent's mother did constitute an intervention, and the Receiver having intervened, the insolvent's right in property devolved on the Official Receiver and he alone could maintain the appeal and therefore, the insolvent's application was not maintainable. A.I.R. 1938 Mad. 420=47 L.W. 363=1938 M.W.N. 272=1938-1 M.L.J. 413=I.L.R. (1938) Mad. 528=175 Ind. Cas. 398 (FB).

——S. 28 (4)—English Law—Applicability.

The provisions of S. 28 (4) exclude the application of the doctrine in **Cohen v. Mitchell,** (1890) 25 Q.B.D. 262 that the property acquired by the insolvent after the order of adjudicatiou and before the discharge does not vest in trustee unless and until the trustee intervenes. A.I.R. 1937 Sind 306=31 S.L.R. 506=173 Ind. Cas. 40.

——S. 28 (4)—Insolvent's powers in respect there of—English and Indian law distinguished.

Under the Provincial Insolvency Act, 1920, property which is acquired by or devolves on an insolvent after the date of adjudication and before his discharge forthwith vests in the Court or the Receiver and, whatever other rights the insolvent may have in respect of such property such as the right to maintain a suit in respect of it he cannot have the right to convey a good title in respect of such property to another without the assent of the Official Receiver. The wording of S. 28 (4) of the Provincial Insolvency Act, 1920, clearly indicates that the Legislature did not intend to apply the English law in this respect so far as the **mofussil** in India is concerned. A.I.R. 1935 Mad. 694=1935 M.W.N. 724=42 L.W. 33=157 Ind. Cas. 1002.

——S. 28 (4)—Date of vesting in Receiver.

The provisions of S. 28 (4) means that the moment the property is acquired by or devolves upon the insolvent after the date of adjudication and before his discharge, it vests **eo instanti** in the Court or Receiver.

The insertion of the word "forthwith" by the Legislature in S. 28 (4), was to sweep away the Courts's attempts to postpone the vesting. A.I.R. 1936 Bom. 164=38 Bom. L.R. 211=60 B. 141=162 Ind. Cas. 253.

——S. 28 (4)—Time of vesting in Receiver.

Where on the death of a person, the share of his estate devolves on an insolvent, it forthwith vests in the Receiver, and a mortgage of that share by the insolvent is invalid. A.I.R. 1934 Lah. 809=16 Lah. 392=36 P.L.R. 185=155 Ind. Cas. 938.

——S. 28 (4)—Date of vesting.

The alternative in the section applicable to vesting in the Court is inserted to provide for the case of a Receiver not being appointed at the same time as the adjudication of insolvency and to foreclose an argument that vesting is suspended until the actual appointment of a Receiver. The Court only acts through a Receiver, and any estate acquired by or devolving on an insolvent is vested in him as from the date of acquisition or devolution whatever the date of the Receiver's actual appointment. A I.R 1925 Cal. 785 Reversed. 101 Ind. Cas. 442=54 Cal. 595=54 I.A. 190=29 Bom. L.R. 882=31 C.W N. 741=45 C.L. J. 544=25 A.L. J. 621=1927 M.W.N. 485=39 M. L. T. 5=26 M L.W. 268=A.I.R. 1927 P.C. 108=52 M.L. J. 734 (P.C.).

——S. 28 — After-acquired property—Transfer by insolvent — Validity.

After-acquired property of an insolvent before discharge can be transferred by him provided the transaction is **bona fide** and for value and is completed before the intervention of the Receiver: 43 Bom. 890; A.I.R. 1924 All. 703 Foll.; A.I.R 1926 Rang, 179, not Foll. 114 Ind. Cas. 465=9 P.L.T. 969=8 Pat. 478= A.I.R. 1929 Pat. 97.

——S. 28 (4)—Transfer by insolvent—Validity.

Immovable property acquired by an insolvent after the adjudication order but before his final discharge, can be transferred by him provided transaction is **bona fide** and for value and is completed before the intervention of the Official Assignee: 43 Bom. 890 and **Cohen** v. **Mitchell**, (63 L.T. 206), Foll.

The same rule applies whether the property is acquired by the insolvent or it has devolved upon him by succession. 97 Ind. Cas. 980=A.I.R. 1927 Nag. 16.

——S. 28 (4)—After—acquired property—Dealings with, by insolvent is void against Receiver.

Where a bankrupt, who has not obtained his discharge, enters into transactions in respect of property acquired after the bankruptcy, all such transactions are void as against the Receiver who can therefore move the Court for their avoidance. 97 Ind. Cas. 221=4 Rang. 125=5 Bur. L. J. 98=A.I.R. 1926 Rang. 179.

——S. 28—(1907), S. 16—After-acquired property —Right of insolvent.

Failing intervention by the Court or the Receiver in which or in whom an insolvent's property has vested, the insolvent has the same power of acting in respect of after-acquired property as he had before the insolvency. 48 Ind. Cas. 236 (Nag.).

——S. 28 (4) — After-acquired property — Suit in respect of — Insolvent's right to maintain.

In the case of after-acquired property an insolvent has a right to maintain a suit subject to the Official Receiver or Official Assignee intervening and if the Official Receiver or Official Assignee did not intervene the insolvent is entitled to go on with the suit and the principle to be deduced from the authorities is that the insolvent has "a right against all the world except the the Official Assignee."

The share of a partner in such a property as can be attached under the C.P. Code and is thus such a property as would vest in the Official Receiver. 7 L.W. 516 Dist. 30 Mad. 145=16 Bom. 452, Foll. 76 Ind. Cas. 805=33 M.L.T. 205=A.I.R. 1924 Mad. 223=45 M.L. J. 827.

——S. 28 (4) — After-acquired property — Receiver — If can sue for declaration of title without asking for possession.

All property such as is acquired by or devolves on the insolvent after passing of the order of adjudication and before his discharge forthwith vests in the Receiver and he can sue, for a mere declaration without claiming possession of the same. 68 Ind. Cas. 245=44 All. 617=20 A. L. J. 569=A.I.R. 1922 All. 448.

——S. 28 (4) — (1907) — S. 16 (4) — Vesting of property—Transfer—Mahomedan Law—Bequest—Consent of insolvent heir.

When the consent of the heirs of a Mahomedan is signified to a bequest in a will in favour of an heir the legatee takes from the testator. The consent does not operate as a transfer by the heirs signifying their consent. Where the consenting heirs are insolvents their consent is equally effective in validating the bequest and the property vests in the legatee and not in the Receiver. 42 All. 593=18 A.L. J. 745=2 U.P.L R. (All)251=59 Ind. Cas. 296.

——S. 28 (4)—Applicability—Adjudication under old Act.

Where upon a single application of a father and two sons they were adjudged insolvents in 1919, under the old Act and no appeal was preferred, the order cannot subsequently be questioned by insolvents relying upon S. 28 (4) of the new Act. A.I.R. 1939 Pat. 18=5 B.R. 20=19 P.L.T. 860=177 Ind. Cas. 829.

15. Property exempt from vesting in Court or Receiver—Sub. S. (5).

——S. 28 (5)—Insolvent's salary below Rs. 100.

Cause (h) of S. 60, Civil P.C., read with S. 28 (5), Provincial Insolvency Act, must be held to exempt the insolvent's salary, when it is less than Rs. 100 per month. Consequently, it is not open to the Insolvency Court to attach a rider to the order of adjudication that the insolvent should pay a part of his salary into Court every month, where the salary is below Rs. 100 per month. A.I.R. 1942 Pat. 194=20 Pat. 866=8 B.R. 554=23 P.L.T. 400= 199 Ind. Cas. 635.

——S. 28 (5) — (1907) S. 16 (2) Exemption from vesting — Attachment of salary of insolvent—Salary not sufficient for his maintenance, C. P. Code, S. 60.

When an appropriation of the income of an insolvent is made for the benefit of the creditors the Court usually acts on the principle of giving to the creditors the surplus after allowing a sufficient portion thereof for the maintenance of the insolvent according to his position in life. The statute law of this countryfixes this amount by S. 60 of the C.P. Code, read with S. 16 (2) of the Provincial Insolvency Act. Consequently an order rejecting the creditor's application praying for an attachment of half the salary of an insolvent on the mere ground that his pay is not large enough to allow half of it being attached is illegal. 18 C.W.N. 1052 Foll. 40 All. 213=16 A.L. J. 107=43 Ind. Cas. 984.

——S. 28 (5) — Test of vesting—Property exempt from attachment.

Under S. 28 (5), any property which is exempt from attachment by the provisions of Civil P.C., or by any other enactment does not vest in the Receiver in

insolvency and consequently, the Receiver or the creditors of the insolvent cannot lay hands on it. (1940) 42 P.L.R. 144.

——S. 28 (5)—Ex-proprietary holding under Agra Tenancy Act—Landlord, if can recover arrears of rent without going to Insolvency Court.

Under sub-s. (5) of S. 28, Prov. Insol. Act., the property of the insolvent does not include any property which, by any enactment for the time being in force, is free from liability to a attachment and sale in execution of a decree. Where the insolvent is an ex-proprietary tenant, and holds several ex-proprietary plots, such plots are not, under S. 23 Agra Ten. Act, attachable and saleable in execution of a creditor's decree. These ex-proprietary plots do not vest in the Receiver at all, and he has no right to seize possession of them or to manage them in his own right so as to realize the income and distribute the amount among the creditors. The londlord is entitled to recover the arrears of rent and is not bound to go to the Insolvency Court to get the decretal amount entered in the schedule of creditors. So long as his decree for arrears of rent remains unpaid, he is entitled to proceed under the Agra Ten. Act and eject the ex-proprietary tenant. The Insolvency Court cannot prevent him from executing such a decree. A.I.R. 1937 All. 399=1937 A.L.J. 405=1937 R. D. 216=169 Ind. Cas. 224.

——S. 28—Ex-proprietary holding of insolvent—Ex-proprietary holdings, whether vest in Receiver—Power of Court as regards rent due from sub-tenants.

Ex-proprietary holdings of an insolvent do not vest in the Receiver as they are not saleable and the Receiver has no right to obtain possession of such holdings so as to be able to cultivate or sub-let them nor can he assign in advance the rents which may become payable in future by the sub-tenants. The Court cannot also direct the attachment or seizure of future rent.

Quaere.—Whether, if the ex-proprietary tenant succeeds in obtaining rents from his sub-tenants before they became due, the Receiver will have any remedy either by seizure of the rents received, whether in cash or in kind, or by proceeding against him under the penal sections of the Insol. Act. A.I.R. 1932 All. 41= 1931 A.L.J. 680=15 R. D. 531=133 Ind. Cas. 479.

——S. 28—Land belonging to member of agricultural tribe in Punjab.

Where members of a notified agricultural tribe are adjudged insolvents for the debt of their father, their land is not liable to sale in execution of a decree under S. 16, Punjab Alienation of Land Act, and because some of the debts were incurred by their father under S. 9, Punjab Debtors' Protection Act, 1936, their land would not be liable for those debts. Thus the land exempt from attachment and sale cannot be taken into account for purposes of S. 28, Prov. Insol. Act and cannot vest in Official Receiver. A.I.R. 1937 Lah. 680=I.L.R. (1938) Lah. 120=39 P.L.R. 338=173 Ind. Cas. 748.

——S. 28—Land of agriculturist insolvent.

Land of a member of an agricultural tribe does not, on his insolvency, vest in the Receiver and cannot be leased by the Receiver. A.I.R. 1937 Pesh. 57=169 Ind. Cas. 14.

——S. 28 (5).

Land belonging to a member of an agricultural tribe is within the purview of S. 28 (5) and does not vest in the Receiver for purposes of sale. A.I.R. 1936 Pesh. 109.

——S. 28 (5)—Land belonging to member of agricultural tribe—Power of Receiver to sell to agriculturist.

A Receiver in insolvency, in whom the property of the member of a notified agriculturist tribe has become vested, does not possess power to sell his land to another agriculturist. 31 Punj. L. R 842= A.I.R. 1930 Lah. 1034.

——S. 28 (5)—'Attachment and sale'—Meaning—Land belonging to member of agricultural tribe—Liability to attachment.

The words "attachment and sale" in S. 28 (1) (5) Prov. Insol. Act, must be given their plain grammatical meaning and cannot be taken to be equivalent to "attachment or sale."

Land belonging to a member of a notified agricultural tribe is liable to attachment in execution of a money decree passed against him and in the event of his being adjudicated insolvent such land vests in the Receiver who has the power to effect a temporary alienation or create a self-redeeming mortgage. 31 Punj. L.R. 842=A.I.R. 1930 Lah. 1034.

——S. 28—Vesting of property—Property of agriculturist.

Under S. 16, the property of an insolvent agriculturist is not liable to sale, but nothing is said about its being not liable to attachment and, therefore, his property does vest in the Receiver and the Receiver would be entitled to sell the property to an agriculturist. 115 Ind. Cas. 475=A.I.R. 1928 Lah. 734.

[But see **supra.**]

——S. 28 (2)—Occupancy rights of insolvent.

Occupancy-rights under S. 6, Punjab Ten. Act, do not vest in the Court or in the Receiver under S. 28, Prov. Insol. Act. The **duami** rights can vest in the Official Receiver only if they are occupancy rights under S. 5, Ten. Act or are rights held under some peculiar tenure, outside the Act and are liable to attachment or sale in execution of a decree or order of a Court. A.I.R. 1937 Lah. 782=40 P.L.R. 8=174 Ind. Cas. 953.

——S. 28.

No right in insolvent's occupancy holding vests in the Insolvency Court or in a Receiver under the Provincial Insolvency Act, nor can a Receiver be appointed to manage such holding under S. 51, Civil P.C. A.I.R. 1937 Nag. 242=I.L.R. (1937) Nag. 484= 170 Ind. Cas. 284.

——S. 28 (2).

Occupancy rights under S. 6, Punjab Ten. Act, cannot vest in the Receiver on the adjudication of the occupancy-tenant as insolvent, and, therefore, it is not competent to the Receiver to mortgage them. A.I.R. 1936 Lah. 502=38 P.L.R. 233=160 Ind. Cas. 921 (2.)

——S. 28.

An occupancy holding under the Agra Tenancy Act cannot be dealt with by the Insolvency Court. 62 Ind. Cas. 897=43 All. 510=19 A.L.J 439=A.I.R. 1921 All. 13 (F B.).

——S. 28 (2)—(1907), S. 16 (2)—Vesting of property—Ordinary and occupancy holdings.

The ordinary and occupancy holdings of an insolvent tenant in the Central Provinces do not vest in the Court or Receiver under S. 16 sub sec. (2) of the Provincial Insolvency Act. 13 N.L.R. 215=42 Ind. Cas. 710.

——Ss. 28, 53, 69—(1907), Ss. 16, 36 and 43—Exemption from vesting - Insolvent agriculturist—Lease of occupancy holding ordered to be surrendered—Order illegal.

An agriculturist by occupation was adjudicated by insolvent shortly after he had granted a lease of his occupancy holding **Held**, that the order to sell the house and surrender the land to the Zamindar is unsound because the occupancy holding and the house were property, the transfer or attachment of which being forbidden by law could vest neither in the Court nor in the Receiver. 39 All. 120=14 A.L.J. 1031=38 Ind. Cas. 171.

——S. 28—Applicability to land coming under Bundelkand Alienation of Land Act (III of 1901), S. 16.

Property which is exempted by virtue of S. 16 of the Bundelkhand Alienation of Land Act (III of 1903) from liability to be sold in execution of money decree is "exempted from attachment and sale" within the meaning of Pro. Ins. Act, S. 28 (5) and does not vest in the Receiver in insolvency.

Per **Sulaiman, J.**—The policy of the legislature obviously seems to be that properties which cannot be attached and sold do not vest in the Receiver. There is no injustice in this, for, when creditors cannot recover their debts by sale of the properties, they suffer very little if their representative, the Receiver, cannot realise the debts out of such properties. 89 Ind. Cas. 488=47 All. 952=23 A.L.J. 648=A.I.R. 1925 All. 467.

——S. 28 (5)—(1907)—S. 16 (2) (a)— Exemption from vesting.

Under the section the insolvent's property exempted from attachment or sale in execution of a decree does not vest in the Receiver. 14 P.L.R. (All.) 192=42 All. 142=18 A L.J. 59=58 Ind. Cas. 551.

——S. 28 (5)—(1907), Ss. 16 (2) (a) 16 (4)—Exemption from vesting—Political pension.

A political pension does not vest in the Court or Receiver under S. 16 (2) (a) of the Act. An order directing the insolvent to pay the Receiver a portion of the pension is bad in law.

Property exempted from attachment under the C. P. C. and other Acts does not vest in the Receiver under S. 16 (4) of the Act.

As regards the after - acquired property of an insolvent, the same property would vest in the court of Receiver, as is available for division among the creditors. 12 O.C. 323=4 Ind. Cas. 145.

16. Property vesting in Court or Receiver—Sub. S. (2).

See also: Notes 9, 14 and 19.

——S. 28 and C. P. Code (V of 1908), S. 60 (e)—Benefit of a contract—Nature of—Vesting in the Official Assignee.

The benefits arising out of a contract for delivery of goods vest in the Official Receiver on the insolvency of the promisee, even after the breach of contract by the promisor and as such "the right to sue for damages" which is one of the benefits arising under the contract, also vests in him and it cannot be said ta be a mere right to sue for damages within the meaning of S. 60 (e), C P. Code. I.L.R. (1949) A. 746=1949 A.L. J. 17=A.I.R. 1949 A. 433=1949 A.W.R. 126.

——S. 28 (2)—"Property"—Meaning of.

The property of an insolvent which, under S. 28 (2) of the Provincial Insolvency Act, vests in the Official Receiver must mean only the property which is divisible amongst his creditors. If the insolvent has no present right of disposal over certain assets, he has no such property as would vest in the Court or Receiver under S. 28 (2). 223 Ind. Cas. 330=12 B.R. 394=A.I.R. 1947 Pat. 7.

——Ss. 28, 51—Insolvency petition admitted—Prior to adjudication, insolvent, to avoid sale, depositing amount under O. 21, R. 89, Civil P. C., after obtaining money from third person—Third person advancing money only to help relative debtor and not for special purpose only—No trust, held created—Deposit would vest in Receiver under S. 28—Decree-holder not entitled to benefit under S. 51 nor was he a secured creditor.

After the admission of the insolvency petition by a debtor but before his adjudication, a sum of money was obtained from a third person and deposited under O. 21, R. 89, Civil P. C., for setting aside a sale of the debtor's property. The third person was a relation by marriage of the debtor and his object was to help his relative. The money advanced to the debtor was not earmarked for a specific purpose and no condition was attached that it should be spent only for that purpose. The arrangement was one entirely between the debtor and his relative and the creditor was not a party to it. The advance was made by way of gift to held a relative out of his distress, and the debtor had full control and unfettered discretion as regards the use of this money:

Held, that the sum deposited by the debtor under O. 21, R. 89, Civil P. C., vested in the Receiver on the debtor being adjudicated insolvent and the decree-holder creditor was not entitled to the benefit of it. Even if the money deposited under O. 21, R. 89, Civil P. C., could not be regarded as "benefit of execution" within the meaning of S. 51, Provincial Insolvency Act, the Receiver was entitled to lay claim to it. The money that was paid into Court was not impressed with a trust and hence it did vest in the Receiver under S. 28, Provincial Insolvency Act. The decree-holder was not entitled to rank as a secured creditor in respect of the money thus paid into Court. A.I.R. 1943 Cal. 555=47 C.W.N. 480=I.L.R. (1943) 2 Cal. 397=210 Ind. Cas. 513

——S. 28 (2)—Service inam land.

Service (masjid service) inam lands are inalienable and do not vest on the insolvency of the holder in the Official Receiver because if the lands go out of the control of the holder and pass into the control of an official such as the Official Receiver, the performance of the services must obviously be in peril. This is specially so, where the insolvent is a Mahomedan and the Official Receiver is a Hindu. A.I.R. 1943 Mad. 72=55 L.W. 640=1942 M.W.N. 621=1942 2 M.L.J. 504=I.L.R. (1943) Mad. 349=205 Ind. Cas. 513.

——S. 28 (2)—Transfer without legal necessity by Hindu widow—Death of widow—Transferee adjudicated insolvent—Property does not vest in Official Receiver.

On the death of a Hindu widow holding a life-interest, the title of the transferee from her without any legal necessity ceases and hence the property transferred cannot vest in the Official Receiver under S. 28 (2) on the adjudication of the transferee as an insolvent. Consequently, there can be no question of the Official Receiver holding it in a fiduciary capacity and the proviso to S. 55 (2), T. P. Act has no application. A.I.R. 1942 All. 39=1941 A.W.R. H. C. 362=1941 A.L.J. 765=I.L.R. (1942) All. 120 =198 Ind. Cas. 397.

——S. 28 (2) Insolvent's right to receive maintenance under will—Monies accrued due, if vest in Receiver—Right of Insolvent to apply to Court for giving him allowance out of such money.

Where the insolvent has a right to receive maintenance allowance under his father's will, the monies as they accrued due would undoubtedly come to the Receiver till the insolvent gets his discharge. It would be certainly open to the Insolvency Court to attach a condition to the order of discharge that the insolvent would subscribe some part of his allowance for the benefit of his creditors. It would be open to the insolvent, if he is so advised, to apply to the Insolvency Court for giving him such allowance for the support of himself or his family as the Court considers proper. A.I.R. 1942 Cal. 241=I.L.R. (1942) 1 Cal. 427=74 C.L.J. 528=201 Ind. Cas. 568.

——S. 28 (2).

Although palampat land does not pass to the Court on insolvency, the same does not apply to income from it. A.I.R. 1942 Nag. 83=1942 N.L.J. 246=I.L.R. (1942) Nag. 714=200 Ind. Cas. 524.

——S. 8.

Where property has been transferred by a deed which falls within the mischief of S. 53 and the transferor becomes insolvent, the property does not form part of his estate and comes within the purview of S. 17, Presi. Towns Insol. Act. or S. 28, Prov. Insol. Act. A.I.R. 1941 Mad. 903=1941 M.W.N. 942=54 L.W. 495=(1941) 2 M.L.J. 684=I.L.R. (1942) Mad. 1=197 Ind. Cas. 599 (F.B.).

——S. 28—Trust property.

Under an oral will of his brother, one K, an insolvent, held a sum of Rs. 11,000 which his brother had instructed him to pay to his wife R. K formally handed over the amount of Rs. 11,000 to her for which she passed a receipt, and then she formally handed back Rs. 10,000 out of that amount to K to be kept by him as a deposit, and she created the trust deed in respect of the same. It was to bear interest at eight annas percent per month. Certain beneficiaries were mentioned in the trust deed, the principal one being R herself for the amount of Rs. 8,000 from the income of which she was to be maintained during her life time. With regard to the balance of Rs. 2,000 she was to be given it in two instalments if she wanted to go on pilgrimage, and after her death, the corpus was to be distributed to certain temples. It was further provided that the majority of the trustees, of whom K was one was empowered to invest the trust moneys either in authorised securities or with several reputed merchants. The trust deed was written on October 14, but its actual execution was on October 20. On the latter date, K stated in the receipt of the amount passed by him to R that he had received the amount of Rs. 10,000 by way of deposit for which he was to pay interest at eight annas per cent per month, and he further stated that according to her husband's directions, R was to make a trust deed in respect of the said amount, that he was to be one of the trustees, that as stated in the trust deed, the amount was to be dealt with according to the opinion of the majority of the trustees and that he was bound to pay the amount on demand by them:

Held, that the deposit and the trust were parts of one and the same transaction and that even though the receipt might have been passed in order of time before the execution of the trust deed, the intention of the parties was to enter into one transaction on that date. It could not be said that K was not a trustee when the amount was deposited with him. The widow R was therefore, entitled to claim priority under S. 28 (5). A.I.R. 1941 Bom. 41=42 Bom. L.R. 1044=I.L.R. (1941) Bom. 42=193 Ind. Cas. 718.

——S. 28—Firm supplied with money to be invested in other firms—Slowly, firm investing the amount in their own business—Firm becoming insolvent—Death of lender—Share in fund allotted on partition to minor sons of lender—Held, that insolvents held funds as agents and were trustees—Right to priority.

X, the manager of a joint Hindu family, transferred a certain sum to a certain trading firm for investment; the money was entrusted to the firm to invest in other Chetti firms, and they had no authority to employ any part of it in their own business. But from a very early date they did so employ a part of the fund, and this practice was by degrees so expanded that shortly after X's death, large sums out of the monies then representing the fund were being utilised in the firm's business. It was admitted on the evidence that the firm charged the amount in every case, whether the interest credited to X came from themselves or from outside investments, with the regular agents' commission, and when there was a question of loss on an investment, made it quite clear that no responsibility for any loss rested upon them. The firm used to furnish accounts from time to time of their dealings with the fund showing its actual disposal and X copied these accounts into his own

books apparently without demur. Subsequently, X died and partition was effected of his property, by which a certain portion of the moneys kept with the firm was allotted to X's minor sons. On the firm becoming insolvent, the minors asserted that the transactions were of agency nature and these moneys were, in effect, a trust fund in the hands of the insolvent, and should be paid over to them with interest by the Official Assignee in priority to the claims of other creditors:

Held, that a new contract, or a variation of the original contract could not be proved by such means as a mere change in the course of dealings even were the terms of the supposed new contract less vague. Nor could the doctrine of ratification be applied so as to turn the fund originally held by the insolvent as agents in a fiduciary capacity into a mere deposit with them on ordinary banking terms. There was nothing whatever to show that X had full knowledge of the facts as is required by S. 198, Contract Act. It was also at least doubtful whether what the agents did could be regarded under the circumstances as acts done on his behalf.

Held further, that from the beginning the insolvents were, with regard to the whole fund, in the position merely of agents entrusted with money to invest, and that this relationship still existed unchanged at the date of X's death, when they became, (if indeed they had not already become, as from the date when the terms of the partition decree were communicated to them), trustees for the minors. A.I.R. 1937 P.C. 296=3 B.R. 770= 1937 O.W.N. 928=1937 M.W.N. 1179=46 L.W. 399 =66 C.L.J. 118=1937 A.L.J. 1381=18 P.L.T. 1007 =40 Bom. L.R. 1=42 C.W.N. 8=31 S.L.R 678= 1938-1 M.L.J. 545=64 I.A. 343=1937 A.W.R. 879= I.L.R. (1938) Mad. 91=170 Ind. Cas. 329 (P.C.).

——S. 28 (2)—Trust property.

Where property of the insolvent is comprised in a trust deed, it is not the insolvent's property but is vested in the trustees, it is not competent for the Receiver in insolvency to deal with the property in any way. After the execution of the trust deed, the insolvent has no interest in the properties comprised therein and consequently, they never vest in the Receiver in insolvency and are not subject to be administered by him on behalf of the general body of creditors. Nor has the Receiver in insolvency any right to administer the assets in accordance with terms of the trust. A.I.R. 1935 P.C. 105=1 B.R 491=1935 O.W.N. 610 =68 M.L.J. 741=61 C.L.J 274=1935 M.W.N. 660= 42 L.W. 146=1935 A.L.J. 785=1935 A.W.R. 944= 37 Bom. L.R. 874=40 C.W.N. 33=155 Ind. Cas. 426 (P.C.).

——S. 28—Money deposited with insolvent by his employees for due performance of duties, nature of.

The petitioners deposited a sum of money with their employer as security for due performance of their duties. The empolyer became insolvent and the petitioners claimed that the employer with regard to the sum deposited, must be treated as a trustee and, therefore, this amount should be paid to them in preference to the claims of the creditors of the insolvent:

Held, that there was no object of the trust and the employer was not expected to carry out any trust; it was a simple case of deposit by an employee with his employer as security for his good behaviour. Therefore, the depositors must be deemed to be the creditors and the depositee as the debtor, and the relationship of beneficiaries and trustee did not exist in their case. A.I.R. 1937 Lah. 444=39 P.L.R. 107=170 Ind. Cas. 534.

——S. 28.

A sold certain properties to B reserving the price with B for payment of his debts, including a sum of Rs. 800 due to C. A was adjudicated insolvent and the Official Receiver claimed the sum of Rs. 800. C contended that there was a trust in his favour and he was entitled to the sum in preference to the Official Receiver:

Held, (i) that there was no trust in favour of C; (ii) that even if there was a trust, it was open to A or the Official Receiver to revoke the same as it had not been communicated to C and the amount was part of the insolvent's assets. A.I.R. 1932 Lah. 66=32 P.L.R. 876=134 Ind. Cas. 100.

——S. 28—Properties burdened with a trust.

Where the dominating purpose and intention of the testator in executing the will was to provide for the members of his family and the maintenance and conduct of the charity was only of subsidiary importance.

Held, that the properties covered by the will were not properties absolutely dedicated to a trust but were only properties burdened with a trust. The properties therefore would vest in the Official Receiver for the benefit of the creditors and could be sold by the Official Receiver. 107 Ind. Cas. 786=27 M.L.W. 88=1928 M.W.N. 86=A.I.R. 1928 Mad. 190=54 M.L.J. 272.

——S. 28 (2).

The property of the mortgagor, when he is adjudged insolvent, vests in the Court with effect from the presentation of the application in insolvency. Hence, in a mortgage suit where a preliminary decree is passed after the mortgagor has applied in insolvency but before he is adjudged an insolvent and that decree is made final and the insolvent's property is sold in execution thereof, the proceedings are not binding on the Receiver if he was not impleaded in those proceedings. A.I.R. 1939 Nag. 128=1939 N.L.J. 202=I.L.R. (1941) Nag. 559=183 Ind. Cas. 97.

——S. 28 (2)—Tenancy-holding in respect of which rent decree is passed.

The tenancy - holding in respect of which the decree for arrears of rent has been obtained by decree-holder is not property which vests in the Official Receiver. A.I.R. 1938 All 198=1938 A.W.R. 119=1938 A.L.J. 134=1938 R.D. 297=174 Ind. Cas. 892.

——S. 28 (2)—Vesting of salary—Test.

The test to determine as to whether a certain property was the property of the insolvent or not would be as to whether or not it was liable to be attached and sold in execution of a decree at the date when the attachment order was passed. To determine whether the salary which has been ordered to vest in the Receiver is excluded by the terms of sub-S. (5) of S. 28. it must be seen whether on the date of the order of adjudication the salary was liable to attachment and sale in execution of a decree assumed to subsist on that date. Where, therefore, an adjudication order was made on April 3, 1937, the extent of the salary to be excluded from vesting in the Receiver shall be determined according to S. 60, Civil P.C., as it stood on that date and not according to S. 2, Civil P.C., (Amendment) Act (IX of 1937). A.I.R. 1938 Cal. 325=177 Ind. Cas. 352.

——S. 28 (2)—Salary of insolvent.

There is no doubt that in the case of a person in India in receipt of a salary or pension, the maximum which is divisible amongst the creditors is half. Section 28, the ordinary vesting section, makes the whole of the property of the insolvent on adjudication divisible amongst the creditors, but except by sub-section 5 from the property so divisible, any property which is exempted by the Code of Civil Procedure from attachment. The combined operation therefore of Section 28 (5) of the Provincial Insolvency Act and Section 60 (1) (III) is to make only half his salary divisible amongst the creditors. 73 Ind. Cas. 413=21 A.L.J. 216=45 All. 364=4 L.R.A Civ. 149=A.I.R. 1923 All. 466.

——S. 28 (2)—(1907), S. 16 (2), S. 40 (2)—Vesting of property—Salary of insolvent.

Under S. 16 (2) read with C.P. Code S. 60 half the salary of an insolvent vests in Receiver and the Court cannot prevent it from so vesting under S. 40 (2). 2 U.B.R. (1916) 132=38 Ind. Cas. 410.

——S. 28 (2)—(1907), S. 16 (2)(a)—Vesting of property—Salary.

Salary is property of the insolvent within S. 16 (2) (a) of the Act. 19 C.L.J. 83=18 C.W.N. 1052 =21 Ind. Cas. 950.

——S. 28 (2)—Right to sue for breach of Contract.

When a mortgagee having contracted to make certain payments on behalf of the mortgagor, failed to perform them and on the mortgagor becoming insolvent, the Receiver sold the equity of redemption to a third party:

Held, that the definition of property under S. 2 does not include the right to sue for breach of contract and hence that right remained with the insolvent mortgagor and did not pass to the Receiver. A.I.R. 1937 All. 317=1937 A.L.J. 304= 1937 A.W.R. 241=168 Ind. Cas. 683.

—— S 28 (2)—Unascertained damages for breach of contract.

Neither under S. 28 (2), Prov. Insol. Act, nor under O. 22, R. 10, Civil P.C., does a right to sue for unascertained damages for breach of contract pass to the Receiver in insolvency. A.I.R. 1933 Nag. 6=28 N.L.R. 310=141 Ind. Cas. 479.

——S. 28 (2)—T.P. Act, S. 6 (e)—Damages for breach of contract.

A claim for breach of contract which has become due to the insolvent before his adjudication and has not been rendered to him vests in the Official Receiver. Under the English Law of Insolvency, the word "property" is inclusive of claims in the nature of damages which have accrued due prior to the date of insolvency except such of them as arise from bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputation. 80 Ind. Cas. 141=19 S.L.R. 286=A.I.R. 1925 Sind 159.

——S. 28—Lawyer's books.

On an insolvency of a lawyer, his books can be taken possession of by the Official Receiver. A.I.R. 1937 Oudh 177=1937 O.W.N. 33=13 Luck. 61=166 Ind. Cas. 228 (1).

——S. 28 (2).

What vests in the Official Receiver on the insolvency of a person is not the property which he knows, he possessed but the property which he, in law, possesses. Where, on the date of his insolvency the insolvent possesses a certain legacy, but is ignorant of it and hence does not show it in the schedule of assets, the legacy would still vest in the Official Receiver. A.I.R. 1937 Sind 306=31 S.L.R. 506=173 Ind. Cas. 40.

——S. 28—Amount from pension received by insolvent.

An insolvent cannot be ordered to pay a certain amount monthly out of pension received by him from Government for past services, to the Receiver. (1936) 164 Ind. Cas. 747=40 C.W.N. 142.

——S. 28 (2)—Insolvent's movable property in foreign state—Powers of Receiver.

Movable property in a foreign state belonging to the insolvent would ordinarily vest in the Receiver in insolvency and the latter can take steps to recover it through the insolvent or otherwise so to make it available and distributable among his creditors. It may be that in some cases he may not succeed in doing so but the liability of the property being distributed among creditors does remain according to the law of British India. A.I.R. 1936 Bom. 167=38 Bom. L.R. 168=37 Cr.L.J. 577=60 Bom. 706=162 Ind. Cas. 310 (D.B.).

——S. 28—Provident Fund amount.

Where, under Works Provident Funds Rules, the contract between the Company and its

employees contemplates that at all times during the twelve years' employment, the amount contributed by the employee be within the disposal of that contributor, such money, on the making of the order of insolvency of the employee, vests under S. 28 (2) in the Receiver and the Company is in no better position than the insolvent in respect of that money. But so far as any money which the Company might have the right to claim against the insolvent under R. 18 of Works Provident Fund Rules, it would be necessary to give effect to that lien before the amount is handed over to the Receiver. A.I.R. 1935 Pat. 211=16 P.L.T. 167=1 B.R. 575=156 Ind. Cas. 159.

——S. 28.

Where the insolvency petition was admitted before the decree against the defendant was obtained, the plaintiff is not entitled to claim the amount which is lying in the hands of the Receiver in another Court. A.I.R. 1934 Lah 535=35 P.L.R. 408=149 Ind. Cas. 127.

——S. 28—Liability imposed on property.

Under S. 28, the insolvent's property does not vest in the Receiver free from the liabilities imposed upon it and the Receiver is bound by any covenant entered into by the insolvent involving a liability on his property. A.I.R. 1932 All. 78=54 A. 17=1932 A.L.J. 36=133 Ind. Cas. 541.

——S. 28.

Where an Advocate put in a claim to the Official Assignee for certain monies due to him by an insolvent for the work done for the insolvent in a probate litigation in respect of a will of which the insolvent was the executor and the legatee, and he claimed it from the estate of the testator:

Held, that the insolvency Court was not competent to make an order against the estate of the testator inasmuch as the only estate which was vested in the Official Assignee was the estate of the insolvent. A.I.R. 1932 Mad. 256=35 L.W. 166=1932 M.W.N. 8=62 M.L.J. 185=55 M. 455=137 Ind. Cas. 571.

——S. 28—Holder of decree for monthly allowance adjudicated—Payments made to insolvent—Receiver, if bound.

The holder of a decree against a zemindar for a monthly family allowance was adjudicated an insolvent. When the Receiver applied for execution, the zemindar contended that he should be given credit for the payments that had been made to the decree-holder after his adjudication as insolvent.

Held, that as the decree had become vested in the Receiver from the date of adjudication, none of the payments could be recognised as against the Receiver if, for no other reason than that none of them was certified to the Court under O 21, R. 2, Civil P.C. A.I.R. 1932 Mad. 250=35 L.W. 161=37 Ind. Cas. 394.

——S. 28 — Payment of debts to insolvent — Receiver if bound.

Any payment made be debtors of the insolvent to him subsequent to the date on which the insolvency application is presented are void as against the Official Receiver unless the debtors prove that they had made the payments **bona fide** and without knowledge of the insolvency petition having been filed in the Court.

The belief, if any, entertained by the insolvent cannot be of any avail to the debtors who are **ex party**. A.I.R. 1932 Sind 62=138 Ind. Cas. 628.

——S. 28—Damages for defamation.

Damages obtained by an insolvent in an action for damages are recoverable by him and do not belong to his trustees. A.I.R. 1932 Sind 33=26 S.L.R. 21=140 Ind. Cas. 233.

——S. 28—Insolvent's money deposited in Court as security for costs of appeal.

Insolvent's money deposited by him in the Court as security for the costs of an appeal to his Majesty in Council, can be attached, but the order of attachment must be made subject to result of the appeal. 114 Ind. Cas. 465=8 Pat. 478=A.I.R. 1929 Pat. 97.

——S. 28 (2)—Subject-matter of a suit for taking accounts of a dissolved partnership.

The subject-matter of the suit for taking accounts of a dissolved partnership, is property. Such property is liable to attachment and sale in execution of a decree. The Provincial Insolvency Act does not only vest the property of the insolvent which can be attached and sold in execution of a decree but vests the "whole of his property" in the Receiver. Clause (5) cannot be construed as meaning that it is not the whole property but only the property which is liable to attachment and to sale, under the 1st clause of Section 60, C. P. Code, which vests in the Official Receiver. The first clause of Section 60, C. P. Code, does not refer to property liable to attachment but liable to attachment and to sale. 4 I A. 247 Foll. 13 Mad 447 Foll. 80 Ind. Cas. 642=17 S.L.R. 334=A.I.R. 1925 Sind 18.

——S. 28—(1907), S. 16 (2).

The right to receive money due is property within the meaning of S. 16 (2). 73 Ind. Cas. 1037=19 N. L. R 144=6 N.L.J. 213=A.I.R. 1923 Nag. 290.

——S. 28 (2)—(1907), S. 16 (2).

Property of an insolvent situated in a foreign territory vests in the Court under S. 16 (2) (a). 65 Ind. Cas. 334=18 N.L.R. 93=A.I.R. 1922 Nag. 221.

——S. 28—Lease-hold property.

As regards onerous property, such as leases the Insolvency Court or Receiver has the right to elect whether they will accept or repudiate the lease-hold property belonging to the insolvent, and unless he accepts it, such property is not considered to vest in him. 62 Ind. Cas. 850=17 N.L.R. 205=4 N.L.J. 61=A.I.R. 1921 Nag. 10.

——S. 28 (2)—(1907), S. 16—Vesting of property.

The mortgagee of a factory obtained a mortgage decree and the factory was about to be sold in execution when the judgment-debtor applied to have a Receiver to work for the decree-holder. The Receiver worked for 2 years when the judgment-debtor was adjudged insolvent. The factory was sold in execution of the plaintiff's decree. The profits had been paid to a certain association. This money was attached by holders of money decrees against the judgment-debtor. The plaintiff sued to recover the amount from the creditors and impleaded the Receiver as a party.

Held, that S. 16 had no application to the case, as the money claimed by the plaintiff was not a debt provable under the Act but was the property of the plaintiff and never the property of the insolvent. The plaintiff was not seeking any remedy against either the person or property of the insolvent. 39 All. 204=15 A. L. J. 49=38 Ind. Cas. 613.

——S. 28 (2)—(1907), S. 16 (2)—Vesting of property —Debts due to insolvent—Interest.

An insolvent's solvent debtors cannot be absolved from the liability to pay interest on the ground that the insolvent has filed his petition in insolvency. 112 P.L.R. 1913=92 P.W.R. 1913=18 Ind. Cas. 205.

——S. 28 (4)—(1907), Ss. 16 (4)—Vesting of property—"Property" meaning of.

'Property' in S. 16 (4) does not include personal earnings over and above what is properly necessary for the debtor's support. 7 N.L.R. 19=10 Ind. Cas. 698.

17. Receiver.

(a) Position and Status of
(b) Suit against
(c) Suit by
(d) Vesting order.

17 (a). Receiver—Position and Status of.

——Ss. 28, 56, 57—(1907), Ss. 16, 18, 19—Presidency Towns Insolvency Act III of (1909), Ss. 17, 61, 83—Official Receiver, position of.

The position of an Official Assignee in Madras differs from that of an Official Receiver in the muffussil in that the Official Assignee may sue and be sued as such without mentioning his own name under S. 83 of the Presidency Towns Insolvency Act, whereas there is no such corresponding section under the Provincial Insolvency Act. 5 L.W. 507=32 M. L. J. 520=40 Ind. Cas. 170.

——S. 28—(1907), S. 16—Vesting of property — Partner of firm insolvent—Position of Receiver.

When a partner is adjudged an Insolvent the Receiver appointed under S. 16 merely replaces the Insolvent partner and cannot claim to take exclusive possession of the entire assets of the firm. 42 Cal. 225=26 Ind. Cas. 836.

——Ss. 28, 56—Obstructing a Receiver appointed by court.

Obstructing a Receiver appointed by court in taking possession of the property of a person against whom insolvency proceedings are pending is contempt of court. The proper procedure is to move the court against the action of the Receiver. 9 Ind. Cas. 485 (Sind).

——S. 28—Receiver — Status of — Payment by Receiver whether saves limitation.

A person appointed to receive the insolvent's property after the order of adjudication is not the insolvent's agent duly authorized to make the payment, because the insolvent has no control over the property and it is impossible to conceive that he would, in law, be in a position to grant valid authority to the appointee to make any payment out of the property held by the appointee. Payment by him will not, therefore save limitation. A.I.R. 1935 Rang. 152=156 Ind Cas. 783.

17 (b). Receiver—Suit against.

——S. 28—Suit against Receiver — Leave of Court.

A stranger to the insolvency proceedings is not required to obtain the leave of the Court before bringing an action in respect of a property seized by the Receiver on the ground that it belonged to him and not to the estate of the insolvent. 125 Ind. Cas. 625=A.I.R. 1930 Lah. 708.

——S. 28—Suit against Receiver — Leave — Necessity for.

There is no statutory provision under which leave is necessary to file a suit against Official Receiver. On the other hand whatever provision there is in the Act relating to the grant of such leave is confined to claims of creditors. Reference may be made to S. 28, sub-cl. 2. 77 Ind Cas. 57=21 A. L. J. 737=4 L. R. A. Civ. 483=46 All. 16=A.I.R. 1924 All. 40.

——S. 28—Suit against Receiver—Leave of Court.

A Receiver, in insolvency proceedings, is not in the same position as a Receiver in a suit. His position is that of an Assignee in bankruptcy, and it is well settled that it is not necessary for a party to obtain the leave of the Court to proceed against a Receiver appointed under the provisions of the Provincial Insolvency Act of 1920. (30 C. L. J 515 Foll.) 77 Ind. Cas. 589=2 Pat. 724=A.I.R. 1924 Pat. 259.

——S. 28 (2)—(1907), S. 16 (2)—Vesting of property—Receiver — Leave of court if essential to suit against.

A Receiver is exactly in the same position as the trustee in bankruptcy and the whole property of the insolvent is vested in him and he is the owner of the property until he is discharged. The rule that a suit should not be instituted against a Receiver without a previous sanction of the Judge having the carriage of the proceedings in which the Receiver had been appointed, only applies to cases where the Receiver is appointed in an action and does not apply to a Receiver as mentioned in Prov. Insolvency Act. 30 C.L. J. 515=53 Ind. Cas. 973.

——S. 28 (2)—(1907), Ss. 16, Cl. (2) (b)—Suit against Receiver—Leave of Court.

Leave of Court is not generally necessary for a plaintiff to sue the Receiver in insolvency and a person who claims adversely to the insolvent is not affected by the provision of S. 16 cl. (2) (b) of the Pro. Ins. Act and is not therefore bound to obtain leave of the Court before suing the Receiver. 10 S.L.R. 179=40 Ind. Cas. 122.

——Ss. 28. 56—(1907), Ss. 16 and 18—Suit against Receiver—Decision against—it res judicata.

The Official Receiver is not a mere respresentative of the creditors of the estate but an officer of court. A decision against him necessarily does not operate as **res judicata.** Where an Official Receiver was not in fact impleaded as representing the general body of creditors and he did not defend the suit on their behalf and an **ex parte** decree was passed against him, it does not operate as **res judicata** in a subsequent suit by the creditors.

The words "any suit or other legal proceeding" in S. 16 of the Provincial Insolvency Act cover a case where the object of the suit or other legal proceedings is to obtain any remedy against the property of the person of the insolvent in respect of a provable debt. 12 S.L.R 61=49 Ind. Cas. 421.

17 (c). Receiver—Suit by.

——S. 28—Suit by Receiver—Defence of absence of leave.

The expression "As hereinafter provided" in S. 16(2) (a) of the Act qualifies the word "Receiver" and not the word "vest" in the same sub-section.

The obtaining of leave is a matter between the Receiver and the Court and the absence of leave is not a valid defence to a suit by the Official Receiver under Act III of 1907. 69 Ind. Cas. 908=45 Mad. 167=30 M.L.T. 152=14 M. L. W 655=1921 M.W.N. 858=A.I.R. 1922 Mad. 51=42 M.L. J. 53.

17 (d). Receiver—Vesting order.

——S. 28—Vesting order—Written order - Necessity for.

The property of a person adjudicated as insolvent under the Act does not **ipso facto** vest in the Official Receiver who may have been appointed for the local area in which the insolvent is residing but it is necessary that an order should have been passed appointing a Receiver before the property would vest in the local Official Receiver. Orders of Court are invariably reduced to writing and where there is no ground for supposing that any verbal order appointing the Official Receiver of a particular estate was passed it cannot be presumed that the Official Receiver must have been appointed Receiver for the estate in the absence of a written order. 30 M L. J. 415; 43 Mad. 869, Foll. 62 Ind. Cas. 396=1921 M.W.N. 243 =A.I.R. 1921 Mad. 642=41 M.L. J. 78.

——S. 28.

Where an adjudication of insolvency is made by an Official Receiver in the exercise of the powers delegated to him under S. 55 (1) (a) of the Provincial Insolvency Act, the insolvent's estate does not vest in the Official Receiver under S. 18 or any other province and will not so vest unless an order vesting it in him is passed by the Court, 30 M. L. J. 415, Foll. Consequently a sale without such order by the Receiver will not pass any title. 59 Ind. Cas. 507=43 Mad. 869=12 L.W. 262=1920 M.W.N. 537=39 M.L.J. 438.

——S. 28—(1907), S. 16—Vesting order, absence of—Attachment after adjudication of insolvency—Validity.

An attachment in execution is ineffective, if the properties had become vested in the Court or the Official Receiver as soon as the judgment debtors were adjudicated insolvents. The absence of a vesting order is immaterial. 41 Mad. 923=35 M.L. J. 581=(1918) M.W.N. 796=48 Ind. Cas 756.

18. Relation back—Sub. S. (7).

——S. 28 (7)—Relation back of order of adjudication—Scope and effect—Annulment of adjudication of Hindu father—Rights of sons born after petition for adjudication and before annulment—Order directing the properties to continue to vest in the Official Receiver—Effect.

On 18th April, 1933, a petition was filed to adjudicate **X** (a Hindu debtor) an insolvent and he was adjudged insolvent on 1st November, 1934. On 8th March, 1940, the adjudication was annulled, because the insolvent had not applied for a discharge within the time allowed; but at the same time the Court passed an order directing that the property should continue to vest in the Official Receiver; **Y** and **Z** the sons of **X** born in April, 1934, and May, 1939 respectively. filed a petition in 1944 for permission to sue **in forma pauperis** to have the sale of their shares in the properties sold by the Official Receiver in 1939 and 1942 set aside.

Held: The effect of S. 28 (7) of the Provincial Insolvency Act is that the adjudication must be deemed **to have taken** place on 18th April, 1933, and that from that date the property vested in the Official Receiver and the property passed out of the hands of the insolvent before either of his sons **Y** or **Z** were born and they were in no better position with regard to the property than they would have been with regard to alienations made before they were born.

As simultaneously with the order of annulment of adjudication there was an order continuing the vesting of the property in the Official Receiver, the property continued to vest throughout in the Official Receiver and there was no reverter to the insolvent to confer any rights on **Y** or **Z** at any time.

Accordingly the petition for permission to sue **in forma pauperis** must be dismissed on the ground that the draft plaint disclosed no cause of action. 60 L.W. 200=1947 M.W.N. 201=A.I.R. 1947 Mad. 372 =(1947) 1 M.L.J. 203.

——S. 28 (7)—Relation back—Doctrine explained.

Section 28, cl. (7), only enunciates the well-known doctrine of relation back in insolvency law. The principle underlying that doctrine is that the adjudication has relation to the act of bankruptcy and the property

vests by relation from that time in the trustee in bankruptcy, i. e., the title of the trustee in bankruptcy or Receiver relates back to the commencement of the insolvency. This is the Eng ish rule. Under the English Law, the insolvency commences either on the date of the presentation of the petition, or from the earliest act of insolvency committed within three months before the date of the petition and the title of the trustee in bankruptcy relates to that date. It is also the law under the Presi. Towns Insol. Act. Under S. 28, cl. 7 however, the insolvency commenees from the date of the presentation of the petition. No different rule from the English Law and that laid down in the Presi. Towns Insol Act is intended to be laid down in regard to the legal consequences flowing from the doctrine of relation back. The only difference is as to the point of time when the insolvency commences. A.I.R. 1938 Mad. 19 =1937 M.W.N 929=46 L.W. 559=(1937) 2 M.L.J. 703 =I.L.R. (1938) Mad. 439=176 Ind. Cas. 321.

——S. 28 (7).

The clear enactment that an order of adjudication shall relate back to and take effect from the date of presentation of the petition must affect the order of adjudication for all purposes unless otherwise expressly enacted. Hence, S. 28 (7) governs S. 34. A.I.R. 1939 Lah. 384=I.L.R (1040) Lah. 50=42 P.L.R. 367=184 Ind Cas. 330. (F.B.).

——S. 28 (7)—Proof of debts within time on date of petition but barred on date of adjudication.

Where a right to recover a debt subsists on the date of the presentation of an application by the creditor for adjudication of the debtor as insolvent, the creditor is entitled to prove his debt in the insolvency proceedings, even though the right to recover the debt has become barred by time on the date on which the order of adjudication is made.

The statute of limitation does not affect, in such case those debts which are within time on the date of the petition. A.I.R. 1933 Lah. 688=34 P.L.R. 464=14 L. 730=143 Ind. Cas. 175.

——S. 28 (7)—Transfer by insolvent pending insolvency proceedings—Validity.

Since, by virtue of sub-s. (7) of S. 28, the order of adjudication relates back to and takes effect from the date of the presentation of the petition under which it is made, the transfer made by the insolvent during the pendency of the insolvency proceedings must be pronounced to be void and inoperative. A I.R. 1939 Nag. 207=1939 N.L. J. 267=I.L.R. (1939) Nag. 540= 183 Ind. Cas. 172.

——S 28—Charges created during pendency of application.

As the property of the insolvent, by virtue of the adjudication, vests in the Receiver on the date of the petition, the coodition of the property must also be taken from that date and charges whether created by decrees or otherwise after the date of the petition cannot be held binding against the Receiver, though they may bind the insolvent himself. 109 Ind. Cas. 373= A.I.R. 1928 Lah. 738.

——S. 28 (7)—Limitations of doctrine—Title of auction-purchaser.

By the combined operation of Ss. 28 and 51, it is clear that a sale of the property until the date of the order of adjudication is not prohibited in spite of the presentation and the admission of the insolvency petition, but the creditor is not given the benefit of the remedy had by him. But the law protects the title of the auction purchaser to the property sold in auction under S. 51 (3). If, therefore, a purchaser can say that the purchase was made in good faith, in spite of the fact that there has been an order of adjudication subsequent to the sale, his title to the property will remain unaffected. Therefore, the doctrine of relation back of the title of Official Receiver is subject to the exception enacted in S. 51 (3). A.I.R. 1938 Mad. 906=1938 M.W.N. 841=48 L.W. 279= (1939) 1 M.L J. 705=182 Ind. Cas. 888.

——S. 28—Auction-purchaser purchasing property of debtor after admission of insolvency petition but before adjudication—Title obtained, nature of.

By the operation of S. 28 (7), the title of the auction-purchaser who purchases the property of the debtor after the admission of the insolvency petition but before the order of adjudication is not absolute but contingnet on the insolvency application being dismissed. If the insolvency application is dismissed, he gets an indefeasible title. But if the order of adjudication is made, he cannot claim any title as against the Receiver. There is an exception, however, in the case of a purchaser in good faith. A.I R. 1935 Cal. 612=39 C.W.N. 1289 =63 C. 176=158 Ind. Cas. 574.

——S. 28.

Where the purchase at the sale in execution is made in good faith, without any knowledge whatsoever of the insolvency proceedings, the sale is not a nullity on account of the fact that no notice under O. 21, R. 22, Civil P. C., was served. A.I R. 1935 Cal. 503=39 C.W.N. 424=62 C. 457=157 Ind. Cas. 862.

——S. 28.

Execution sale—Purchase by decree-holder with permission to bid and set off—Sale after presentation of insolvency petition without notice to Receiver.

Held, that the sale was a nullity. But the Official Receiver was not entitled to require the decree-holder to refund the purchase-money. A.I.R. 1935 Mad. 907 =159 Ind. Cas. 244.

[Overruled in A. I. R. 1942 Mad. 425=201 Ind. Cas. 686.]

——S. 28 (7)—Property vests in Official Receiver from date of petition for adjudication.

Where a transfer made before the petition for adjudication of the transferor as insolvent is found to have been fictitious and fraudulent and hence, void as against the Official Receiver by virtue of S. 28 (7), the property vests in the Official Receiver from date of the presentation of the petition and the transferor having no saleable interest after this, a transfer by him is void. A.I.R. 1935 Lah. 368=16 L. 1013=38 P.L.R. 24=156 Ind. Cas. 1018.

——S 28—Relation back—Doctrine of—Applicability to S. 53.

The doctrine of "relation back" cannot be imported into S. 53, Provincial Insolvency Act, so as to make it appear that the point of time from which the two years are to be calculated is the date of the presentation of the petition, and not the date when the transferor is adjudged insolvent, and thus interpreting the language according to its plain meaning without reference to the doctrine of relation back provided in Cl. 7, S. 28, it can be held that in S 53 the date of adjudication and not the date of presentation should be the starting point: 49 Bom. 730, Foll.; 46 Cal. 991; 42 All. 433, not Foll. 110 Ind. Cas. 361=6 Rang. 193 =A.I.R. 1928 Rang. 148.

——Ss. 28 (7) and 53.

Section 53 is not controlled by S. 28 (7). 111 Ind. Cas. 8=10 Lah. 106=29 P L.R. 446=A.I.R. 1928 Lah. 361. (F.B.).

——S. 28 (7)—Doctrine of relation back—If can be imported in S. 53.

The doctrine of "relation back" cannot be imported into S. 53 so as to make it appear that the point of time from which the two years are to be calculated is the date of the presentation of the petition and not the date when the transferor is adjudged insolvent; and therefore a transfer effected more than two years before the order of adjudication but within two years of the date of the presentation of the petition cannot be annulled under the section. A.I.R. 1924 Lah. 374 and A.I.R. 1925 Bom. 480, Foll; 35 M.L.J. 296 and 46 Cal. 991 Not Foll. 97 Ind. Cas. 321=A.I.R. 1927 Sind 66.

——Ss. 28 (7) and 53.

The provisions of S. 28 (7) Provincial Insolvency Act apply to S. 53. 46 Cal. 991; 42 All. 433; 1927 Mad. 163; 35 M.L.J. 296, Foll.; A.I.R. 1925 Bom. 480; A.I R. 1924 Lah. 374; and 23 Ind. Cas. 924, not Foll.

The two years provided by section 53 should be reckoned from the date of the alienation up to the date of adjudication. 104 Ind. Cas. 177=26 M L.W. 61 =1927 M.W.N. 429=1927 M.W.N. 702=A.I.R. 1927 Mad. 826=53 M.L.J. 136.

——Ss. 28 (7) and 53.

Clause 7, S. 28 governs S. 53. 99 Ind. Cas. 241= 50 Mad. 300=1926 M W.N 972=26 M.L.W. 865= A.I.R. 1927 Mad. 163=51 M.L.J. 719.

——Ss. 28 (7) and 53—(1907), Ss. 16 (6)and 36.

S. 16 (6) of the Act does not govern S. 36 and therefore transfers taking place within two years of the presentation of the petition but beyond two years of the order of adjudication cannot be annulled. 35 M.L.J. 296 not Foll. 72 Ind Cas. 433=A.I.R. 1924 Lah. 374.

——Ss. 28, 53—(1907), Ss. 16, 36 Applicability—Two years in S. 36, how reckoned.

S. 16 (6) applies to S. 36 and the two years mentioned in the latter section mean the two years before the date of presentation of the Insolvency Petition. 6 N.L.R. 146=8 Ind. Cas. 1115.

——S. 28 (7)—Relation back—Doctrine of—Scope and extent.

Section 28 (7) of the Provincial Insolvency Act must be read in conjunction with Ss. 28 (2) and 29.

No doubt, once the order of adjudication is made the effect created by it is by a legal fiction, taken to relate back to the presentation of the petition or in other words, the commencement of the insolvency. For all the purposes of the Insolvency Act, this fiction has to be used, and it is a very useful fiction; but outside those purposes it has no place; and the filing of a suit prior to the adjudication may be regarded outside the purpose of the Insolvency Act with reference to the provisions of S. 28 (2): 42 All. 433, Foll.

Therefore, where, after the institution of the suit the defendant is adjudicated insolvent and the Receiver is brought on record; he is brought in, not because he is an essential party to the suit in the sense that his absence is fatal to the suit and if he is impleaded at a later date, the suit will be regarded as filed on that date, but because of the provisions of S. 29 of the Insolvency Act.

There is a devolution of interest on the Receiver who is merely a continuation of the original defendants. Consequently there is no rule of limitation governing the application to bring in the Official Receiver as a party. Directions of Court under S. 29 are the only matters that can govern the matter. 102 Ind. Cas. 444 =1927 M.W.N. 245=26 M.L.W. 171=A.I.R. 1927 Mad. 693=53 M.L.J. 142.

——S. 28 (7)—Payment to insolvent's creditors—Effect.

The property of the insolvent by reason of the principle of relation back, on the date the insolvency petition was presented becomes the property of the Official Receiver, and a payment made by a debtor of the insolvent to his (insolvent's) creditors would not relieve him from liability to pay the amount to the Official Receiver. 78 Ind. Cas. 16=A.I.R. 1925 Mad. 328.

——S. 28—Date of adjudication.

Although S. 28 enacts that an order of adjudication shall relate back to and take effect from the date of the presentation of petition, it does not state that the date of adjudication shall be the same as the date of the petiuon. 127 Ind. Cas. 424=A.I.R. 1930 All. 461.

——Ss. 28 (7), 55—(1907), Ss. 16 (2) (6) and 38—Date of adjudication—Relation back to presentation of petition—Transfer of ipso facto—**Scope of S. 38.**

It is the making of the order of adjudication which vests the property in the Receiver and only upon such an order being made can any vesting take place at all; but once the order is made the effect created by it is by a legal fiction taken to relate back to the presentation of the Insolvency petition. An insolvency petition was presented by a creditor on 3rd March, 1919 and the debtor sold his immovable property on 12th March 1919 and the order of adjudication was passed on 21-3-19.

Held, that the sale was void under S. 16 and the property vested in the Receiver. The protection given by S. 38 of the Provincial Insolvency Act is not available to a transferee where the circumstances show that the transfer which he had taken is in itself an offence against the Bankruptcy Law; **e.g.,** as giving an undue preference to some creditors or as being a transfer of the whole of the debtor's property with the intention of defeating or delaying some of his creditors. 18 All.L J. 449=2 U.P L.R. (All.) 122=55 Ind. Cas. 941.

——Ss. 28(7), 51—(1907), Ss. 16, 34—Date of adjudication, date of operation of—Decree-holder's rights to assets realised before order of adjudication.

S. 34 controls S. 16 of this Act and though an order of adjudication relates back to date of application, the decree-holder has greater rights than Receiver in respect of assests realized before date of adjudication. As soon as a sale is held in an execution and money deposited for the **benefit** of the decree-holder the assests are considered as realized and at the disposal of the decree-holder. 2 Pat. L. J. 235=1 Pat. L.W. 463=(1917) P.H.C.C. 111=39 Ind. Cas. 463.

19. Reputed ownership—Sub-S. (3).

——S. 28—Reputed ownership—Application of doctrine.

The doctrine of reputed ownership applies only when the goods are proved to be in the possession of the insolvent with the consent of the true owners and a countermanding order to deliver the goods to the vendor re-vests the property in the vendor before it gets into the possession of the insolvent and thus prevents the applicability of this doctrine. A.I.R. 1936 Sind 106=30 S.L.R. 148=163 Ind. Cas. 875.

——S. 28—Reputed ownership.

Where goods, precious stones and such like things are given into the hands of a goldsmith or a jeweller either for the purpose of being converted into ornaments or for sale, they are given to him in the ordinary way of his business; where, therefore, jewels are entrusted to a goldsmith for sale, they cannot be called the reputed property of the goldsmith. They are the jewels of the bailor and so being easily identifiable cannot vest in the Receiver in case of the goldsmith's insolvency. 1930 M.W N. 869=32 M.L.W. 449=A.I.R. 1930 Mad. 913=54 Mad. 5=59 M.L. J. 629 (F.B.).

——S. 28 (3)—(1907), S. 16 (3)—Reputed ownership — Railway receipt — Pledge of—Charge holder.

A Railway receipt is a mercantile document of title to goods, and lawful possession as pledgee of such receipt enables the holder, by virtue of local custom to get possession of the goods from the carrier. The insolvent's right to get possession under S. 16, (3) of the Prov. Insol. Act ceases with the pledge. 15 Bom. L.R. 890, Foll. 38 Mad. 664=30 Ind. Cas. 950.

——S. 28 (3),(6)—(1907), S. 16 (3) and (5)—Reputed ownership, doctrine of—Applicability to secured creditor—Receiving order, effect of.

S. 16 (5) excludes secured creditors from the doctrine of reputed ownership. A receiving order under English Law does not divest the property of the insolvent. The property of the insolvent is only divested by the adjudication order. The failure on the part of a mortgagee to object to the sale of the mortgaged goods does not deprive him of his interest which is transferred to the sale proceeds. 6 S.L.R. 97=17 Ind. Cas. 31.

——S. 28 (3)—(1907), S. 16 (3)—Reputed ownership—Machinery—Oil press—Goods — Receiving of.

An oil press worked by kerosene oil engine is not "goods" within the meaning of S. 16 (3) of the Act, though it is capable of being removed without damage to the building. 25 Bom. 659. Foll. 6 L.B.R. 44=14 Ind. Cas. 447.

——S. 28 (3)—(1907), Ss. 16 (3), 2 (a), 13 (2)—Reputed ownership—Insolvent in possession of goods as commission agent—Power of Receiver to take possession.

Goods entrusted to a commission agent for sale are his property for purposes of the Provincial Insolvency Act and a Receiver is entitled to take possession of the same; but in cases where circumstances point out the agent is not the 'reputed owner' the principal is entitled to a restoration of the same. 5 S.L.R. 78=11 Ind. Cas. 14.

20. Secured Creditor—Sub-S. (6).

——Ss. 28 and 4—Secured creditor—Person claiming that her stridhanam was trust fund in hands of insolvent is entitled to charge on total assets of insolvent—There being no question of 'realising' or 'otherwise dealing with the security' S. 28 does not apply to such case.

A Nattukottai Chetty woman claimed that her stridhanam was a trust fund in the hands of the insolvent and that she being entitled to a charge on the total assets of the insolvent, was a 'secured creditor' within S. 28, Provincial Insolvency Act and her power of realising or otherwise dealing with her security was not affected by the debtor's adjudication:

Held, that she was not in the position of an ordinary secured creditor holding a mortgage or charge over any specific asset of the insolvent. She could only claim to be paid in full out of the total assets of the insolvent. There was no question of 'realising' or 'otherwise dealing' with her security without recourse to the Insolvency Court which had full control of the insolvent's assets. Section 28, therefore, had no application to the case and the matter being completely

within the cognizance of Insolvency Court, its decision was final and binding on the woman as well as her son who claimed through her under S. 4. A.I.R. 1946 Mad. 519=(1946) 1 M.L.J. 31=I.L.R. (1946) Mad. 429=1946 M.W.N. 9=59 L.W. 725.

——S. 28 (6)—Secured creditor—Who is.

The view that, it is only after a creditor has proved in insolvency that he is a secured creditor that the provisions of S. 28 (6) apply, is clearly erroneous. A secured creditor owes this position to his security obtained prior to the debtor's insolvency, and not necessarily to any proof in insolvency for his debt. 122 Ind. Cas. 857=31 Bom.L.R. 1199=A.I.R. 1930 Bom. 11.

——S. 28 (6)—Creditor secured by decree need not prove in insolvency.

Where a decree is passed before the insolvency proceedings, subsequent insolvency proceedings do not invalidate the decree. Moreover, where by the terms of the decree a party to a money suit is a secured creditor, it is not necessary for him to prove in insolvency. 120 Ind. Cas. 218=A.I.R. 1930 Nag. 17.

——S. 28 (6)—Holder of rent-decree.

The holder of a rent-decree is always a secured creditor. The mere fact that the judgment-debtor was declared insolvent prior to the passing of decree does not save limitation and the application for execution made after 3 years is time barred. 113 Ind. Cas. 86 = 5 O.W.N. 1134=4 Luck. 241=A.I.R. 1929 Oudh 71.

——S. 28 (6)—Charge—Proof.

Where the plaintiff claimed a charge in respect of a share which, she alleged, had been bought by the defendant with her moneys, but it was found that she had only made a mere deposit of her moneys with the defendant and there was no evidence to prove that the deposit was for any specific propose:

Held, that the plaintiff was not entitled to a charge over the share. A.I.R. 1933 Mad. 917=38 L.W. 891= 146 Ind. Cas. 699.

——S. 28 (6)—Rights of secured creditor.

The words "otherwise deal with his security" in S. 28 (6), Prov. Insol. Act, do cover the application of the decree-holder under O. 34, R. 6, Civil P.C., and a secured creditor is entitled by this sub-section to obtain a decree under O. 34, R. 6 and to deal with the security by the method allowed by that rule. A.I.R. 1939 All. 401=1939 A.L.J. 238=I.L.R. (1939) All. 492=1939 A.W.R. 265=184 Ind. Cas. 863.

——S. 28 (6)—Power of secured creditor to realise his security—Extent.

The power of a secured creditor to realise his security does not authorise him to secure an out and out sale of the equity of redemption in satisfaction of his own charge decree as the equity of redemption after adjudication vests in the Court under S, 28 (2), Prov. Insol. Act, and thereafter, the insolvent becomes wholly incompetent to deal with the property. To be able to dispose of interest in the property, the transferor must have subsisting interest in it. When the interest devolves on somebody else by operation of law, it cannot validly be transferred to the person after he is divested of it. A.I.R. 1939 Nag. 207=1939 N.L.J. 267=I.L.R. (1939) Nag. 540=183 Ind. Cas. 172.

——S. 28 (6)—Rights of secured creditor.

The right of a secured creditor to realise or otherwise deal with his security is unaffected by an order of adjudication, the equity of redemption only vesting in the Receiver in insolveney. A.I.R. 1935 Cal. 460= 62 Cal. 483=39 C.W.N. 384=157 Ind. Cas. 140.

——S. 28 (6) and (2)—Right to realise security—Leave of Court.

A secured creditor of the insolvent is entitled notwithstanding S. 28 (2), to realise the security by filing a suit or otherwise in accordance with law without obtaining the leave of the Court in that behalf. A.I.R. 1935 Rang. 92=13 Rang. 37=155 Ind. Cas. 227.

——S. 28 (6)—Secured creditor—Leave of Court—Necessity for.

Having regard to S. 28 (6) a suit by a mortgage (i. e., a secured creditor) to realise his security is maintainable without the leave of the Court: 38 Bom. 359, Foll.; White v. Simmons, 38 Bom. 364n, Diss. from. 122 Ind. Cas. 857=31 Bom.L.R. 1199=A.I.R. 1930 Bom. 11.

——S. 28 (6)—Rights of secured creditor after adjudication.

Clause 6 does not mean that the secured creditor is entitled to deal with the security as though there had been no vesting in the Court or the Receiver. That the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent is, of course plain; but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it, and he and not the insolvent, has the sole interest in respect of the property. A compromise in a mortgage suit between mortgagee and insolvent mortgagor is therefore a nullity. A.I.R. 1925 Cal. 785, Reversed. 101 Ind. Cas. 442=54 Cal. 595=54 I.A. 190=29 Bom. L.R. 882=31 C.W.N. 741=45 C.L.J. 544=25 A.L.J. 621=1927 M.W.N. 485=39 M.L.T. 5=26 M.L.W. 268 =A.I.R. 1927 P.C. 108=52 M.L.J. 734 (P.C.).

——S. 28 (6)—Rights of secured creditor.

A secured creditor is entitled to deal with security as though there has been no vesting in the Court or in the Receiver and therefore the Receiver of the mortgagor's estate is not a necessary party to a suit by mortgagee for foreclosure instituted against mortgagor in his life-time. 86 Ind. Cas. 1042=29 C.W.N. 771=41 C.L. J. 290=A.I.R. 1925 Cal. 785.

——S. 28 (6)—Right of suit.

The right of a secured creditor to institute a suit or to proceed with the suit already commenced is not taken away by S. 28 by reason of the adjudication of the mortgagor as an insolvent. 88 Ind. Cas. 934=48 Mad. 750=1925 M.W.N. 672=A.I.R. 1925 Mad. 1051 =49 M.L. J. 203.

——S. 28 (6).

S. 28, Cl. 6, which is applicable only to the mofussil cannot be said to refer to the right of a mortgagee to effect private sale of the property. The word 'realise' must be understood in the ordinary sense of a secured creditor realising his security by a suit. 88 Ind. Cas. 934=48 Mad. 750=1925 M.W.N. 672= A.I.R. 1925 Mad. 1051=49 M. L. J. 203.

——S. 28 (6) — (1907), S. 16—Secured creditor — Remedies—Restrictions imposed.

Under the Provincial Insolvency Act, a secured creditor is not exempted from the restriction imposed by S. 16 (2) (b) barring any remedy against the person and the property of the debtor and is subject to all disadvantages arising when the insolvent debtor cannot carry on his promises. The Official Receiver takes the property free from any personal undertaking of the insolvent. 7 S.L.R. 61=21 Ind. Cas. 520.

——Ss. 28 (6), 47 — (1907), Ss. 16 (2) and 31 — Secured creditors — Right of — Mortgages effected during attachment — Procedure—Assets, realised by sale.

An insolvent judgment-debtor during an attachment by certain decree holders executed mortgages and the decree holders contended in the insolvency proceedings that the mortgages were void under S. 64, C.P. Code. **Held**, that according to S. 16 (2) of the Provincial Insolvency Act, the claims which the creditors were able to enforce under the C.P. Code ceased to be enforceable upon the making of the order of adjudication. The creditors could only work out their remedy under the conditions laid down in the Insolvency Act and they could not therefore claim that the mortgages were void against them. If the property were sold up, the mortgagees would have the same remedy against the assets realised by the sale as against the property itself; and in all such cases where claims were set up by the mortgagees the provision of S. 31 of the Insolvency Act must be strictly complied with. An attaching creditor has no lien or charge upon the debtor's property which he attaches and is not entitled to rank as a secured creditor. It is expedient in the interest of all the creditors that the Court should be allowed to bring the insolvent's mortgaged property to sale and give the mortgagee the same remedy against the sale proceeds as he had against the property itself. The right of secured creditors are not affected in any way by the passing of an order of adjudication. 15 Ind. Cas. 860 (Oudh).

——S. 28 (6) — Suit on basis of mortgage—Receiver, whether necessary party.

It is to the interest of the mortgagee decree-holder to make the Receiver in insolvency a party to the pending proceedings, and it is also required of the Receiver in insolvency to have himself added as party to the same as the person in whom the equity of redemption has vested by operation of law. A.I.R. 1935 Cal. 460=39 C.W.N. 384=62 Cal. 483=157 Ind. Cas. 140.

——S. 28 (6) — Parties to suit on foot of mortgage.

In a suit by a mortgagee of an insolvent, the Receiver in necessary party. A.I.R. 1935 Lah. 316= 36 P.L.R. 483.

——S. 28 (6).

The Official Receiver is not a necessary party in a suit by the mortgagee of an insolvent mortgagor to enforce the mortgagee for his case is covered by S. 28 (6). A.I.R. 1925 Cal. 745, Foll. 126 Ind. Cas. 174 =31 P.L.R. 506=A.I.R. 1930 Lah. 791.

——S. 28 (6)—Secured creditor is not affected by proceedings in insolvency.

S. 28 (6) provides that no property over which a secured creditor has a legal charge, shall be affected by any of the provisions in the sub-sections which precede it.

If the Receiver realises the property, the debt due to the secured creditor at the date of such realisation, constitutes a charge payable to secured creditor out of the amount so realised.

But of course his rights under Section 47 must be necessarily postponed when the legality of his alleged charge is called in question, or if he has not chosen to object to the course proposed by the Receiver of realising by sale and discharging the debt due out of the proceeds.

Inasmuch as the existence of a mortgage over immovable property, which remains in the possession of the debtor, would raise all sorts of questions as to the

meaning of the terms "true owner" and "reputed owner" used in Section 28, the Legislature went out of its way to enact sub-section (6). 76 Ind. Cas. 749=21 A. L. J. 32=A I.R. 1923 All. 159.

——S. 28 (6).

Secured creditor can proceed against goods of which insolvent is the reputed owner. 72 Ind. Cas. 467= A.I.R. 1923 Cal. 532.

——S. 28 (6)—Mortgage executed of Insolvent's property to satisfy previous mortgage—Validity.

Where a mortgage executed prior to the insolvency of the mortgagor was satisfied after the mortgagors had become insolvent by the execution of a fresh mortgage to a third person:

Held, that the provisions of S. 28, Cl. (6) protected the transaction in suit and that the latter mortgagee was entitled to possession under his mortgage as against the auction-purchaser in insolvency proceedings. 43 All. 555, Foll. 90 Ind. Cas. 349=A.I.R. 1926 Nag. 29.

——S. 28 (6).

Mortgage created prior to mortgagor's insolvency discharged through fresh mortgage to third party after insolvency—Latter mortgage is enforceable. 63 Ind. Cas. 366=43 All. 555=19 A. L. J. 511=A,I.R. 1921 All. 232.

——S. 28 (6)—Mortgage—Execution before adjudication—Rights of mortgagee to reliase his security by suit.

Where a person prior to adjudication as insolvent executes a mortgage. the mortgagee as a secured creditor has a right to proceed with a suit upon the mortgage and to realise his security, in spite of the fact that the equity of redemption has vested in the Receiver, who has no right to transfer the mortgaged property free of the claim of the mortgagee. 63 Ind. Cas. 91 All.

——Ss. 28 and 31—Silence of mortgagee in reply to notice by the Official Receiver will not extinguish his security.

The whole property of the insolvent cannot be sold free from encumbrances even with the consent of the incumbrancers who as secured creditors can realise or otherwise deal with the security as if the section had not been enacted. Therefore a mortgagee cannot be said to relinquish the security within S. 31 by his silence in reply to a notice by the Official Receiver stating that he proposed to sell the property free from his mortgage and that in case the mortgagee kept quiet he would take it that he consented to the proposal. Even assuming that the Official Receiver stood in the position of the mortgagor a sale by a mortgagor without relinquishment by the mortgagee but merely with the consent of the mortgagee expressed in an unregistered document cannot be valid unless the facts amount to an authorisation of the mortgagor to sell on the mortgagee's behalf or to an agreement by the mortgagee to accept such sum as may be realised in the sale in discharge of his debt. A sale therefore by the Official Receiver under such circumstances would not in any way bind the mortgagee. 79 Ind. Cas. 850=34 M.L.T. 241=20 M.L.W. 45=1924 M. W. N. 520 =47 Mad. 605=A. I. R. 1924 Mad. 761=47 M. L. J. 16.

21. Miscellaneous.

——S. 28, held repealed by S. 25, Punjab Relief of Indebtedness Act.

Even though S. 28, Provincial Insolvency Act and S. 25, Punjab Relief of Indebtedness Act are in conflict, the provisions of the former Act being earlier, are impliedly repealed by the latter Act which is a later enactment. A.I.R. 1937 Lah. 680=39 P.L.R. 338= I.L.R. (1938) Lah. 120=173 Ind. Cas. 748.

——S. 28—Owner of sir Land—Adjudication of —Effect.

If an owner of **sir** land is adjudged insolvent and order is passed vesting his property in the Receiver, he no doubt loses his right to proprietary rights in the **sir** land but by the vesting order he becomes the occcupancy tenant of the **sir** land and is entitled to possession of the land. 121 Ind. Cas. 54=12 N. L, J. 117=26 N.L.R. 46=A.I R. 1929 Nag. 338.

——S. 28—Adjudication of a partner—Effect of.

In India the insolvency, or even the adjudication of a partner as an insolvent, does not by itself dissolve the partnership, but only affords the ground for the Court to decree dissolution.

It is competent for a partner of the undissolved firm, who is adjudicated insolvent, to execute a deed of assignment on behalf of the firm validly transferring their interest in the decree in favour of the assignee. 106 Ind. Cas. 54=A I.R. 1928 Sind 71.

——S. 28—Voluntary transfer of property—Insolvent not protected.

S. 28 protects the secured creditor in respect of his security, but it does not protect the insolvent in respect of a voluntary transfer of his property. 87 Ind. Cas. 957=A.I.R. 1925 Nag. 418.

——S. 28.

Ancestral property vested in Receiver—Death of insolvent does not divest it from Receiver and vest it in his sons by survivorship. 79 Ind. Cas. 548=4 Lah. L. J. 262 =A.I.R. 1922 Lah. 399.

——S. 28

Non-joinder of Receiver is not fatal where order is in his favour. 70 Ind. Cas. 572=1922 M.W.N. 717= A.I.R. 1922 Mad. 439.

——S. 28 (2).

Objection under Cl. (2) to a mortgage by insolvent cannot be raised by a person who does not represent the creditors or the Receiver but only the insolvent mortgagor. 63 Ind. Cas. 366=43 All. 555=19 A. L. J. 511= A.I.R. 1921 All. 232.

——Ss. 28, 67, 35—(1907), Ss. 16, 41, 42—Transfer by insolvent of property abandoned by Receiver.

A transfer by the insolvent after his discharge of property abandoned by the Receiver of the Insolvent's Estate is good and enforceable by the vendee. 39 All. 223 =15 A. L. J. 79=37 Ind. Cas. 878.

——S. 28—(1907), S. 16—Judge acting as Receiver, duty of.

When under the Act, Judge himself is Receiver, he must in case of dispute appoint a creditor as the representative and the general body of creditors. 39 All. 152 =15 A. L. J. 1=37 Ind. Cas. 76.

——S. 28—(1907), S. 16 (2)—Insolvent guarantee broker—Claim for damages—Suit to recover guarantee deposit—Arbitration.

A suit by an Official Receiver of the property of an insolvent guarantee broker against the employer for the balance of the guarantee deposit after setting off the amount of damages settled in insolvency proceedings as due to the employer cannot be referred to arbitration under S. 19 without leave of the court under S. 16 (2) of the Provincial Insolvency Act. 8 S.L.R. 60=27 Ind. Cas. 138.

——S. 28 (2)—(1907), S. 16(2)—Omission of creditor to prove debt in insolvency proceedings—Liability of surety.

A creditor wilfully omitting to prove his debt against his principal debtor in insolvency proceedings against him can nevertheless proceed against the surety of the insolvent for recovery of the same; in such a case the contingent liability of the surety is a debt provable by him in insolvency proceedings of the principal debtor. 7 N.L.R. 122=11 Ind. Cas. 911.

——S. 28-A.

See also: A.I.R. 1949 Mad. 216 under S. 28, Note 9 (b).

——S. 28-A (introduced by Act XXV of 1948)—Applicability—Insolvency of a manager other than father of joint Hindu family.

S. 28-A of the Provincial Insolvency Act introduced by Act X X V of 1948, would not apply to cases of insolvency of a manager other than the father of a joint Hindu family. (1947) 2 M.L.J. 507 not Foll. I.L.R. (1951) Mad. 449=63 L.W. 766=1950 M.W.N. 471=A I.R. 1950 Mad. 770=(1950) 2 M.L.J. 173.

——S. 28-A—Effect of—Retrospective operation—Adjudication of father of joint family—Transfer of property by Receiver before enactment of section—Transferee obtaining decree for possession—Section coming into force during pendency of appeal.

S. 28-A of the Provincial Insolvency Act, which was added by Act X X V of 1948 which came into force on the 12th April, 1948, brings the Provincial Insolvency Act into line with the corresponding provision of the Presidency Towns Insolvency Act. The effect of the section therefore, is that on an adjudication in insolvency the power of the father to sell the son's interest for payment of his debts which are not incurred for immoral or illegal purposes vests in the Official Receiver. The section as enacted gives it retrospective operation and applies to all transfers which may have been effected by the Receiver on an adjudication of the father or the managing member of a joint Mitakshara Hindu family under the Provincial Insolvency Act. The fact that the transferee had already obtained a decree for possession and the section was enacted during the pendency of an appeal from that decree, does not affect the applicability of the section which is expressly made retrospective. 54 C. W. N. 651=A.I.R. 195 Cal. 210.

——S. 28-A—Retrospective operation and effect—Sale by Receiver before introduction of new S. 28-A—Demand to include shares of sons of Hindu insolvents.

The effect of the insertion of S. 28-A in the Provincial Insolvency Act by Act X X V of 1948, is to alter the law laid down by (1942) 2 M.L.J. 457; I.L.R. (1943) Mad. 83 (F.B.) and the provision is retrospective in operation. Accordingly the Official Receiver must be deemed to have been vested with also the powers of the insolvent fathers to sell, their sons' shares for the family debts, and the sale by the Official Receiver must be held to have been made in exercise of that power. The purchaser from the Official Receiver would therefore be entitled to the shares of the insolvents including that of his sons and entitled to redeem the mortgage to that extent. I. L. R. (1949) Mad. 904=62 L.W. 212=A.I.R. 1949 Mad. 886= (1949) 1 M.L.J. 249.

——S. 29—Applicability.

Leave to continue the suit filed after order of adjudication without leave of the Insolvency Court cannot be granted subsequently under S. 29, as it applies to suits which are already pending when the order of adjudication is made. A.I.R. 1937 Mad. 667 = 45 L.W. 709 = (1937) 2 M.L.J. 223 = I.L.R. (1937) Mad. 841 = 1937 M.W.N. 654 = 173 Ind. Cas. 285.

——S. 29—Dismissal of suit—Legality of.

Defendant was adjudicated insolvent on the 24th of April, 1922. The plaintiff filed his suit on the 19th of June, 1922, in ignorance of that order of adjudication. Defendant mentioned his insolvency at a very late stage when practically all the witnesses had been examined: the Court thereupon dismissed the suit holding that under the insolvency law no proceeding against an insolvent can be started or continued without the permission of the Insolvency Court.

Held, that the order dismissing the plaintiff's suit on the ground that it was barred by any provision of the Provincial Insolvency Act was wrong and must be set aside. 79 Ind. Cas. 662 = 21 N.L.R. 9 = A.I.R. 1924 Nag. 300.

——S. 29—Effect of stay.

The presumption from the word "stay" is that the suit stayed is not at an end, but may be continued until a further order is passed and as all orders in suit must be made after hearing parties, a Court cannot make a final order until it has heard objections, even where the creditor, whose suit is stayed, has not made an application the Court would have to consider his request to continue the suit. 120 Ind. Cas. 84 = A.I.R. 1929 Sind 204.

——S. 29—Proper procedure.

Party to suit adjudged insolvent—Court should ask other party to bring Official Receiver on record, and if latter is unwilling to join, Court may go on with suit on any terms it may impose—Omission to do this does not vitiate judgment on merits. 97 Ind. Cas. 765 = 24 M.L.W. 387 = 1925 M.W.N. 739 = A.I.R. 1926 Mad. 1145.

——S. 29—Scope.

Section 29 which immediately follows S. 28, must refer to the same term as S. 28, that is to say, proceedings subsequent to an order of adjudication. Section 29 which must be read with S. 28 can only refer to proceedings which are pending at the time of adjudication, that is, instituted before the order of adjudication or else simultaneously with it. A.I.R. 1940 Rang. 239 = 1940 Rang. L.R. 544 = 191 Ind. Cas. 690.

——S. 29—Scope of enquiry.

It is not for the Court to calculate the value of the assets and liabilities and hold an enquiry as to whether the assets are sufficient to discharge the debts or to determine whether the debts are fictitious. (1931) 132 Ind. Cas. 11 = 31 P.L.R. 1016.

——S. 29—Staying or continuing execution proceedings.

The adjudication of a person as insolvent vests the property of the insolvent either in the Receiver or in the Court and deprives him of any saleable interest in it, and the Court has no jurisdiction to sell the property, and no question of continuing the execution proceedings under S. 29 can arise, and in the absence of notice under O. 21, R. 22, Civil P. C., execution proceedings are a nullity against the Insolvency Court. A.I.R. 1933 Nag. 28 = 28 N.L.R. 317 = 140 Ind. Cas. 835.

——S. 29—Suit for maintenance.

Suit for maintenance praying for charges on defendant's properties—Defendant adjudged insolvent during suit—Decree can be passed making maintenance a charge on defendant's estate. 99 Ind. Cas. 564 = A.I.R. 1927 Mad. 403.

——Ss. 30, 28 and 54—Order of adjudication under—Privy Council decision in 208 Ind. Cas. 351, if applies.

The decision of the Privy Council in **Mahomed Siddique Yousuf** *v.* **Official Assignee of Calcutta,** (208 Ind. Cas. 351) which follows the decision in **Ex parte Learoyd** [(1878) 10 Ch. D. 3], applies to orders of adjudication under the Presi. Towns Insol. Act alone and cannot be applied to orders of adjudcation under the Prov. Insol. Act as the relevant provisions of the two Acts, namely, Ss. 116, 51 and 53 of the Presi. Towns Insol. Act and Ss. 30, 28 (7) and 54 of the Prov. Insol. Act are different. A.I.R. 1945 Mad. 66 = 58 L.W. 5 = (1945) 1 M.L.J. 17 = 1945 M.W.N. 137 = I.L.R. (1945) Mad. 541 = 218 Ind. Cas. 240 (F.B.).

——S. 30—Failure of publication of order of adjudication—Effect.

Neither the validity of the order of adjudication nor of the proceedings subsequent to it, depend on the publication of the notice of the order of adjudication in the local official **Gazette.** The object of the publication is to provide conclusive evidence in all legal proceedings of an order of adjudication having been duly made and its date. Want of notice is a mere irregularity and cannot vitiate the proceedings. A.I.R. 1939 Nag. 103 = 1939 N.L.J. 93 = I.L.R. (1939) Nag. 478 = 182 Ind. Cas. 214.

——S. 31—Applicability—Arrest for arrears of revenue.

Though S. 31 applies to debts due to the Crown, nevertheless in view of the fact that even an order of discharge does not release the insolvent from such debts, it would be impnoper for the Insolvency Court, which under S. 31 has a discretion, to make a protection order which would apply to such debts. A person under arrest by order under S. 45, Burma Land Revenue Act, but illegally released by an Insolvency Court, gets no advantage of protection order. 109 Ind. Cas. 145 = 5 Rang. 806 = A.I.R. 1928 Rang. 81.

——S. 31—Automatic protection.

Adjudication does not automatically operate as a protection against execution upon the person of the insolvent. The insolvent is compelled to apply to the Court to grant him the privilege of protection against arrest.

(Protection order, when should be granted, indicated.) A.I.R. 1935 Rang. 415 = 13 Rang. 623 = 159 Ind. Cas. 936.

——S. 31—Discretion.

Under S. 31 which provides for an insolvent applying for a protection order to the Insolvency Court, a discretion is granted to the Court either to make a protection order, or make a limited order or not to make a protection order at all. It is not a matter of right for a judgment-debtor to apply in insolvency and be **ipso facto** absolved from liability to arrest. A.I.R. 1932 All. 188 = 1932 A.L.J. 168 = 54 A. 416 = 34 Cr.L.J. 18 (2) = 140 Ind. Cas. 150 (2).

——S. 31—Discretion.

The protection order is a privilege to be granted or withheld as the Court, in its discretion, may determine and in exercising that discretion it is relevant and proper for the Court to have regard to the character and circumstances of the insolvent. 118 Ind. Cas. 791 = 31 Bom. L.R. 206 = A.I.R. 1929 Bom. 135.

——S. 31—Effect.

Held, that the effect of a protection order is to render the insolvent immune from arrest or detention on account of the debts mentioned in the schedule of debts. 31 P.L.R. 456 (2) = A.I.R. 1930 Lah. 1070.

——S. 31—Interim protection.

Where pending an application for adjudicatioen a warrant for arrest of the alleged insolvent was issud, in execution of a money decree but actual arrest was not effected and he applied to the Insolvency Court for an order of protection :

Held, that the Court had no power to pass an **ad interim** protection order. A.I.R. 1934 Lah. 113 = 148 Ind. Cas. 975.

——S. 31—Interim protection.

Application for arrest of the applicant by another decree-holder :

Held, that the protection orders could be granted only after adjudication and under the circumstances, the executing Court should have given the benefit of O. 21, R. 40, Civil P. C., to the judgment-debtor. A.I.R. 1931 Lah. 121 = 32 P.L.R. 311 = 131 Ind. Cas. 208.

——S. 31—Interim protection.

There is no provision in the Provincial Insolvency Act in respect of orders to prevent the arrest of a petitioner pending the hearing of a petition for insolvency. Refusal to grant protection in exercise of inherent power is not revisable. 96 Ind. Cas. 131 = 30 C.W.N. 834 = A.I.R. 1926 Cal. 1011.

——S. 31—Interim protection.

An insolvent is not entitled to apply for protection before adjudication unless he has been actually arrested in execution of a decree. 80 Ind. Cas. 938 = 20 M.L.W. 870 = 1924 M.W.N. 836 = A.I.R. 1924 Mad. 893 = 47 M.L.J. 530.

——S. 31—Interpretation—"Arrest or detention"—Whether include arrest or detention under sentence of imprisonment of Criminal Court.

The term "arrest or detention" used in S. 31 does not include arrest in execution of a Criminal Court process or detention under a sentence of imprisonment passed by a Criminal Court. Arrest or detention must mean arrest or detention in pursuance of an order of a Civil Court passed in execution of a decree of such Court. A.I.R. 1938 All. 253 = 1938 A.L.J. 225 = 39 Cr.L.J. 553 = I.L.R. (1938) All. 486 = 1938 A.W.R. 157 = 175 Ind. Cas. 235.

——S. 31—Liability to arrest—Refusal of protection to insolvent against all his debts—Appeal—Impleading of only three creditors—Grant of protection in appeal—Creditors other than the three—Whether can execute their decrees against insolvent.

An insolvent applied to the Insolvency Court for a protection order. Though only three creditors contested it, the Court refused protection as regards all his debts. In an appeal impleading the three creditors, he obtained a protection order. Subsequently, a creditor other than the three who contested, took out execution praying for the arrest of the insolvent :

Held, that the order of the Insolvency Court of Appeal, though general in its terms, was effective only so far that it set aside the order of the Court of first instance as regards the three creditors who had been impleaded as respondents, that as regards the other creditors, the order of the Court of first instance became final and that consequently, the appellant was entitled to apply for the insolvent's arrest. A.I.R. 1932 All. 385 = 1932 A.L.J. 407 = 138 Ind. Cas. 267.

——S. 31—Liability to arrest.

A person who was adjudicated insolvent under the Provincial Insolvency Act of 1907 and has not been discharged is not liable to arrest in execution of a decree in accordance with the provisions of the Act of 1920 even if he does not take out a protection order. 72 Ind. Cas. 911 = A.I.R. 1923 Oudh 36.

——S. 31—Limitation.

No doubt the period from the date of the adjudication to the date of annulment cannot be excluded under S. 78 in case of an execution of a decree unless the debt to which the decree related was proved in insolvency. Where, however, the application for execution is directed against the person of the judgment-debtor and not against his property movable or immovable the decree-holder will, if he applies promptly after the cessation of the protection order, be entitled to the exclusion of the period during which the protection order was in force. 126 Ind. Cas. 16 = A.I.R. 1930 All. 580.

——S. 31—Protection order, when to be passed—Previous refusal of protection—Whether bars subsequent protection order—Indebtedness, if a ground for refusing protection order.

A previous order refusing protection to an insolvent is not a bar to a protection order being made at a subsequent stage. Lapse of time and the fact that no misconduct can be attributed to the insolvent in the meantime are circumstances which may justify a Court in granting an order of protection which has been previously refused. Section 31 is so worded as to confer a wide discretionary power on the Insolvency Court. The discretion is not to be exercised arbitrarily but with due regard to the circumstances of each case.

If a debtor has been adjudged insolvent, has placed all his assets at the disposal of the Insolvency Court without concealing any material facts relating to his pecuniary position and has not been guilty of any fraud or dishonesty in relation to his creditors or his estate, an order of protection should ordinarily be granted. Refusal to grant protection in spite of the insolvent having done all he could be expected to do, may lead to grave abuses. Unless some misconduct or want of good faith can be imputed to an insolvent, a protection order should not be refused on vague and general assumptions. A.I.R. 1933 All. 591 = 1933 A.L.J 1051 = 146 Ind. Cas. 819.

——S. 31—Surety of Insolvent judgment-debtor.

The fact that the judgment-debtor had got a protection order does not absolve the surety of his duty to produce the judgment-debtor on the adjourned date. 97 Ind. Cas. 413 = 24 M.L.W. 480 = 1926 M.W.N. 612 = A.I.R. 1926 Mad. 958.

——S. 33—

Synopsis.

1. Debt incapable of being estimated.
2. Enquiry into debts.
3. Framing of schedule.
4. Interpretation.
5. Limitation for proving debts.
6. Non-scheduled creditor.
7. Provable debt.
8. Receiver, when a proper party.
9. Scope.
10. Who may prove debt.
11. Miscellaneous.

1. Debt incapable of being estimated.

——Ss. 33, 34 and 44—Debt incapable of being estimated—A purchasing shares of Company and making certain payment on allotment and call—Insolvency of A and unconditional discharge—Company going in liquidation—Balance of money due upon shares, held could not be recovered in liquidation—whether debt can be fairly estimated or not can be decided by Insolvency Court alone.

It is for the Insolvency Court alone to decide whether the debt can be fairly estimated or not and to make an order accordingly. The High Court has no jurisdiction to decide whether the debt can be fairly estimated or not.

One **R** purchased ten shares of Rs. 100 each in the company in liquidation. He paid Rs. 200 on allotment. Later the company, before the order for compulsory liquidation, made a call of Rs. 300 on these shares. **R** was adjudged insolvent and was unconditionally discharged. In the insolvency, he included these shares in Schedule B. The company was wound up compulsorily. **R's** name at the time of the liquidation was still upon the register of the members of the company and the Official Liquidator placed his name upon the list of contributories;

Held, that the possibility of a call being made by the company, when it was in existence, upon the uncalled balance of the share money due upon the shares was certainly a contingent liability. The debt of Rs. 500 on the shares was provable in the insolvency and therefore the liability therefor disappeared when the order of discharge was made. A.I.R. 1940 Lah. 304 = I.L.R. (1940) Lah. 458 = 42 P.L.R. 754 = 190 Ind. Cas. 211.

——S. 33—Debt incapable of being estimated—Deferred dower.

Deferred dower debt is incapable of being fairly estimated, and, therefore, should not be entered in the schedule of creditors. 123 Ind. Cas. 754 = 1930 A.L.J. 1038 = A.I.R. 1930 All. 580.

——Ss. 33, 50 and 44—(1907) Ss. 24, 26 and 45—Debts not capable of estimation—Undetermined liability—Deferred dower—Conditional discharge.

It is unfair to suspend the discharge of an insolvent on account of an undetermined liability which might never arise and the court is not competent to make it a condition of the discharge that the insolvent should furnish security for the amount of this liability. The amount of a deferred dower should not have been entered in the Schedule having regard to S. 24 proviso. 21 P.L.R. 1919 = 50 Ind. Cas. 774.

2. Enquiry into debts.

——S. 33—Enquiry into debt—Presumption about receipt of consideration—If available against Official Receiver or creditor in insolvency.

It is a settled rule of the Court of bankruptcy, that it can enquire into the consideration for a judgment debt, the object of the rule being to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relations without any debt being due on them at all. It is, therefore, necessary that the consideration of the judgment should be liable to investigation. It therefore follows that a presumption of receipt of full consideration, arising from a debtor's signature on a promissory note, can only be invoked against the debtor personally but not against the Official Receiver or a creditor in insolvency proceedings: A.I.R. 1927 All. 426, Foll. 108 Ind. Cas. 147 = 26 A.L.J. 241 = A.I.R. 1928 All. 380.

——S. 33—Enquiry into debts—Admission of debt by Insolvent co-parcener—Court must enquire as to genuineness of debts.

Although a Hindu insolvent governed by the law of the Mitakshara has admitted a certain debt to be a good debt, his sons can attack a decree as benami on their own behalf as co-parceners with their father, and it is the duty of the Insolvency Court under S. 33 to adjudicate as to whether the debt is, as a matter of fact, a good debt or not. 95 Ind. Cas. 463 = A.I.R. 1926 Cal. 982.

——S. 33—Enquiry into debts—Rights of representatives of Insolvent.

Representatives of Insolvent should be permitted to cross-examine claimants and witnesses, and give rebutting evidence. 48 Cal. 87 = A.I.R. 1921 Cal. 219.

——S. 33 (3)-(1907) S. 24 (3)—Enquiry into debts—Application by a creditor—Rights of other creditors.

When an application is made by a creditor of an insolvent debtor to be included in the schedule of

creditors, the other creditors have a right to be heard against the application. 34 All. 442 = 9 A.L.J. 577 = 14 Ind. Cas. 589.

3. Framing of schedule.

——S. 33—Framing of schedule—Scope—Duty of Court—Creditor tendering proof of debt—Omission to frame schedule—Creditor if to be penalised.

S. 33 of the Provincial Insolvency Act, lays on the court the responsibility for determining who are the creditors and for framing a schedule showing the amount of the debts. When proofs are tendered to the Receiver, who is an officer of the Court, it is his duty to place them before the court for necessary action. If a creditor tenders proof, he has done his duty and he cannot be penalised for the failure of the Court to perform the duty imposed upon it by S. 33, namely, the framing of a schedule. 25 Pat. 447 = 12 Cut. L.T. 53 = 13 B.R. 479 = 231 Ind. Cas. 14 = A.I.R. 1947 Pat. 161.

——S. 33—Framing of schedule—Scope—Court's omission to frame schedule—Proof of debts tendered by creditor—Creditor should not be penalised.

Section 33 lays on the Court, the responsibility for determining who are the creditors and for framing a schedule showing the amount of the debts. Receiver's duty is to place the proofs tendered to him before the Court. The creditor, having tendered the proof as required by law, cannot be penalised for the failure of the Court to perform the duty imposed upon it by S. 33. (1946) 12 Cut. L.T. 53.

——Ss. 33, 49 and 64—Framing of schedule—Creditor filing affidavit in time specifying amount and particulars of decretal debt—Affidavit returned for representation along with copy of decree—Affidavit represented along with copy of decree when final dividend was declared and distributed among creditors—Creditors' name omitted from schedule of creditors—Application by creditor for including his name in schedule—Held creditor must be deemed to have proved his debt and was entitled to dividend—Court can order redistribution after calling back the amount distributed.

A creditor filed in time an affidavit before the Official Receiver in respect of the insolvency matter in proof of a debt due to him under a decree passed in his favour but did not send along with it a copy of the decree. The affidavit was returned for representation with the copy of the decree which was done six months later. In the meantime the Official Receiver had declared a dividend excluding this creditor's debt and the same was approved by the Court and dividend was paid. The creditor now applied to the Court under Ss. 5 and 33, Provincial Insolvency Act and other sections of the Civil Procedure Code for including his debt and for paying a dividend to him but the application was dismissed on the ground that the creditor was guilty of negligence in not filing the copy of decree in time before the preparation of the schedule and payment of dividend to the creditors were ordered :

Held, that the creditor in this case having filed an affidavit verifying the debt and giving particulars of the amount due must be deemed to have proved his debt within the meaning of S. 49 of the Act and therefore he was entitled to the dividend under S. 64 of the Act :

Held, further that the Insolvency Court had ample powers to direct the creditors who had received their dividends to bring back the amount received by them and pass an order re-distributing the amount after including the creditor's claim. A.I.R. 1946 Mad. 500 = 59 L.W. 317 = 1946 M.W.N. 425 = (1946) 2 M.L.J. 105 = 227 Ind. Cas. 258.

——Ss. 33 and 47—Framing of schedule—Right of insolvent to have a person scheduled as creditor against his wishes—Charge-holder under S. 58-A, C. P. Tenancy Act.

The landlord holding a decree for arrears of rent of occupancy-holding is a charge-holder under S. 58-A, C. P. Tenancy Act. If he is not prepared to give up his charge, he cannot be placed as a creditor in schedule. The insolvent is not entitled to have a particular person scheduled as a creditor when that person does not desire that he should be scheduled and more so when he gives cogent reasons for not desiring to be scheduled. A.I.R. 1946 Nag. 119 = 1945 N.L.J. 507 = I.L.R. (1946) Nag. 39.

——S. 33—Framing of schedule—Court's power to dispense with formal proof.

Under S. 33, it is obligatory on a creditor to tender proof of his debt and if he omits to do so, the Court may ignore him till he takes steps to comply with the provisions of the Act to get his debt admitted in the schedule. But there is nothing to prevent the Court from admitting the debt relying on the admission of the insolvent in his petition or on any other evidence before it and entering his name in the schedule. Formal proof may be dispensed with if the Court is of opinion that the debt has been otherwise sufficiently established. A.I.R. 1942 Mad. 474 = 1942 M.W.N. 202 = (1942) 1 M.L.J. 511 = 202 Ind. Cas. 565.

——S. 33—Framing of schedule—Creditor's name and debt entered in schedule—Composition binding on creditor.

If in the schedule framed under S. 33, a creditor's name is entered in the said schedule, it will be binding on him so far as his debt is concerned. What is required under the section is that there must be an entry of the name of the creditor and the debt due to him in the said schedule. A.I.R. 1942 Mad. 474 = 1942 M.W.N. 202 = (1942) 1 M.L.J. 511 = 202 Ind. Cas. 565.

——S. 33—Framing of schedule—Adjudication of insolvent at the instance of creditor—Creditor's duty to prove claim before Official Receiver—Duty of Official Receiver.

Where an insolvent is adjudicated at the instance of a creditor, it is incumbent upon him to prove his claim before the Official Receiver and on such proof being lodged, it is equally incumbent on the Official Receiver to examine the proof filed before him and reject it if he comes to the conclusion that the claim is not proved. A.I.R. 1933 Sind 313 = 146 Ind. Cas. 221 (2).

——S. 33—Framing of schedule.

Before entering in or deleting from schedule names of creditors, Court is bound to come to a judicial

finding after considering any cause shown against so doing. 90 Ind. Cas. 802 = A.I.R. 1926 Cal. 160.

——S. 33—Framing of schedule—Duty of.

The framing of the schedule is the duty of the Court, not of the Receiver. Though a report from the Receiver may in some cases assist the Court, it is for the Court to decide on each claim on evidence, and in case of contest after hearing necessary parties. 61 Ind. Cas. 904 = 25 C.W.N. 137 = A.I.R. 1921 Cal. 376.

4. Interpretation.

——S. 33—Interpretation—Order, held amounted neither to acceptance nor rejection of debt—Order, held not appealable.

An order that the creditors is "suspended" from the schedule along with two others on the allegation of the Receiver that the debts are not fully binding on him and the creditors must, therefore, prove how they got their decrees, does not mean that the creditor's claims were either finally rejected or that he was finally excluded from the schedule in the insolvency proceedings. The word "suspended" used in the order can have no special significance, and imports that no decision to accept or reject the proof has been come to—in other words, that the Court has not yet discharged its duty to frame the schedule referred to in S. 33 of the Act. Such an order is not one which can be taken in appeal. A.I.R. 1943 P.C. 98 = 47 C.W.N. 715 = (1943) 2 M.L.J. 121 = 56 L.W. 444 = 1943 A.L.J. 323 (2) = 10 B.R. 49 = 1943 A.W.R. 11 = 1943 M.W.N. 565 = 1943 N.L.J. 587 = I.L.R. (1943) Nag. 669 = 46 Bom. L.R. 306 = 70 I.A. 83 = I.L.R. (1943) Kar. (P.C.) 169 Sup. = 208 Ind. Cas. 102 (P.C.).

——S. 33—'Any creditor may, etc.'—Interpretation of.

The words "any creditor may, at any time before the discharge of the insolvent, tender proof of his debt" are not restrictive but merely directory and non-compliance with them does not in any way deprive any creditor of his right or limit his right. 75 Ind. Cas. 572 = 18 M.L.W. 636 = 1923 M.W.N. 895 = 47 Mad. 120 = A.I.R. 1924 Mad. 163 = 45 M.L.J. 166.

——S. 33—(1907) S. 24—Interpretation—Voluntary payment—Test.

'Voluntary payment' is one made spontaneously by a person of his own accord and not (1) under a pressure of demand by creditors or (2) special agreement or (3) a possible danger of prosecution. A payment made in the ordinary course of business is not voluntary. 35 Mad. 712 = 10 M.L.T. 124 = 21 M.L.J. 920 = 11 Ind. Cas. 769.

5. Limitation for proving debts.

——S. 33 (1) and (3)—Limitation for proving debt—Proof of debt—Requirements—Discharge when decision as to proof of debt is pending—Creditor, if affected.

The provisions of S. 33 (1) of the Provincial Insolvency Act are mandatory, and proof of debt should be tendered within a reasonable time though the time is not specified therein. S. 33 (3) softens the rigour of sub-S. (1) of S. 33 and provides that any creditor, who has been unable to prove his debt under S. 33 (1), may at any time before discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule of creditors. Therefore, if a creditor has tendered proof of his debt and the matter is under investigation and a discharge is made either by mistake or otherwise, that will not take away the right of the creditor to be put on the schedule and share in the dividends, provided there is money available in the hands of the receiver. I.L.R. (1949) A. 686 = 1949 A.L.J. 329 = A.I.R. 1949 A. 645 = 1949 A.W.R. 422.

——S. 33 (3)—Limitation for proving debts—'Discharge', what is—Debt can be proved at any time before final discharge.

The discharge mentioned in S. 33 (3) is the final discharge and not a conditional order of discharge. A creditor is entitled under the law to prove his debt at any time so long as there were assets available for distribution, so as not to disturb the distribution of any dividend already declared. Order rejecting application of a creditor for inclusion of his name as a creditor on the ground of delay is not proper if his name was not included in the list of creditors and no opportunity was given him to explain the delay. A.I.R. 1936 Cal. 807 = 41 C.W.N. 221 = 167 Ind. Cas. 277.

——S. 33 (3)—Limitation for proving debt—Proof after final discharge.

Section 33 (3) prevents a creditor from proving his debt after the insolvent has been given a final discharge. A.I.R. 1936 Rang. 393 = 14 Rang. 529 = 164 Ind. Cas. 1061.

——S. 33—Limitation for proving debt.

The provisions of sub-S. (3) of S. 33, are directory and the creditor can come on the schedule of creditors as long as there are any assets available for distribution amongst the creditors and till the final dividends are distributed and till the administration is complete. A.I.R. 1936 Cal. 434 (436) = 9 R.C. 611 = I.L.R. (1937) 1 Cal. 127 = 166 Ind. Cas. 886.

——S. 33—Limitation for proving debt.

No period of limitation has been prescribed in the Provincial Insolvency Act for applications by creditors to be brought on to the schedule of creditors. The matter was intended to be left to the discretion of the insolvency Court. 104 Ind. Cas. 816 = 5 Rang. 384 = A.I.R. 1927 Rang. 263.

——S. 33—Limitation for proving debt.

Creditor not proving debts for five years—No explanation given—Debt time barred—Application should not be allowed. 104 Ind. Cas. 816 = 5 Rang. 384 = A.I.R. 1927 Rang. 263.

——S. 33—Limitation for proving debt.

A debt which is not barred at the commencement of the insolvency does not become barred by lapse of time for the purpose of insolvency. A.I.R. 1924 Mad. 163; Foll. 98 Ind. Cas. 74 = 2 Luck. 261 = 3 O.W.N. 793 = A.I.R. 1926 Oudh 621.

——S. 33—(1907) S. 24—Limitation for proving debts—Inherent power—Application made after

insolvency proceedings closed—No jurisdiction to entertain.

An insolvency Court has the same inherent power as ordinary Court to correct clerical mistakes, etc. Where a creditor in insolvency proceedings has exhausted all the remedies open to him for rectifying an error in the statement of the debt due to him, the insolvency Court becomes **functus officio** and has no jurisdiction to entertain an application under S. 24 of the Act. 1 U.P.L.R. (H.C.) 69 = 51 Ind. Cas. 55.

6. Non-scheduled creditor.

——S. 33—Non-Scheduled creditor—Rights of —Creditor whose debt is not entered in schedule is not bound by composition—His remedy lies elsewhere.

Where the creditors of an insolvent agree to a composition and one of the creditors who had a decree against the insolvent does not prove his debt in insolvency and is not a party to the composition proceedings, after the annulment of the order of adjudication, he can, under S. 33, pursue his remedy by execution of his decree by arresting the judgment-debtor.

(But in the circumstances of the case, the arrest of the judgment-debtor was refused by the Revision Court also.) A.I.R. 1935 Mad. 602 = 1935 M.W.N. 380 = 42 L.W. 399 = 159 Ind. Cas. 689.

——S. 33—Non-Scheduled Creditor—Rights of.

The fact that a claim of the creditor was not entered in the schedule of creditors would not preclude him from enforcing his claim against the insolvent even after the discharge. 16 Cal. 592, Foll. 76 Ind. Cas. 250 = 17 S.L.R. 300 = A.I.R. 1924 Sind. 122.

——Ss. 33, 44 (2)—(1907) Ss. 24 and 45 (2)—Non-Scheduled creditor—Rights of.

Under the Act a creditor can deprive an insolvent of the remedies intended to be provided to him by the simple expedient of refraining from proving the claim and of thus excluding it from the schedule framed by the Court. 6 S.L.R. 163 = 19 Ind. Cas. 387.

7. Provable debt.

——S. 33—Provable debt—Creditors' right to benefit of contracts.

In insolvency proceedings, creditors cannot claim benefits under a contract which would not be available to them in action by suit. A.I.R. 1943 Sind 190 = I.L.R. (1943) Kar. 238 = 210 Ind. Cas. 25 (D.B.).

——S. 33—Provable debts—Money advanced in respect of fraudulent transfers.

Money advanced in respect of transfers set aside by the Court as fraudulent transfers cannot be allowed to be proved as a debt, as it was advanced for the purpose of carrying out the fraud. A.I.R. 1939 Lah. 145 = 41 P.L.R. 575.

——Ss. 33, 49, 50—(1907) Ss. 24, 25 and 26—Provable debt—Claims on forward contracts.

Claims on forward contracts are demands, in the nature of unliquidated damages arising out of contract, They are contingent debts capable of being fairly estimated and can be proved under the Insolv. Act before the due dates for the performance of the contracts have arrived. Where different creditors file affidavits before the Official Receiver in proof of such debts it is his duty to inquire into the matter and to determine a uniform rate for the purpose of making a fair estimate or valuation, of these debts. The creditors' affidavits should not be accepted without question, as the affidavits can only disclose the chance of liability and are nothing but the creditors' estimate and no part of the proof of such a debt. 5 S.L.R. 249 = 15 Ind. Cas. 825.

8. Receiver, when a proper party.

——Ss. 33 and 50 (2)—Receiver, when a proper party—Receiver, if a proper party in matters between creditors and third parties—Dispute amongst creditors themselves—Receiver, whether a proper party—Schedule under S. 33—Amendment of schedule sought by one creditor—Receiver, if a necessary party.

The Receiver is a proper party in regard to any matter arising between the creditors and third parties. In such cases the Receiver does, without doubt, properly represent the whole body of creditors: but this proposition is clearly inapplicable to a case of a dispute among the creditors themselves, where the interests of some of the creditors are adverse to the interests of others. In such matters, the Receiver is not a proper party, but the creditors concerned are the proper parties. Consequently, if any creditor wishes to have any amendment made of the schedule as framed by the Court under S. 33, he must, of course, cause notice to issue to all the other creditors who would thereby be affected, and their objections must be heard before any alteration or amendment of the schedule can be ordered by the Court and the Receiver is not a necessary party in an application or appeal in this connection. A.I.R. 1934 Rang. 112 = 150 Ind. Cas. 960.

9. Scope.

——Ss. 33 (1) and 78 (2)—Scope—Proof of debts, whether obligatory—Proof, what is.

The provisions of S. 33 (1) make proof of debts obligatory, after the passing of an order of adjudication upon creditors who desire to have their claims considered. The modes of proof mentioned in S. 49 are, of course, not exhaustive, but the fact remains that some form of proof must be supplied by a creditor who wishes to have his debt considered, and a mere admission of the debt due on the bond by the debtor in his petition for adjudication does not amount to proof under the Insolvency Act and therefore, does not save limitation under S. 78 (2). A.I.R. 1938 Oudh 8 = 1937 O.W.N. 1143 = 171 Ind. Cas. 609.

——S. 33—Scope—Policy of Insolvency Acts—Presidency Towns Insolvency Act (III of 1909), S. 30 compared.

The policy of the Insol. Acts is that when a person is indebted, all his debts should be dealt with in the insolvency. It does not seem to be right that a creditor who has got a debt which is provable in insolvency should stand aside when all the other creditors or most of them have their debts dealt with by the Insolvancy Court and refuse to come in or take

any notice of a composition scheme and then, as soon as the adjudication is annulled, proceed once more to harass the insolvent. Of the two Acts (Presi. Towns Insol. Act and Provincial Insolvancy Act), the Presi-Towns Insol. Act carries out the policy of the Insolvency Acts more correctly, because the plain meaning of the words in S. 30, Presi. Towns Insol. Act is that if any composition creditor has a debt which he could prove in insolvency and does not do so, he is nevertheless bound by that composition. But if the words of S. 33, Provi. Insol. Act are strictly followed, a creditor whose debt is not entered in the schedule is not bound by the composition and can have a remedy elsewhere against the insolvent.

(Amendment of Prov. Insol. Act and the necessity of bringing it in conformity with S. 30, Presi. Towns Insol. Act, suggested.) A.I.R. 1935 Mad. 602 = 1935 M.W.N. 380 = 42 L.W. 399 = 159 Ind. Cas. 689.

——Ss. 33 and 78—Scope—Proof of debt necessary for purposes of exemption under S. 78.

In order that a creditor may be entitled to exemption of the period between the order of adjudication and the order of annulment, under S. 78 (2), it is necessary that the debt must have been proved under the Act, that is to say, there must have been either a formal order proving the debt or any proceedings which, by necessary implication, are tantamount to such an order. A.I.R. 1932 Lah. 173 = 32 P.L.R. 905 = 135 Ind. Cas. 194.

10. Who may prove debts.

——S. 33—Who may prove debts.

Transferees whose transfers have been set aside under S. 53 as being without valuable consideration, cannot prove their debts before the Official Receiver as unsecured creditors as regards the unproved consideration. A.I.R. 1939 Lah. 145 = 41 P.L.R. 575.

——Ss. 33, 64 and 74—Who may prove debts—Summary administration of insolvency—Procedure—Transfer to Official Receiver for disposal—Creditor's right to prove debts.

Where the Judge when admitting insolvency petition, orders summary administration under S. 74, a creditor may come at any time before the Court before any dividend has been distributed and prove his claim for a share.

In case of summary administration it is for the Judge to inquire into the debts and assets and to determine the same by order in writing and to distribute the property in a single dividend and he cannot transfer the petition to an Official Receiver for disposal. If, however, he does so, the creditor is nevertheless competent to apply for proving his debt. 1937 M.W.N. 1160.

——S. 33—Who may prove debts.

A partner in a firm against which a commission of bankruptcy issues shall not prove in competition with the creditors of the firms, who are in fact his own creditors, and shall not take part of the fund to the prejudice of those who are not only creditors of the partnership but of himself, but it is essential for application of this rule that there should be some creditors proving under the bankruptcy for a debt or debts in respect of which the present or former partners, whose proof is excluded, and the bankrupt, were jointly liable.

Where the debts that led to the insolvency proceedings against the sole proprietor of a firm were debts incurred before his brother became a partner, who, however, subsequently retired, leaving the insolvent a sole proprietor by S. 31 (2) of the Partnership Act, he, by becoming a partner, does not thereby become liable for those debts and he should be allowed to prove his debt against the insolvent firm if he is not defeating his own creditors. But the brother must show what debt, if any, was due to him from the firm when he retired. A.I.R. 1937 Nag. 410 = 20 N.L.J. 196 = I.L.R. (1940) Nag. 242 = 174 Ind. Cas. 19.

——S. 33—Who may prove debts—A drawing money from bank by deposit of title deeds—B paying money to bank and taking back title deeds—Adjudication of A as insolvent—B, if can be subrogated to the bank.

A, by depositing certain title deeds, secured Rs. 10,000 from a bank. An arrangement was entered into between **A** and **B** by which **B** advanced to **A** the sum of Rs. 35,000 of which Rs. 10,000 were paid to the bank and the title deeds taken back. **A** was adjudicated insolvent and the Official Receiver took possession of his property. **B** put forward a claim, **inter alia,** that **qua** the sum of Rs. 10,000, he was in equity entitled to be subrogated to the bank:

Held, that it was clearly the intention of the parties that out of the Rs. 35,000 advanced by **B**, the debt due to the bank was to be liquidated and that the payment to the bank must be deemed to have been made by **B** and hence he was entitled to be subrogated to the bank. A.I.R. 1933 Lah. 416 = 34 P.L.R. 477 = 146 Ind. Cas. 239.

——S. 33—Who may prove debts—Assignee of creditor.

Assignee of debt due by insolvent is entitled to be placed on schedule of creditors irrespective of whether there is consideration for assignment or not. 119 Ind. Cas. 496 = A.I.R. 1930 Lah. 235.

——S. 33—Who may prove debts.

The words of the S. 33 (3) are sufficiently wide to include a person who has already proved one or more debts, but wishes to prove a further debt which for some reason or other he has omitted. 97 Ind. Cas. 1013 = 44 C.L.J. 108 = A.I.R. 1926 Cal. 1210.

11. Miscellaneous.

——S. 33—Miscellaneous—Application for adjudication—Case adjourned for framing schedule—Creditors not having proved debts, Court passing order 'File'—Application for discharge—Objection—Execution application—Insolvency proceedings, if alive on date of application—Held on facts, that proceedings had not terminated and order of lower Court based on misapprehension should be set aside.

L was adjudged an insolvent on his application, on 14th May 1931, the Court ordering that the framing of the schedule and the appointment of a Receiver

were to be considered on 15th June 1931. On this day, the creditors had not till then proved their debts and the order passed was 'File'. On 7th May 1932, an application for discharge was made and an objection by the respondent who was a creditor in the insolvency case was filed on 27th July 1932. On 28th July 1932, execution proceedings were initiated. On 17th December 1932, the appellants applied to be impleaded in the place of **L**, they being L's sons. This application was subsequently rejected.

Held, that simply because the word 'file' occurred in the order of 15th June 1931, it did not mean that the proceedings terminated; and it could not be said that because the substitution petition of the appellants was rejected the insolvency proceedings terminated. As the execution petition was filed before the death of **L** it could not be said that the insolvency proceedings had terminated on the date the execution proceedings were initiated; and the order of the Court being based on this misapprehension, it should be set aside. A.I.R. 1935 Pat. 480 = 1 B.R. 840 = 158 Ind. Cas. 18.

——S. 33—Miscellaneous—Conditional discharge.

On the 20th September, 1918, the lower Court granted the insolvent a conditional discharge, the condition being that he should, subject to his right to an allowance of Rs. 25 per month for maintenance of himself and his family, place at the disposal of the Court all property he might afterwards acquire.

Held, that the order did not amount to a discharge as contemplated in S. 24 (3). 75 Ind. Cas. 572 = 18 M.L.W. 636 = 1923 M.W.N. 895 = 47 Mad. 120 = A.I.R. 1924 Mad. 163 = 45 M.L.J. 166.

—— Ss. 33 and 49—(1907) Ss. 24 and 25—Miscellaneous—Composition before adjudication.

As according to the Act the composition should be approved by the majority in number and three-fourths in value of the creditors **whose debts are proved**, the court can approve only compositions after adjudication under Ss. 24, 25. 4 S.L.R. 222 = 9 Ind. Cas. 724.

——S. 33—Miscellaneous—Debt proved—Effect.

Once a debt has been proved, it does not cease to be a proved debt merely because the creditor states that he no longer wishes to be recorded as a scheduled creditor. (1936) 160 Ind. Cas. 663 = 18 N.L.J. 145.

——S. 33—(1907) S. 24—Miscellaneous—Schedule of creditors not prepared—Effect of.

No creditor of an insolvent can enforce his claim as a schedule creditor against the property acquired by the insolvent after discharge, unless a schedule of creditors has been prepared before discharge. 35 All. 462 = 11 A.L.J. 559 = 20 Ind. Cas. 316.

——S. 34—

Synopsis.

1. Applicability and scope.
2. Debt incurred after adjudication.
3. Doctrine of relation back.
4. Ignorance of decree-holder.
5. Interpretation.
6. Provable debt.
7. Miscellaneous.

1. Applicability and scope.

——S. 34 (1) and (2)—Applicability and scope—Debt provable in insolvency—Claim in respect of decree-debt payable by insolvent but paid by claimant.

The claim of a creditor tendering proof of his debt was made in respect of an amount which the creditor paid to discharge a decree which was passed against the claimant, the insolvent, and another. The petitioner claimed that though the decree ran against three persons it was only the insolvent that was really liable and that he, the petitioner, having paid the entire decree amount was entitled to recover the same from the insolvent. On a contention that the debt was not a provable debt:

Held, that assuming that the petitioner's claim was by way of contribution it did not fall within either category mentioned in sub-S. (1) of S. 34 of the Provincial Insolvency Act. It cannot be said that the value of the debt is incapable of being fairly estimated. It certainly is not a demand in the nature of unliquidated damages. The claim in contribution is not a claim in damages. The claim of the petitioner is not a debt which is not provable under the Act. 60 L.W. 103 = 1947 M.W.N. 122 = A.I.R. 1947 Mad. 338 = (1947) 1 M.L.J. 103.

——S. 34—Applicability and scope.

Section 34, Provincial Insolvency Act is governed by provisions of S. 28 (7) of the Act. A.I.R. 1939 Lah. 384 = I.L.R. (1940) Lah. 50 = 42 P.L.R. 367 = 184 Ind. Cas. 330 (F.B.).

——S. 34 (2)—Applicability and scope.

Society dissolved—Certain members adjudged insolvents—No liquidator appointed until after discharge of insolvents:

Held, that their liability as members was not provable under S. 34 (2) and the liquidator was not debarred from fixing the liability of the insolvents as members. A.I.R. 1939 Lah. 275 = 42 P.L.R. 260 = 183 Ind. Cas. 632.

——S. 34 (2)—Applicability and scope.

Section 34 (2), applies to all debts including judgment-debts and by S. 229, Companies Act, this provision is applicable to insolvent companies. A.I.R. 1935 Oudh 451 = 1935 O.W.N. 791 = 156 Ind. Cas. 708.

——S. 34—Applicability and scope.

Section 34, Provincial Insolvency Act is governed by S. 28, sub-S. (7). A.I.R. 1933 Lah. 688 = 34 P.L.R. 464 = 14 L. 730 = 143 Ind. Cas. 175.

2. Debt incurred after adjudication

——S. 34 (1) and (2)—Debt incurred after adjudication—Suit for damages for use and occupation for period after adjudication of defendant.

Damages for use and occupation are of the nature of unliquidated damages and would, therefore, come within the provisions of S. 34 (1). Where such damages are claimed for the period subsequent to the defendant's

adjudication as insolvent, they are not, within the meaning of S. 34 (2), debts and liabilities to which the debtor was subject when he was adjudicated an insolvent nor are they debts to which he became subject before his discharge by reason of any obligation incurred before adjudication. A.I.R. 1945 Mad. 239 = (1945) 1 M.L.J. 379 = 1945 M.W.N. 346 (1).

——S. 34—Debt incurred after adjudication—Arrears of rent due after adjudication—If 'provable' debt.

Claim to the arrears of rent of the property of the insolvent accruing after his adjudication does not fall within the meaning of a debt provable under S. 34, and the Official Receiver cannot claim it for distribution among creditors. A.I.R. 1937 Lah. 790 = 40 P.L.R. 669 = 175 Ind. Cas. 39.

—— S. 34—Debt incurred after adjudication.

In order that a particular debt contracted after the order of adjudication may be a debt provable in insolvency proceedings, the debt should have existed at the date of order of discharge or if contracted subsequent thereto, it should have been based on a liability existing at the time of adjudication. 126 Ind. Cas. 252 = 1930 A.L.J. 350 = A.I.R. 1930 All. 104.

——S. 34—Debt incurred after adjudication.

The debt to be provable under S. 34 must accrue before adjudication, but if it accrues after adjudication and before discharge it is provable only if the obligation giving rise to the debt was incurred before adjudication. 34 C.W.N. 751 = 51 C.L.J. 352 = A.I.R. 1930 Cal. 459.

——S. 34—Debt incurred after adjudicatior.

Debt incurred after adjudication, is not provable under the Act—Creditor has got his usual remedy. 89 Ind. Cas. 923 = 2 O.W.N. 659 = A.I.R. 1925 Oudh 668.

——S. 34—Debt incurred after adjudicatior.

Rent—Arrears due for the period subsequent to order of adjudication is not a provable debt and no leave of Court is necessary for a suit for recovery thereof. 67 Ind. Cas. 549 = 9 O.L.J. 157 = A.I.R. 1922 Oudh 73.

——S. 34—(1907), S. 26—Debt incurred after adjudication.

A suit on an obligation incurred by an insolvent after adjudication is maintainable as it is not a debt provable in the insolvency under section 28 of the Act. The suit is not governed by S. 16 (2) of the Act. 48 Ind. Cas. 913 (Nag.).

3. Doctrine of relation back.

——S. 34 (2)—Debts barred by limitation on date of adjudication but not barred on date of petition—Whether provable—Doctrine of relation back—Applicability.

Where a creditor made an application praying that the respondent's debts admitted by the Official Receiver may be expunged from the schedule on the ground that the remedy by suit for those debts had become barred by limitation before the date of the order of adjudication though the respondent's claim could have been enforced in a Court of law on the date of the presentation of the insolvency petition.

Held, that the debts could be proved in insolvency under S. 34 (2), by reason of the doctrine of 'relation back' which doctrine must be held to govern the interpretation of the expression 'order of adjudication' occurring in S. 34 (2). A.I.R. 1937 Mad. 577 = 45 L.W. 565 = (1937) 1 M.L.J. 637 = 1937 M.W.N. 577 = I.L.R. (1937) Mad. 679 = 172 Ind. Cas. 264.

——S. 34—Construction—Doctrine of relation back.

It is an ordinary rule of construction that the statute or a section should be interpreted according to its natural meaning. As S. 34, Provincial Insolvency Act, stands, there is nothing to show that it is to be read with S. 28 (7). For this reason the doctrine of relation back is not to be imported into S. 34. A.I.R. 1937 Rang. 50 = 167 Ind. Cas. 493.

4. Ignorance of decree-holder.

——S. 34—Discharge of insolvent—Decree against insolvent obtained before discharge—Execution after discharge—Ignorance of decree-holder of insolvency proceedings—Discharged insolvent, if released from debt.

Where, after the discharge of an insolvent, a decree-holder who had obtained a decree before the discharge and who was ignorant of the insolvency proceedings, put his decree into execution:

Held, that the debt was one that was provable: that the effect of the discharge was to release the insolvent from all such debts and that the fact that the creditor was not informed of the insolvency proceedings did not prove that the debt itself was incurred by means of any fraud or fraudulent breach of trust to which the insolvent was a party and that the insolvent was released from the debt by his discharge. A.I.R. 1933 All. 340 = 144 Ind. Cas. 888.

——S. 34—Ignorance of decree-holder—Order of discharge—Decree-holder not having notice of insolvency proceedings seeking execution of decree—Procedure stated.

Where, after the discharge order, the decree-holder having no notice of the insolvency proceedings, applies for execution of his decree, he would have to seek recourse to the Insolvency Court for recovering his debt even if he had no notice of the insolvency proceedings and was not represented in it. A.I.R. 1939 Nag. 103 = I.L.R. (1939) Nag. 478 = 1939 N.L.J. 96 = 182 Ind. Cas. 214.

5. Interpretation.

——S. 34—Interpretation—"Provable debt"—Meaning explained.

To be a "provable debt," according to the definition in S. 34, it must be a debt to which the insolvent has become subject by reason of an obligation incurred before the date of his adjudication as an insolvent. The words "obligation incurred" in the section refer to an obligation incurred by the insolvent himself. 68 Ind. Cas. 340 = 6 N.L.J. 279 = A.I.R. 1923 Nag. 142.

——S. 34—Interpretation—"Date of such adjudication"—Meaning of.

The words "date of such adjudication" in S. 28 of the Act mean the date on which the actual adjudication is made and not the date on which the petition is presented and a creditor can prove a debt subsequent to the presentation but before adjudication. 61 Ind. Cas. 640 = 13 Bar. L.T. 117.

6. Provable debt.

——S. 34—Provable debts—Liability of member of Co-operative Society to contribute, nature of.

The liability of a member of a Co-operative Society to contribute to the assets of the Society in the event of its being dissolved before or during insolvency is "provable debt" and as such the liquidator should either prove it or have it excluded from the schedule under S. 33 if it came within the provisions of that section, and where he does not do so the member's liability for such debt ceases on his being granted a complete discharge bythe Insolvency Court as expressly provided in S. 44 (2). A.I.R. 1942 Lah. 237 = 44 P.L.R. 376 = I.L.R. (1943) Lah. 553 = 202 Ind. Cas. 689.

——S. 34—Provable debt—Liability of insolvent to indemnify his surety.

Though the liability of an insolvent to indemnify his surety is contingent liability, it is a liability which is provable under the Act and consequently, under S. 44 (2), an order of discharge absolves the insolvent from that liability also. A.I.R. 1942 Mad. 745 = (1942) 2 M.L.J. 626 = 55 L.W. 726 = 1942 M.W.N. 678 = 204 Ind. Cas. 248.

——S. 34—Provable debt.

The claim for (1) marriage expenses, (2) arrears of maintenance, (3) lump sum on account of residence, (4) clothing and even (5) claim for future maintenance is a claim for debts provable in insolvency. A.I.R. 1940 Mad. 951 = (1940) 2 M.L.J. 239 = 1940 M.W.N. 883 = 52 L.W. 307 = 191 Ind. Cas. 670.

——S. 34—Provable debt—Claim for maintenance.

In 1932, a decree had been passed in favour of a wife awarding her **mahar** and maintenance. In 1933, her husband was adjudicated insolvent. In 1934, the wife filed a petition for execution for the arrears maintenance which were then due and prayed for execution of her decree by arrest of her husband:

Held, that S. 34 (1), did not apply. The part of the debt at least having been incurred before the adjudication, it was provable in insolvency and the decreeholder could not proceed to execute the decree without the leave of the Insolvency Court.

(Distinction between orders for alimony and decrees for maintenance pointed out). A.I.R. 1939 Mad. 183 = 1938 M.W.N. 1235 = (1938)2 M.L.J. 1042 = 49 L.W. 167 = 182 Ind. Cas. 225.

——S. 34—Provable debt—Claim for maintenance or residence.

A claim for maintenance or residence is capable of valuation as much as an annuity which is admittedly provable in insolvency. A.I.R. 1933 Lah. 901 = 15 Lah. 9 = 36 P.L.R. 450 = 149 Ind. Cas. 693.

——S. 34—(1907), S. 28—Provable debt—Claim for maintenance.

Obiter:—Maintenance ordered to a wife by a decree of the court is not a debt provable under the Act. 10 S.L.R. 28 = 35 Ind. Cas. 541.

——S. 34—Provable debts—Decretal debt including costs.

If a plaintiff starts a suit against another person and during the pendency of the suit that other person becomes an insolvent and subsequent to the adjudication a decree is obtained, the plaintiff can prove in the insolvency both as regards the amount obtained under the decree and as regards the costs awarded, the costs being added to the decretal amount. But the debt in respect of which the costs are an incident must be one which itself is provable in insolvency. Therefore, what has to be seen is whether the decree in respect of which the order for costs is made is one which is provable in insolvency, and an examination of S. 34 (2) becomes necessary. A.I.R. 1937 Mad. 725 = 46 L.W. 719 = 1937 M.W.N. 834 = (1937)2 M.L.J. 29 = 172 Ind. Cas. 251.

——S. 34—Provable debt.

A debt contracted by an insolvent between the date of the presentation of the application for adjudication and the date of the order of his adjudication is a debt provable in insolvency. A.I.R. 1937 Rang. 50 = 167 Ind. Cas. 493.

——S. 34—Provable debts.

It is open to a creditor to appear in the bankruptcy proceedings and prove the whole of the liability from the defendant to him, even if it is a liability in futurity or even a contingent liability.

Where therefore, a creditor standing surety for payment of a debt incurred by the insolvent, becomes liable to pay the debt by instalments by reason of his being a surety, and does not prove the liability of the insolvent to him during the insolvency proceedings, but subsequent to the discharge of the insolvent, takes a promissory note from him in respect of this liability, and brings a suit on it, his claim being based on the revival of the old guarantee cannot be enforced. The discharge of the insolvent is a bar to his claim. 163 Ind. Cas. 858 = 39 C.W.N. 563.

——S. 34—Provable debts, what are.

Where some members of the partnership are separately in debt with the creditor of the concern, the creditor has the option either to go in insolvency against the assets of the partnership or against those of the members who are indebted to him. But having once elected, he is bound irrevocably by his choice and cannot alter the position he has taken without showing good reasons for the change. 1936 M.W.N. 1070.

——S. 34 (2)—Provable debt—Debt contracted after petition but before adjudication, whether provable.

Having regard to the scheme of the Provincial Insolvency Act and the express language of S. 34 (2) therein, a debt contracted after the presentation of a petition in insolvency but before an order of adjudi-

cation is provable in insolvency. A.I.R. 1932 Bom. 511 = 34 Bom. L.R. 980 = 141 Ind. Cas. 466.

——S. 34—Decree against legal representatives of deceased person—Decree, whether can be proved in insolvency.

Though the legal representatives of a person cannot be adjudicated in respect of a debt of the deceased, yet a creditor who has obtained a decree against the estate of the deceased person in the hands of his legal representatives can prove his debt under S. 34, sub-s. (2) in the insolvency of the legal representatives, and an attachment by him of properties in the hands of the legal representatives effected between the date of the presentation of the insolvency petition and the adjudication cannot confer on him any preferential claim as against the Official Receiver. A.I.R. 1935 Mad. 1058 = 1935 M.W.N. 910 = 42 L.W. 707 = 69 M.L.J. 818 = 159 Ind. Cas. 88.

——S. 34—Deposit of money—Provable debt.

Where a certain sum is deposited by the plaintiff with a firm before the date of the latter's adjudication, when the firm is adjudicated an insolvent, it is under a liability to the plaintiff for payment of this sum. This sum being, therefore, a "debt provable under the Act" within the meaning of S. 34, the plaintiff is forbidden by the provisions of S. 28 (2) from instituting a suit for the money deposited, except with the leave of the Court. A.I.R. 1936 Oudh 236 = 1936 O.W.N. 52 = 11 Luck. 731 = 160 Ind. Cas. 229.

——S. 34—Provable debt—Money paid for insolvent.

Transferee of property subjected to charge is person interested in payment of debt charged within meaning of S. 69, Contract Act and such payment is debt provable in insolvency. 7 O.W.N. 475 = A.I.R. 1930 Oudh 266.

——S. 34—Provable debt—Personal liability of mortgagor insolvent—If can be proved in insolvency.

Though the creditor's right to relief under C. P. Code, O. 34, R. 6 is barred by limitation he can still prove the unrealised balance of his debt at any time during the continuance of the insolvency proceedings, provided the debt was alive and not barred at the time when the order adjudging the debtor an insolvent was made. 85 Ind. Cas. 543 = 6 P.L.T. 410 = 4 Pat. 128 = A.I.R. 1925 Pat. 438.

——S. 34—Provable debt—Personal liability of mortgagor insolvent—Absence of decree under C.P. Code, O. 34, R. 6.

The absence of a decree under O. 34, R. 6 will not in law debar a creditor from proving his debt in insolvency proceedings. All that is necessary for the purposes of insolvency proceedings is to prove the existence of the debt. 85 Ind. Cas. 543 = 3 P.L.T. 410 = 4 Pat. 128 = A.I.R. 1925 Pat. 438.

——S. 34—Provable debt—Third person paying creditors after adjudication.

Creditors accepting payment from 3rd party after date of adjudication, in full satisfaction of their claims, are nevertheless entitled to prove their claims on depositing in Court the amounts received. 61 Ind. Cas. 904 = 25 C.W.N. 137 = A.I.R. 1921 Cal. 376.

——S. 34—Provable debt—Time barred debts, whether provable.

A debt which is within time on the date of petition but is barred by time on the date of adjudication can be proved in insolvency. A.I.R. 1933 Lah. 688 = 34 P.L.R. 464 = 14 L. 730 = 143 Ind. Cas. 175.

——S. 34—Provable debts—Time-barred debts.

A debt not barred at the commencement of the insolvency does not in and for the purpose of the insolvency become barred by lapse of time. 75 Ind. Cas. 572 = 18 M.L.W. 636 = 1923 M.W.N. 895 = 47 Mad. 120 = A.I.R. 1924 Mad. 163 = 45 M.L.J. 166.

——S. 34—Provable debt—Time barred debts.

The point of time with reference to which the question as to whether the recovery of a debt is barred by time or not should be determined is the date of the adjudication. If the recovery of the debt was not barred on the date of the adjudication the debt is provable under the Act. 75 Ind. Cas. 790 = A.I.R. 1924 Oudh 351.

7. Miscellaneous.

——Ss. 34 and 55—(1907) Ss. 28 and 38—Miscellaneous—Composition—Fraudulent misrepresentation—Effect of.

The insolvents after adjudication, proposed a scheme for composition which was rejected by the District Judge. They subsequently represented to the Court that a majority of the creditors had accepted half their respective dues in full satisfaction. The creditors subsequently filed a petition in the Court stating that they had been induced by false and fraudulent mis representation of the insolvents to accept half of the principal sums due to them and prayed that they should be permitted to prove their claim.

Held, that under Ss. 28 and 38 of the Act the transaction could not be recognised in insolvency proceedings and the petitioning creditors were entitled to prove their claims as they stood on the date of adjudication. 25 C.W.N. 137 = 61 Ind. Cas. 904 = A.I.R 1921 Cal. 376.

——S. 35.

Synopsis.

1. **Burden of proof.**
2. **Court's power of annulment.**
3. **Effect of annulment.**
4. **Grounds of annulment.**
5. **Payment of debt—What amounts to.**
6. **Procedure.**
7. **Scope.**
8. **Who can apply for annulment.**
9. **Miscellaneous.**

(1) Burden of proof.

——S. 35—Annulment—Burden of proof.

It can be inferred from the usual course of human conduct that a party who has evidence in his possession favourable to his case will not fail to produce it. This principle is particularly important in insolvency proceedings where the primary burden of proof is on the

Receiver or the petitioning creditor while knowledge of all the essential facts is usually with the other side. This does not mean that the primary burden can be abrogated. Of course, the person seeking annulment must produce **prima facie** proof before he can hope to succeed, but having done so, the attitude of the other side is of the utmost importance in judging the truth of his story and his good faith. A.I.R. 1938 Nag. 216 = I.L.R. (1940) Nag. 526 = 175 Ind. Cas. 430.

——S.35—(1907), S. 42—Burden of proof—Annulment of Insolvency—Payments of debts proof of.

Where an adjudicated insolvent applies for annulment of the adjudication on the ground that his debts have been paid in full, the fact that such payments were not made through the Official Receiver is no justification for refusing to great the annulment. The petitioner should be put to proof of the allegations made by him. 26 M.L.T. 139 = (1919) M.W.N. 622 = 52 Ind. Cas. 689.

——Ss. 35 and 27—(1907), Ss. 42 and 16—Burden of proof—Annulment—Refusal of adjudication.

An adjudication under S. 16 can be annulled only upon proof by the applicant under S. 42 of the existence of one or more of the circumstances specified in S. 42 (1). It is doubtful whether under the Indian Law, the court could refuse to make an order of annulment where one or more of the circumstances specified in S. 42 (1) were proved to exist. 23 C.L.J. 220 = 21 C.W.N. 936 = 34 Ind. Cas. 792.

2. Court's power to annulment.

——S. 35—Scope—Court's powers of annulment.

Section 35 contains no restriction on the power of the Court to set aside the adjudication where it is shown that the debtor ought not to have been adjudged insolvent. If no act of inoslvency has been committed, the estate cannot be administered under the provisions of the Provincial Insolvency Act and S. 35 has been inserted in the Act to give the Court power to set aside an adjudication which ought not to have been made. The fact that a debtor does not object to an order of adjudication being passed against him is no bar to the granting of an application for an order setting aside the adjudication under the provisions of S. 35. A.I.R. 1940 Mad. 375 = (1940) 1 M.L.J. 228 = 51 L.W. 231 = 1940 M.W.N. 167 = I.L.R. (1940) Mad. 441 = 189 Ind. Cas. 573 (F.B.).

——S. 35—Court's power of annulment—Ex parte order of adjudication—Annulment.

An order of adjournment passed by a Court **ex parte** on the last clearance day is liable to be annulled. A.I.R. 1940 Pat. 58 = 20 P.L.T. 768 = 6 B.R. 270 = 185 Ind. Cas. 857.

——S. 35—Scope—Court's power of annulment.

If on the materials before the Court at the time the order of adjudication was passed, it is clear that the Court had no jurisdiction to pass the order, S. 35 clearly empowers the Court in revision to annul the adjudication. It is true that the Provincial Insolvency Act, does not confer upon the Court the wide powers given by S. 8, Presidency Towns Insolvency Act, 1909, which allow the Court to review, rescind or vary any order made by it under its insolvency jurisdiction, but S. 35 is sufficient for the purpose and leaves the Court no discretion in the matter. A.I.R. 1938 Mad. 898 = 48 L.W. 239 = 1938 M.W.N. 844 = (1938) 2 M.L.J. 385 = I.L.R. (1939) Mad. 24 = 178 Ind. Cas. 737.

——Ss. 35 and 43—Court's power of annulment—Appeal from order rejecting proof—District Judge annulling adjudication altogether—Power to review—Error apparent on face of record—Insolvency Court's powers of review.

An insolvent got himself collusively adjudicated in order to defeat a genuine creditor who had brought a suit. When the bogus creditor who had filed the petition put in his proof, it was rejected by the Official Receiver. He preferred an appeal to the District Judge, who not only dismissed the appeal, but annulled adjudication. Another genuine creditor filed a petition under O. 47, R. 1 to review the order annulling the adjudication, and the District Judge rejected the application on the ground that he had no jurisdiction to review :

Held, Per **Beasley, C. J., Ramesam** and **Cornish, JJ.,** that since the only question before the District Judge was whether or not the Official Receiver's order dismissing the petitioner's proof was correct and the District Judge had proceeded to do that which neither party had prayed the Court to do, namely to annul the adjudication, there was an error apparent on the face of the record and the District Judge had power to review apart from the question whether he had committed any error of law.

Per **Waller, J.**—Although S. 35 of the Provincial Insolvency Act gives no power to the Insolvency Court to annul an adjudication **suo motu** and the District Judge was wrong in annulling the adjudication, his error did not fall within the category of mistakes apparent on the face of the record or anything analogous to them.

Per **Krishnan Pandalai, J.**—There is a difference between wrongly understanding or applying the law and not being aware of conditions legally necessary for exercising a power given by law and in the latter case, an application for review is competent. A.I.R. 1933 Mad. 631 = 1932 M.W.N. 153 = 65 M.L.J. 173 = 38 L.W. 257 = 145 Ind. Cas. 346 (F.B.).

——S. 35—Court's power of annulment.

It is only when an appeal against an order of adjudication has been made under S. 75 (1) or when an application is made by a person interested under S. 35 that the Court has authority to annul or set aside an order of adjudication. 1930 M.W.N. 651.

——Ss. 35 and 28 (5), (1907)-Ss. 42 (1) and 16 (2) (a)—Court's power of annulment—Insolvency application — Adjudication — Condition imposed—Annulment of order, if valid.

Where on an insolvency petition the Court passed an order imposing a condition on the non-fulfilment of the condition, annulled the order it could not be so annulled if the condition was itself illegal, e.g., condition as to payment of one-fourth of the insolvent's salary to the Receiver pending realisation of assets. Salary is the property of the insolvent within S. 16 (2) (*a*) of the Provincial Insolvency Act and the District Judge could arrange for payment to the Receiver of one-half of the salary earned by the insolvent. 19 C.L.J. 83 = 18 C.W.N. 1052 = 21 Ind. Cas. 950.

——S. 35—Court's power of annulment—Failure to deposit costs of publication.

An order adjudicating a person an insolvent cannot be annulled for failure to deposit costs of publication under S. 30. It can only be annulled under provisions of S. 35 or S. 43. Where costs are not deposited the only remedy for the Court is under R. 277 (3) to recover the costs from the insolvent's property if the property is sufficient for the purpose, or to remit the costs, if the property is insufficient. 6 O.W.N. 1093 = A.I.R. 1930 Oudh 53.

3. Effect of annulment.

——S. 35—Effect of annulment.

Order adjudicating Hindu coparcener insolvent—Annulment of—Assets in hands of Receiver—If revert as coparcenary property or individual property. I.L.R. (1946) Mad. 54 = 1945 M.W.N. 206 = 58 M.L.W. 150 = A.I.R. 1945 Mad. 257 = (1945) 1 M.L.J. 292.

——Ss. 35 and 59—Effect of annulment—Suit by widow of deceased insolvent to recover part of husband's estate impleading Official Receiver—Adjudication subsequently annulled—Effect.

A widow of the deceased insolvent sued for the sale-proceeds of the property acquired under the decree which alleged to be part of her husband's estate. She impleaded the Official Receiver alleging that the Official Receiver had taken no action to get possession of this money for the estate. At the time she filed this suit, she was taking steps for the annulment of the adjudication of her husband but did not, in her plaint, specifically pray that the money claimed in the suit should be made payable to the Official Receiver, but claimed it for herself possibly anticipating the annulment of the adjudication before the suit was decreed. The adjudication was annulled. At the time of annulment, the suit was barred as regards one item but was within time as regards the other item :

Held, that she had no legal basis for her suit at the time when it was filed. As, however, the suit was within time so far as the second item was concerned when the adjudication was annulled, the suit with reference to this item was maintainable. A.I.R. 1941 Mad. 84 = 52 L.W. 522 = (1940) 2 M.L.J. 606 = 1940 M.W.N. 1039.

——Ss. 35, 39 and 43—Effect of annulment.

Annulment of adjudication, under Ss. 35, 39 or 43, on whatever ground it is based, must be taken to put an end to the legal character of an insolvent which, adjudication under the Act confers upon a debtor, and he can no longer be regarded in the eye of the law as an insolvent. A.I.R. 1941 Mad. 22 = 52 L.W. 527 = (1940) 2 M.L.J. 590 = 1940 M.W.N. 1011 = 193 Ind. Cas. 147.

——S. 35—Effect of annulment.

Where subsequent to his **ex parte** adjudication as insolvent on a petition of a creditor the person endorses a promissory note to another and the insolvency petition is afterwards dismissed on contest, the effect of the dismissal is to revest the debtor's property in the debtor as from the date of the order of adjudication, and the transfer of the pro-note is a good transfer and the transferee can sue on it. A.I.R. 1937 Mad. 717 = 47 L.W. 366 = 1938 M.W.N. 467 = 176 Ind. Cas. 600.

——S. 35—Effect of annulment.

It is doubted whether an annulment of adjudication **ipso facto** in all cases will put an end to the insolvency proceeding. 113 Ind. Cas. 550 = A.I.R. 1929 Mad. 480.

——S. 35—(1907), S. 42—Annulment of insolvency—Suit by Receiver commenced before—Effect of annulment.

A suit instituted by the Receiver of an insolvent's estate against a debtor of the insolvent does not cease to be maintainable by reason of the annulment of the adjudication **pendente lite.** 41 All. 200 = 16 A.L.J. 938 = 48 Ind. Cas. 443.

4. Grounds of annulment.

——S. 35—Grounds for annulment.

Where on the petition of a creditor an adjudication is made and subsequently it is found possible to establish that on the date of that petition, there was no genuine debt due to that creditor, the order of adjudication cannot be annulled under S. 35 on the ground that the debtor ought not to have been adjudged insolvent for, once an adjudication takes place, all the other creditors of the debtor become interested in the matter and unless it can be shown that the debtor did not owe any other debts or that the debtor was not really insolvent at the time the order of adjudication was made, it is not open to him to contend that is a case in which the order of adjudication ought not to have been made. A.I.R. 1940 Mad. 151 = (1939) 2 M.L.J. 753 = 50 L.W. 821 = 1939 M.W.N. 1203.

——S. 35—Grounds for annulment.

The petitioners in insolvency had failed to disclose the whole of their property and they had included in their petition fictitious debts for which no consideration had passed. A large part of the property which the creditors claimed to be available for the purpose of paying the petitioners' debts had been ostensibly transferred by three deeds of sale which were fictitious, taking all this property together the assets of the petitioners considerably exceeded the liabilities and they were able to pay their debts. Petitioners were adjudged insolvents :

Held, that the adjudication should be annulled. A.I.R. 1938 Pat. 368 = 4 B.R. 733 = 176 Ind. Cas. 541.

——S. 35—Grounds for annulment—Enquiry.

The debtor was adjudicated an insolvent on an application of a creditor who had obtained a decree on a promissory note. The debtor filed an application under S. 35 for annulment of the order on the ground that there was no consideration for the promissory note and that the judgment was obtained by fraud or collusion :

Held, that the Insolvency Court had power to enquire into the consideration for a judgment debt. The Insolvency Court would do so when there would be evidence that the judgment had been obtained by fraud or collusion or that there had been some miscarriage of justice. A.I.R. 1935 Rang. 276 = 158 Ind. Cas. 333.

——S. 35—Grounds for annulment—Judgment obtained by fraud or collusion—Annulment of adjudication.

When it is alleged that a judgment had been obtained by fraud or collusion, it is the duty of the Insolvency

Court to hold an inquiry and come to a finding as to whether the decree represented a real debt or not and then if it concluded that the decree had been obtained by fraud or collusion, to annul the adjudication under the provisions of S. 35. A.I.R. 1933 Rang. 268 = 145 Ind. Cas. 835.

——S. 35—Grounds for annulment of adjudication.

An adjudication in insolvency cannot be annulled on the ground that the insolvent was dishonest in his dealings, that he had no assets and had destroyed his account books, and that he was entering recklessly into transactions, and incurring debts which he never hoped to re-pay. A.I.R. 1931 All. 331 = 1931 A.L.J. 175 = 53 A. 476 = 131 Ind. Cas. 35.

——S. 35—Grounds of annulment.

In order to obtain an order for annulment it must be shown that the order of adjudication ought not to have been made. In order to show that, it must be proved that the act of insolvency on which the order was based did not really exist. 97 Ind. Cas. 590 = 24 M.L.W. 486 = A.I.R. 1926 Mad. 1159.

——Ss. 35 and 25—(1907), Ss. 42 and 15—Adjudication—Grounds of annulment.

S. 42 of the Act is subject to S. 15 and if the Court acts under S. 42 for reasons untenable under S. 15 for refusing the adjudication the order annulling the adjudication is bad. An order of adjudication cannot be annulled on the ground that the petitioner did not make a true statement of his property, as the question about the extent of his property is immaterial. 15 C.W.N. 213, Rel. 1 Pat. L.W. 227 = 38. Ind. Cas. 822.

——S. 35—(1907). S. 42—Grounds of annulment—Absence of available assets no ground of refusal by court.

A court cannot refuse to make an order for adjudication or for annulling any adjudication already made, merely on the ground of there being no available assets. 171 P.W.R. 1916 = 37 Ind. Cas. 214.

——S. 35—(1907). S. 42—Grounds of annulment—Annulment of adjudication.

An adjudication can be annulled only under S. 42, when the conditions mentioned therein are fulfilled. A Court while annulling an adjudication must find that the adjudication could not legally or properly have been made on the fact as existing at the time of adjudication. Subsequent misconduct on the part of the petitioner should not lead to annulment of the adjudication. An adjudication could not be annulled because the debtor has paid his debts in full out of his assets or a part of his property is subject to the alienation of Land Act. 152 P.L.R. 1915 = 77 P.W.R. 1915 = 29 Ind. Cas. 888.

5. Payment of debt—What amounts to.

—— Ss. 35 and 61 (6)—Application under S. 35—Determination of amount due to creditors—Test—Provisions of S. 61 (6), if can be applied.

Payment in order that it may discharge the insolvent's debt in full within the meaning of S. 35 must be a complete payment of the debts up to date, as if there was no bankruptcy. The provisions made in Part III of the Act for distribution of assets of the insolvent are wholly irrelevant for determination of the amount due to the creditors and payable to them in order to invoke the relevant provision of S. 35. The creditors cannot claim interest as provided in S. 61 (6) when their contractual rate is less than that mentioned in the section. S. 61 (6) is primarily intended to provide for cases where the surplus does not admit payment of more than 6 per cent. The object is not to vary the rates fixed by the contract or decree but to afford some recompense to the creditors for keeping their money frozen during the period subsequent to the adjudication if the surplus held by the Receiver justifies such a course. 22 Luck. 478 = 1947 O.W.N. 357 = 1947 O.A. (C.C.) 134 = 1947 A.W.R. (C.C.) 134 = A.I.R. 1947 Oudh 202.

——S. 35—Payment of debt—Annulment—Consent of creditor as ground—Assignee of decree—Rights to execute.

When the debt due on a creditor's decree has not been paid, the consent of the creditors or even an unconditional discharge by the creditors does not entitle the Court to annul the adjudication unless the debts have been actually paid in full in cash.

When the debt under a decree has not been paid off in the insolvency proceedings, it does not cease to exist by reason of the annulment of adjudication under S. 35. There is, therefore, nothing to prevent the assignee of the decree from executing it. (1936) 160 Ind. Cas. 603 = 18 N.L.J. 145.

——S. 35—Payment of debts—What amounts to.

Where it is admitted that the debts of the insolvent have not been paid in full, but it is stated that all his creditors gave him a complete and full discharge, that admission is not enough for the annulment of insolvent's adjudication, for what S. 35 contemplates is payment of the debts in full. A.I.R. 1926 All. 289, Foll. 124 Ind. Cas. 134 = 30 M.L.W. 948 = 1929 M.W.N. 910 = A.I.R. 1930 Mad. 112 = 57 M.L.J. 816.

——S. 35—Payment of debt—What amounts to—

Even an unconditional release by a creditor cannot amount to a payment in full of the debt within the meaning of S. 35 : 38 Bom. 200, Foll. 92 Ind. Cas. 514 = 48 All. 272 = 24 A.L.J. 244 = A.I.R. 1926 All. 289.

——S. 35—Payment of debt—What amounts to—Payment to one creditor.

Debt due to one creditor only paid, others remaining unpaid—Adjudication cannot be annulled. 99 Ind. Cas. 277 = 3 O.W.N. (Sup.) 296.

6. Procedure.

——S. 35—Procedure—Notice of annulment.

There is no provision for issuing a fresh notice upon the insolvent calling upon him to show cause why the adjudication should not be annulled. 107 Ind. Cas. 830 = 7 Pat. 375 = 9 P.L.T. 329 = A.I.R. 1928 Pat. 338 (F.B.).

——Ss. 35, 69, 41 and 44—(1907), Ss. 42, 43, 44 and 45—Procedure—Annulment of adjudication.

The fact that proceedings are contemplated under S. 43 is not enough to annul adjudication, unless the procedure laid down in S. 42, 44, and 45 is adopted. 5 L.W. 220 = 31 Ind. Cas. 15.

7. Scope.

——S. 35—Scope.

Section 35 contemplates also annulment of the order of adjudication on the ground that a debtor ought not to have been adjudged insolvent and that the order of adjudication is invalid at its inception. A.I.R. 1937 Cal. 158 = I.L.R. (1937) 1 Cal. 628 = 171 Ind. Cas. 280.

——Ss. 35 and 38—Scope—Proceedings under Ss. 35 and 38, whether allied—Rejection of application under S. 35, whether bar to application under S. 38—Res judicata.

Proceedings under S. 38 are not allied to proceedings under S. 35 for, whereas in the latter case, the insolvent has to show that the debts have been paid in full, which implies that the debts have been paid along with interest at the contractual rate, S. 38 contemplates a proposal for a composition in satisfaction of debts and implies a reduction in the claim of the creditors. Consequently, rejection of an application by the insolvent under S. 35 does not bar a later application by him under S. 38 on the principle of **res judicata**. A.I.R. 1936 All. 102 = 1936 A.L.J. 44 = 1936 A.W.R. 41 = 58 A. 655 = 160 Ind. Cas. 994.

——S. 35—Scope of.

If a debtor satisfies the condition laid down by the Act for the presentation of his insolvency petition, it cannot properly be said that he has abused the process of the Court and, therefore, ought not to have been adjudged insolvent within the meaning of S. 35. S. 35 says nothing about abuse of the process of the Court. 109 Ind. Cas. 636 = 1928 M.W.N. 175 = A.I.R. 1928 Mad. 609.

——S. 35—Scope of—Provisions under Presidency Towns Insolvency Act.

Reilly J.—The occasions for exercising the power of annulling an adjudication under the Provincial Insolvency Act on the ground that it ought not to have been made appear to be even more restricted than under the Presidency Towns Insolvency Act. The provisions and procedure of the Provincial Insolvency Act are different from those of the Presidency Towns Insolvency Act; and when dealing with such questions under the Provincial Insolvency Act, 44 Cal. 535 (P.C.) must be followed. 108 Ind. Cas. 208 = 1928 M.W.N. 62 = A.I.R. 1928 Mad. 394.

8. Who can apply for annulment.

——S. 35—Annulment of adjudication—Transferee of insolvent—If can apply.

An order of adjudication is not conclusive against a transferee of the insolvent, and the latter can apply under S. 35 of the Provincial Insolvency Act for annulment of the adjudication. I.L.R. (1948) Nag. 523 = A.I.R. 1948 Nag. 385 = 1948 N.L.J. 589.

——S. 35—Who can apply for annulment—Locus standi to apply for annulment—Purchaser of debtor's property pending insolvency proceeding.

If the order of adjudication itself is challenged as a nullity, a purchaser of the property after the application for adjudication is presented can certainly maintain an application under S. 35, Provincial Insolvency Act, and if he succeeds in proving that the order of adjudication ought not to have been made, he will be certainly a person "interested" within the meaning of that section. I.L.R. (1948) 1 Cal. 131.

9. Miscellaneous.

——Ss. 35 and 37—Adjudication annulled—Vesting order under S. 37.

Where an adjudication is annulled under S. 35, no vesting order should be made under S. 37 except to the extent that any special circumstances render such vesting necessary. A.I.R. 1945 Mad. 257 = 58 L.W. 150 = (1945)-1 M.L.J. 292 = 1945 M.W.N. 206 = I.L.R. (1946) Mad. 54.

——S. 35—Miscellaneous—Annulment of adjudication—Assets vested in officer of Court for benefit of creditors—Power of officer to question debts entered in schedule.

After annulment of an adjudication in insolvency, the Officer of the Court in whose hands the assets are vested for the benefit of the creditors, has the right and indeed the duty to bring to the attention of the Court facts which show that persons appearing in the list of creditors are, in fact, not creditors. This is not invalidating the act of the Official Reciever in admitting a debt, but is part and parcel of the necessary steps that must be taken for the proper administration of the assets with which he is charged. A.I.R. 1936 Mad. 125 = 69 M.L.J. 839 = 43 L.W. 38 = 1936 M.W.N. 509 = 160 Ind. Cas. 205.

——S. 35—Miscellaneous—Legality of annulment.

Where an application of a creditor is dismissed under S. 25 (1) of the Provincial Insolvency Act, there can be no order of annulment under S. 35. 121 Ind. Cas. 55 = A.I.R. 1931 Nag. 109.

——S. 35—(1907), S. 42—Miscellaneous—Object of Act—Failure to keep proper accounts—Reckless debts.

The benefit of Insolvency Acts, is intended for traders who act honestly and straightforwardly and according to the recognised proper mode essential to knowing their position but who through misfortune incur loss. The benefit should not be extended to those traders who fail to keep proper accounts or who deal extravagantly and contract debts recklessly without any reasonable prospect of being able to pay them. 5 Bur. L.T. 80 = 15 Ind. Cas. 276.

——S. 36—Concurrent petitions in different Courts—Stay of proceedings by one Court—Such Court's power to re-open proceedings.

The Chief Court of Oudh cannot pass an order of stay of a case pending in the Court of the Insolvency Judge, Cawnpore, unless the direction of the Chief Court is confirmed by the Allahabad High Court. Where, upon receipt of such an order, the Cawnpore Court stays proceedings, without being directed to act under S. 36, it is authorized to re-open the proceeding stayed by itself. A.I.R. 1938 All. 555 = 1938 A.L.J. 878 = 1938 A.W.R. 566 = I.L.R. (1938) All. 800 = 178 Ind. Cas. 75.

——S. 36—Proceedings in two Courts.

Insolvency proceedings were started at Rawalpindi and subsequently at Delhi at the instance of the

debtor and the Delhi creditors respectively. The Delhi creditors of the debtor had not only to realize a much larger sum than his Rawalpindi creditors, but had also to contest an alienation made by him. The Rawalpindi creditors agreed to accept part payment of their debts out of the sale-proceeds of the debtors' property situated at Rawalpindi :

Held, that having regard to the peculiar circumstances of the case it would be proper to allow the proceedings to continue in both the Courts leaving it to them to decide ultimately which of them should annul the order of adjudication that it might make. 109 Ind. Cas. 648 = A.I.R. 1928 Lah. 848.

——S. 37.

Synopsis.

1. Annulment proceedings.
2. Applicability.
3. Construction.
4. Effect of annulment.
5. Object.
6. Powers and duties of appointee.
7. Powers of Court.
8. Re-vesting order.
9. Scope.
10 Miscellaneous.

1. Annulment proceedings.

——S. 37—Annulment proceedings.—Stay of, pending enquiry under Ss. 53 and 54.

Quare.—It is a matter for consideration whether in all ordinary cases annulment proceedings shall not be kept pending so long as proceedings under S. 53 or 54 are outstanding. The better view seems to be that they can be under S. 27 (2). A.I.R. 1938 Nag. 312 = I.L.R. (1940) Nag. 204 = 177 Ind. Cas. 760.

2. Applicability.

——S. 37—Applicability.

Although S. 37 is applicable only to the annulling of the adjudication, yet its principle will apply to the case of discharge and on the discharge of the insolvent, the administration comes to an end and whatever property has remained has to be given back to the insolvent and would not be available on the application of the creditors but is available for attachment in execution of a decree against the insolvent. A.I.R. 1944 Mad. 208 = 57 L.W. 39 = 1944 M.W.N. 37 = (1943) 2 M.L.J. 677.

——S. 37—Applicability.

Annulment of any kind, irrespective of the ground upon which it is made will attract the operation of S. 37. A.I.R. 1943 Cal. 133 = 47 C.W.N. 74 = I.L.R. (1943) 1 Cal. 5 = 76 C.L.J. 460 = 206 Ind. Cas. 619.

——Ss. 37 and 28—Applicability—Object of Act—In 1932, insolvent granted absolute discharge one of reasons being that no creditor had proved his debt—More than seven years later, on application of one of Official Receiver's creditors, Court ordering sale of insolvent's property by Official Receiver—Order, held not justified—Principle of S. 37, held applied—Administration of insolvency, held came to end by absolute order of discharge in 1932.

The whole purpose of the Insolvency Act is that proceedings in insolvency shall be dealt with as expeditiously as possible, that the creditors shall be satisfied as expeditiously as possible from the property of the insolvent, and that the insolvent shall then be free to start life again unburdened by his debts.

The debtor, on his own petition, was adjudicated an insolvent in December 1930. In July 1932, he was granted an absolute order of discharge for two reasons—(1) because there was no **mala fide** conduct on the part of the insolvent and (2) because no creditor had proved his debt before the Official Receiver and therefore, no one was entitled to oppose his petition for an order of absolute discharge. At the time of the insolvent's discharge the insolvent was in possession of a number of acres of wet and dry lands and this property was vested in the Official Receiver. When the order of discharge was granted the Official Receiver had done nothing in regard to the disposal of this property as there were no creditors properly before him. More than seven years later, one of the Official Receiver's creditors applied that the insolvent's property should be sold and the Court ordered that the property could be sold at the instance of this creditor by the Official Receiver :

Held, that the order could not be justified as it amounted to a complete frustration of the intention of the insolvency law :

Held further that although S. 37, Provincial Insolvency Act, did not in terms apply to the circumstances of the case, the principle embodied in that section was applicable. When an adjudication was annulled, it was for the Court to decide whether the property should continue to vest in the Official Receiver or not. When in 1932, the Court gave as one reason for its order of absolute discharge the fact that no creditor had proved his debt that meant in effect that there was no chance of any administering of the insolvent's property. Consequently, the administration of the particular insolvency was brought to an end by the Court's order granting the absolute order of discharge in 1932 and, therefore, there was no longer power in the Official Receiver to bring any of the properties of the ex-insolvent to sale. A.I.R. 1943 Mad. 26 = 1942 M.W.N. 551 = 55 L.W. 561 (2) = (1942) 2 M.L.J. 714 = I.L.R. 1943) Mad. 213 = 205 Ind. Cas. 569.

——S. 37—Applicability.

The order of discharge is not equivalent to annulment of adjudication so as to bring in the provisions of S. 37. The re-vesting of the property in the discharged debtor cannot take place through the operation of S. 37. A.I.R. 1940 Lah. 304 = I.L.R.(1940) Lah. 458 = 42 P.L.R. 754 = 190 Ind. Cas. 211.

3. Construction.

——S. 37—Construction.

While passing an order under S. 37, the Court should no doubt look to the language of S. 37 and pass an order in conformity to the same but the matter is one of substance and not of form. A.I.R. 1943 Cal. 133 = 47 C.W.N. 74 = I.L.R. (1943) 1 Cal. 5 = 76 C.L.J. 460 = 206 Ind. Cas. 619.

——Ss. 37 and 43—Construction.

Sections 37 and 43 cannot be interpreted in such a way as to favour the insolvent. A.I.R. 1941 Lah. 316 = 43 P.L.R. 369 = I.L.R. (1942) Lah. 330 = 197 Ind. Cas. 564.

——S. 37—Construction—Principles of.

Proceedings in insolvency are the creature of statute and the jurisdiction of the Court in insolvency is granted to it because it is deemed that in the case of an insolvent debtor, the most efficacious method of disposing of his assets is to follow the procedure laid down in the Insolvency Act. Apart from the Insolvency Act, the Court has no jurisdiction, nor has a Receiver or any person the right to dispose of the debtor's property except in accordance with the ordinary civil law. That is the first and main consideration for the Court to bear in mind when construing S. 37 of the Act. A.I.R. 1936 Rang. 284 = 14 Rang. 254 = 163 Ind. Cas. 217 (F.B.).

——S. 37—Construction—'All acts theretofore done,' significance of—Property, meaning of.

The words " all acts theretofore done " in S. 37 mean all acts done with a view to making sales and dispositions of property, including the setting aside of transfers made by the insolvent with a view ultimately of making sales of the property so recovered for the benefit of the estate in his hands and, therefore, ultimately for the benefit of the creditors, even though the actual final disposal of the property has not been made on the date of annulment of the adjudication and, therefore, the date on which the Receiver in insolvency **qua** Receiver ceases to exist.

In S. 37, the word 'property' is used in its widest sense, that is to say, it is used in the sense not only of the thing which is the subject-matter of ownership, but includes also the dominion or the right of ownership or of partial onwership. The right to collect money due to the insolvent is 'property' within the meaning of S. 37 and it vests in the appointee under the provisions of S. 37, and the appointee can take necessary steps to realise the amount. A.I.R. 1935 Rang. 328 = 14 Rang. 63 = 158 Ind. Cas. 651.

——S. 37—Construction—'Property,' meaning of—Right to sue, whether property.

In S. 37, the word " property " does not include the right to sue for cancellation of the transfer which accrued to the Official Assignee under the statute. A right to sue cannot be subject of a transfer, being a personal right. And being a personal right specially granted by law, it cannot devolve on the trustees under O. 22, R. 10, Civil P.C. A.I.R. 1934 Pesh. 89 = 152 Ind. Cas. 380.

——S. 37—Construction—'As the Court may, by order in writing, declare,' meaning and effect of—Annulment order—Effect of—Reversion of property to insolvent—His powers.

The words 'as the Court may, by order in writing, declare' in S. 37, govern the vesting of property in the debtor only and mean that the vesting of the property in him, in the absence of any other person being appointed by the Court, shall be subject to any condition which the Court may declare. It is not essential that the condition should be declared and where it is not declared, property will vest in the debtor unconditionally. A.I.R. 1933 Pat. 84 = 13 P.L.T. 775 = 12 Pat. 163 = 141 Ind. Cas. 836.

4. Effect of annulment.

——S. 37—No vesting order made on annulment of adjudication—Reversion of property to debtor.

Where under S. 37 of the Provincial Insolvency Act no vesting order is made when the adjudication is annulled, the property of the debtor must be deemed to have reverted to him, and the Insolvency Court has no jurisdiction over him or over his property except for a limited purpose under the section. I.L.R. (1948) Nag. 284 = 1948 N.L.J. 112 = A.I.R. 1949 Nag. 39.

——Ss. 37 and 43—Effect of annulment—Adjudication annulled unconditionally—Effect—"Revert," meaning of.

Defendant 2 was adjudged an insolvent on February 16, 1931. The adjudication was annulled on February 10, 1937 under S. 43 unconditionally without a vesting order under S. 37. Plaintiff filed suit in 1933 against defendant 2 without obtaining leave of Insolvency Court, got decree and in execution thereof purchased the suit property at a court sale:

[**Held**, that once the adjudication is annulled unconditionally, the effect is as if there never was an adjudication subject only tothe exceptions laid down in S. 37. The expression " revert " in S. 37 means that prior state of things are to be restored and hence the court sale was valid. A.I.R. 1945 Mad. 388=(1945) 1 M.L.J. 472 = 58 L.W. 289 = 1945 M.W.N. 745.

——S. 37—Effect of annulment.

On the annulment of adjudication, the insolvency proceedings cease, except in so far as the Insolvency Court may order or S. 43 of the Act which says that " all acts theretofore done by the Court or Receiver shall be valid," may permit. A.I.R. 1944 Mad. 49 = 56 L.W. 654 = (1943) 2 M.L.J. 492 = 1943 M.W.N. 701 = 216 Ind. Cas. 75.

——S. 37—Effect of annulment—Adjudication of A annulled—Property vested in Official Receiver for one year—Execution petition by creditor before expiry of year—Notice to A but not to Official Receiver—Property sold after expiry of year—Sale, held could not be set aside at instance of A.

The adjudication of the insolvent A was annulled on September 10, 1935. By the same order, his property was directed to continue to vest in the Official Receiver for a period of one year. Within that year, on February 29, 1936, a creditor of A filed execution petition without impleading the Official Receiver and took certain preliminary steps. On October 15, 1936, after the property had ceased to vest in the Official Receiver and again vested in A, the property was brought to sale. A third party purchased it. The question was whether the sale could be set aside at the instance of A who had been fully heard in the execution application:

Held, that as the execution proceedings were not void **ab initio**, the sale could not be set aside except

on equitable grounds which did not exist. The Official Receiver should have been made a party and although the procedure in not impleading him was irregular, the judgment debtor A had nothing to complain of if he had not been given a fair hearing at an earlier stage because he was not a person interested in the property: he would, of course, have good ground to have the sale set aside. But as he had notice of the execution petition and had been fully heard, no equitable reason existed why the sale should be set aside. A.I.R. 1943 Mad. 260 = (1943) 1 M.L.J. 83 = 1943 M.W.N. 42 = 209 Ind. Cas. 309.

——S. 37—Effect of annulment—Annulment of insolvency—Reversion of property to debtor—Joint Hindu family—Father's insolvency annulled—Fund representing son's share would be out of reach of Official Receiver by reason of attachment before re-vesting order begins to operate.

On the annulment of the insolvency, in the absence of an appointment by the Court, the property of the debtor reverts to him to the extent of his right or interest therein. When, in a joint Hindu family, the insolvency of the father is annulled if the fund representing the sons' shares is to be regarded as in a limited sense the property of the insolvent, it will revert to the insolvent to the extent of his interest therein and his interest is limited to the power to devote the fund to the payment of his just debts, which power will be suspended by the attachment at the instance of a creditor. If on the other hand, the fund is regarded as the property of the sons until it is actually utilised for the discharge of the father's debts, it will clearly revert to the sons from whom it was taken. In either case, it will be out of the reach of the Official Receiver by reason of the attachment before the re-vesting order begins to operate. A.I.R. 1943 Mad. 94 = 1942 M.W.N. 470 = 207 Ind. Cas. 124.

——S. 37—Effect of annulment—Adjudication annulled—Debtor ceases to be insolvent—Vesting order under S. 37, effect of—After annulment, property remaining vested in Official Receiver on October 1, 1937 and March 22, 1938—Debtor, if agriculturist within meaning of Madras Agriculturists' Relief Act—Debtor, whether has saleable interest in property vested in Receiver.

The annulment of the adjudication relegates the debtor to the position which he occupied before he was adjudicated, except in so far as the vesting order places the residue of the properties at the disposal of the appointee for the benefit of the creditors. Although to this limited extent, the administration of the estate continues to be in insolvency, the debtor ceases to be an insolvent.

Where, therefore, after the annulment, property is vested in Official Receiver under S. 37 and remains so vested on October 1,1937 and March 22,1938 the debtor cannot be said to be agriculturist within the meaning of Madras Agriculturists' Relief Act and hence, is not entitled to the benefits of that Act. After the annulment, the debtor cannot be said to have a saleable interest in the property vested in the Official Receiver. The most that he can be said to have in those properties is a possible expectation of a surplus, if any, after satisfying the creditors. That cannot, however, be treated as a saleable interest in those properties. A.I.R. 1942 Mad. 523 = 1942 M.W.N. 279 = 55 L.W. 242 = (1942) 1 M.L.J. 491 = 202 Ind. Cas. 298.

——S. 37—Effect of annulment—Reversion of property to debtor—Creditor realizing his dues under decree by attachment—Vesting order subsequently made, if affects such realization.

There is no provision in S. 37 that the vesting of the debtor's property, when ordered later, should relate back to the date of annulment. Where, therefore, no vesting order is made when the adjudication is annulled and no conditions are declared by the Court, the properties of the debtor must be deemed to have reverted to him, and the amount realized by the creditor by attachment of such property cannot be affected by any vesting order subsequently made. A.I.R. 1941 Mad. 588 = (1941) 1 M.L.J. 537 = 53 L.W. 466 = 1941 M.W.N. 350 = 199 Ind. Cas. 480.

——S. 37—Effect of annulment—Removal of attachment.

Where, in execution of a decree, an attachment is effected and while that attachment is pending, the judgment-debtor is adjudged insolvent, the order of adjudication merely makes the attachment ineffective so long as the property is in the hands of the Receiver. The order dismissing the pending execution petition does not automatically raise the attachment. Hence, where the adjudication is annulled, the property re-vests in the judgment debtor with all the burdens which existed upon it at the time of adjudication and the attachment which was in abeyance comes into force. A.I.R. 1940 Mad. 129 = 50 L.W. 716 = 1939 M.W.N. 1111 = (1939) 2 M.L.J. 786.

——S. 37—Effect of annulment—Official Receiver, if can sell leasehold rights of insolvent.

All that the Insolvency Judge can do on the annulment of the adjudication is to direct that the property of the insolvent should vest in a certain person. Even if he passes a vesting order, the Receiver can only hold the property for the benefit of the creditors, and the creditors would have to enforce their claim by a proper suit. The property cannot be sold in any case by the Insolvency Court.

Where, therefore, the Insolvency Judge has annulled the adjudication, no further proceedings can be taken by the Official Receiver for the sale of the leasehold rights of the insolvent. A.I.R. 1939 Lah. 536 = I.L.R. (1939) Lah. 275 = 41 P.L.R. 741 = 185 Ind. Cas. 520.

——S. 37—Effect of annulment—Court annulling adjudication and ordering sale of property in Receiver's hands—No vesting order—Receiver, held was subject to condition to distribute proceeds among creditors.

A Receiver applied to the Court to annul the adjudication and the adjudication was annulled. There was no vesting order made and no person appointed under S. 37 or at all. The application to annul asked that "the property of the insolvents be ordered to vest in the Receiver as before." The order, as published in the **Gazette**, was a simple annulment order as follows: ".....order that the adjudication is annulled

subject to the property in the hands of the Receiver which will be sold and assets will be distributed amongst the scheduled creditors." The former insolvents asked for the return of their movable property and account books in the hands of the Receiver:

Held, that the reverter was subject to the condition that the property would be sold and proceeds would be distributed among the creditors and it was all that was necessary. A.I.R. 1939 Nag. 203 = I.L.R. (1941) Nag. 410 = 1939 N.L.J. 186 = 183 Ind. Cas. 316.

——S. 37—Effect of annulment.

Where after a person is adjudged an insolvent and his property vested in Official Receiver by order of the Court the property is sold by the Receiver with the approval of the Court but the adjudication is subsequently annulled and after such annulment the sale-deed is executed and registered by the Receiver, the sale is valid. A.I.R. 1939 Oudh 55 = 1939 A.W.R. 17 = 1939 O.W.N. 32 = 14 Luck. 404 = 179 Ind. Cas. 764.

——S. 37—Effect of annulment on proceedings under Ss. 53 and 54.

The Receiver or a creditor or the Insolvency Court cannot either institute or continue proceedings under S. 53 or 54, once the adjudication has been annulled.

Consequently, where the creditors apply for an annulment of transfer made by the insolvent during the insolvency, and during the pendency of the application, the adjudication is annulled without any opposition by the creditors, the creditors cannot pursue their application for the annulment of the transfer. The question of violating the proceedings under S. 37 does not arise. The property transferred ceases to be the property of the debtor and the Court has no power to deal with it under S. 37. A.I.R. 1938 Nag. 312 = I.L.R. (1940) Nag. 204 = 177 Ind. Cas. 760.

——S. 37—Effect of annulment.

Money was deposited with a banker on current account. The banker was adjudged insolvent and the credit or made a claim by a tender of proof of his debt. The adjudication was annulled and an order under S. 37 (1), Provincial Insolvency Act was passed. Payment of dividend was made to the creditor by the appointee. The creditor subsequently instituted a suit to recover the balance:

Held, that the claim made by tender of proof of debt to share equally and proportionately in the assets was also annulled when the adjudication was annulled, except in so far as any payment towards that claim had been made. The effect of the annulment was to remit the party whose insolvency was set aside, to his original situation. While the estate was in the hands of the appointee who must be considered as in a position of a trustee, the time did not run against the creditor. A.I.R. 1938 Rang. 335 = 1938 Rang. L.R. 468 = 179 Ind. Cas. 428.

——S. 37—Effect of annulment.

Though the annulment of adjudication will revive the remedies of the creditors which they had before the order of adjudication, any transfers made by the insolvent after the order of adjudication cannot be made valid by the annulment. 1937 O.W.N. 94.

——Ss. 37 and 43—Effect of annulment—Termination of insolvency proceedings—Vesting order under S. 37—Whether can be made after date of annulment order.

The insolvency proceedings do not automatically terminate with the annulment, and it cannot be said that by an order passed under S. 43, the Judge loses seisin of the matter and cannot thereafter make any order in those proceedings. A.I.R. 1936 Cal. 573 = 40 C.W.N. 1229 = I.L.R. (1937) 1 Cal. 264 = 166 Ind. Cas. 509.

——Ss. 37 and 28 (4)—Effect of annulment—Annulment of adjudication of Government servant—Creditor's right to proceed against salary.

Where the insolvent, a Government servant, incurs debts subsequent to adjudication and the creditor obtains a decree and subsequently, the adjudication is annulled but the Official Receiver has not availed himself of S. 28 (4), the decree-holder can proceed against salary obtained by him after the annulment order. A.I.R. 1936 Lah. 761 (762) = 166 Ind. Cas. 214.

——S. 37—Effect of annulment—Duty of Court—Failure to pass reverting order—Effect.

The phraseology of S. 37 clearly indicates that on passing an order annulling the adjudication, the Insolvency Court must pass an order vesting the property of the insolvent in a person appointed by it and in the absence of such an order, the property reverts to the insolvent. A.I.R. 1936 Lah. 568 = 38 P.L.R. 273 = 163 Ind. Cas. 1007.

——S. 37—Effect of annulment—Reversion of property to debtor.

Where an adjudication is annulled under S. 43, S. 37 comes into operation and the property of the debtor reverts to the debtor unless the Court directs that it shall vest in some other person, and if the Court does not make provision in this behalf, the Official Receiver ceases to have any right to deal with the debtors' properties thereafter. A.I.R. 1936 Mad. 915 = 1936 M.W.N. 806 = 44 L.W. 719 = 165 Ind. Cas. 207.

——S. 37—Effect of annulment.

Except where there is an express provision in that behalf, the effect of an order annulling an order of adjudication is that there is no longer an insolvent before the Court, and the Court, subject to S. 37, is no longer entitled to pass orders in respect of debtor's estate in its insolvency jurisdiction. A.I.R. 1936 Rang. 284 = 14 Rang. 254 = 163 Ind. Cas. 217 (F.B.).

——S. 37—Effect of annulment—Vesting order under S. 37—Proceedings, if continue for all purposes.

When an insolvency Court annuls an adjudication under S. 43, and also vests the insolvent's property is an appointee under S. 37, the Insolvency Court retains full power to give directions under S. 37 as to

realisation and disposal of the debtor's assets. An order under S. 37 does not continue the insolvency proceedings for all purposes. A.I.R. 1935 Mad. 826 = 1935 M.W.N. 886 = 69 M.L.J. 364 = 42 M.L.W. 386 = 58 Mad. 908 = 158 Ind. Cas. 1060 (F.B.).

——S. 37—Effect of annulment.

Where an adjudication is annulled during the pendency of a petition filed by a creditor for setting aside a sale effected by the Receiver, the petition cannot be dismissed summarily on this ground, but should be proceeded with. The Court should, however, make an order under the latter part of S. 37 that the property shall revest in the Receiver if the sale is set aside. A.I.R. 1935 Mad. 433 = 41 M.L.W. 461 = 1935 M.W.N. 494 = 156 Ind. Cas. 284 (2).

——S. 37—Effect of annulment—Effect on proceedings under Ss. 53 and 54.

Where, soon after the dismissal of an application by the Receiver to set aside a transfer, the adjudication is annulled there is no existing insolvency upon which an order in favour of the Receiver or the scheduled creditors as such can be based. The Receiver has ceased to exist and consequently no appeal is competent by the Receiver or a creditor from the order of dismissal. A.I.R. 1935 Rang. 498 = 160 Ind. Cas. 861.

——S. 37—Effect of annulment—Rights of creditors to pursue their remedies.

The consequences of annulment of adjudication are different to those of a discharge and on the annulment of adjudication, there is nothing to prevent a creditor from pursuing his remedy in a Court of law if his debt has not been scheduled in the insolvency proceedings.

Therefore, where an adjudication is annulled after a composition scheme, a creditor in whose name the debtor had issued a cheque before adjudication is entitled to recover the amount due on the cheque. A.I.R. 1933 Lah. 187 = 34 P.L.R. 135 = 141 Ind. Cas. 260.

——S. 37—Effect of annulment.

It is not correct to say that after the order of annulment, the insolvency proceeding comes to an end **ipso facto**. A.I.R. 1933 Pat. 84 = 13 P.L.T. 775 = 12 Pat. 163 = 141 Ind. Cas. 836.

——S. 37—Effect of annulment—Transfer by insolvent.

Different considerations may arise if, subsequent to the order of annulment and before the order vesting the property in some other person than the insolvent, the latter has made transfers of properties to a **bona fide** purchaser. Such a purchaser perhaps may not be affected. But the insolvent and all those persons who were party to the insolvency proceeding are bound by the order. A.I.R. 1933 Pat. 84 = 13 P.L.T. 775 = 12 Pat. 163 = 141 Ind. Cas. 836.

——S. 37—Effect of annulment.

The effect of S. 37 is to remit the party whose insolvency is annulled to his original pesition.

On February 24, 1926, an application was made for adjudicating a person as an insolvent, and he was adjudicated on November 8, 1927. Meanwhile, one of the creditors applied for execution on June 16, 1926, and sold a debt on April 1, 1927. On June 14, 1928, the adjudication was annulled under S. 43, and the purchasers claimed the amount due under the debt which they had purchased objecting to its distribution among the creditors :

Held, (i) that even assuming that the adjudication had not been annulled, the purchasers obtained a good title to the debt ;

(ii) that under S. 37, the only properties of the debtor which reverted to him were the sale-proceeds and not the debt itself and the purchaser was, therefore, entitled to the amount claimed. A.I.R. 1931 Pat. 70 = 9 Pat. 945 = 130 Ind. Cas. 38.

——S. 37—Effect of annulment.

A creditor's name was included in an insolvency petition schedule by a debtor. The adjudication was annulled on acceptance of a composition scheme by which a surety gave undertaking to pay a certain dividend, and the debts due to all the scheduled creditors were taken into the reckoning of the amount for which the surety gave his bond. The creditor, who had no notice of this composition scheme, could not prove his debts before the annulment, but was afterwards allowed to prove them and he agreed to accept the composition rate.

Held, Per Wallace J., that although the annulment of an adjudication puts an end to insolvent's state of insolvency, it does not, in cases where the Court still retains control of the insolvent's assets put an end to the insolvency proceedings within the meaning of S. 28. All the creditors named in the insolvency petition schedule must come in, on foot of the composition which has been approved and cannot have any remedy independent of the insolvency proceedings. So any such creditor is entitled, on proving his debt, to be admitted on the foot of the composition to have his name added to those already in the scheme schedule under S. 39 and get his dividends at the schemes rate. A.I.R. 1927 Mad. 919, Expl. A.I.R. 1925 Lah. 489, Expl. and Diss. Ex-parte Clerk's (1884) 13 Q.B.D. 426 and In re. Keef (1905), 2 K.B. 666.

Per **Thiruvenkatachariar J.**—An order of annulment does not amount to a discharge of the insolvent which has the effect of wiping of all the debts of the insolvent provable in insolvency. 115 Ind. Cas. 815 = 29 M.L.W. 23 = 1929 M.W.N. 22 = A.I.R. 1929 Mad. 157 = 56 M.L.J. 458.

——S. 37—Effect of annulment on Receiver's powers.

When the order of adjudication has been annulled the property of the person sought to be adjudicated cannot be distributed by the Official Receiver amongst the creditors. He must keep it in his hands for the benefit of the proposed insolvent. 98 Ind. Cas. 1060 = 1926 M.W.N. 950.

——S. 37—Effect of annulment.

When an annulment is made, the debtor reverts to the position as he was before the insolvency. 9 Pat. 945=A.I.R. 1931 Pat. 70.

——S. 37—Effect of annulment.

Where no appointment was made by the Court and no conditions were imposed, it would seem that the property would revert to the insolvent unconditionally. 86 Ind. Cas. 324 = 3 Rang. 201 = A.I.R. 1925 Rang. 301.

5. Object.

——S. 37—Object.

The object of the vesting order under S. 37 is to protect all the creditors who would have been treated fairly and equally by the Court if the insolvency proceedings went on in normal course. A.I.R. 1936 Cal. 573 = 40 C.W.N. 1229 = I.L.R. (1937) 1 Cal. 264 = 166 Ind. Cas. 509.

——S. 37—Object of S. 37.

The sole object and intention of the Legislature in enacting S. 37 was to put a brake upon the ex-insolvent's activities by giving the Court a discretion, if it thought fit to do so, not to hand back to the debtor his property unconditionally or at once, but either to do so after imposing a condition upon him in a proper case which would give the creditors an opportunity to make good their claims in the ordinary course of law against the debtor, or to vest the debtor's estate in some person appointed by it, presumably for a reasonable period so that if the creditors hereafter acted with reasonable diligence, they would be able by attachment or otherwise to liquidate any decrees that they might obtain against the debtor out of the assets in the hands of the appointee. A.I.R. 1936 Rang. 284 = 14 R. 254 = 163 Ind. Cas. 217 (F.B.).

——S. 37—Object of.

Section 37 was intended to vest the insolvent debtor's admitted properties in some third person for the purpose of making them available to the creditors while in the meanwhile avoiding the debtor being called an insolvent. A.I.R. 1931 Mad. 10 = 1930 M.W.N. 673 = 32 M.L.W. 446 = 59 M.L.J. 710 = 129 Ind. Cas. 36.

6. Powers and duties of appointee.

——S. 37—Person appointed under—Right to ask for possession of debtor's property—Order by court for possession—Propriety.

An order under S. 37, Provincial Insolvency Act, has not the effect of continuing the insolvency proceedings for all purposes, but the person appointed under the section has such powers as are necessarily implied by the vesting order and as may be necessary for carrying out the directions of the court in connection with the realisation and distribution of the debtor's property in accordance with the Act. When the property of the debtor has vested in the appointee he is entitled to ask the court for possession of the property when delivery of possession is obstructed by other persons and the Court can order possession to be delivered to him. 25 Pat. 286 = A.I.R. 1947 Pat. 239 = 13 B.R. 551.

——S. 37—Powers and duties of appointee—Vesting of insolvent's property on annulment of adjudication—Powers of Receiver—Right to enforce claim for contribution.

Where certain properties are vested in a Receiver under S. 37 of the Provincial Insolvency Act on the annulment of an adjudication his powers in respect of such properties need not be expressly conferred by the order made under S. 37; they may be such as are necessarily implied by the vesting order and the receiver will have in respect of such properties the powers he had in respect of the insolvent's properties generally before the date of the annulment. The Receiver would be entitled to maintain a suit to enforce a claim for contribution possessed by the insolvent. 1948 M.W.N. 495 (2) = 61 L.W. 409 = A.I.R. 1949 Mad. 19 = (1948) 1 M.L.J. 473.

——S. 37—Powers and duties of appointee.

When an order adjudicating a debtor insolvent has been annulled by the Insolvency Court under S. 43, for the failure of the insolvent to apply for his discharge within the time allowed to him by the order of adjudication, the custodian of the property of the debtor appointed by the Insolvency Court under S. 37 can continue an application which had been made by the Receiver in insolvency under Ss. 53 and 54 for setting aside a fraudulent alienation. A.I.R. 1944 Bom. 72 = 45 Bom. L.R. 1069 = 211 Ind. Cas. 615.

——S. 37—Powers and duties of appointee.

A Receiver appointed on annulment of adjudication, though he does not enjoy all the powers which a Receiver appointed has under the Act, yet is empowered to sell the properties without the permission of the Court. A.I.R. 1944 Mad. 318 = 57 M.L.W. 157 = (1944) 1 M.L.J. 221 = 1944 M.W.N. 164 = 217 Ind. Cas. 379.

——S. 37—Powers and duties of appointee.

The Receiver or other person appointed to continue the administration of the property after annulment has only such powers as are necessarily implied by the vesting order, which are to carry out the directions of the Court, which directions should, as far as the realisation and distribution of the debtor's property are concerned, be in accordance with the provisions of the Insolvency Act. It is not necessary for the Official Receiver or other person appointed to apply to the Insolvency Court for directions with regard to powers that are obviously intended to be conferred by the order vesting the property in the Official Receiver. The principal purpose of continuing the property in the Official Receiver is that he might sell the property and distribute the proceeds. That power must be implied from the order itself. A.I.R. 1943 Mad. 266 = 1943 M.W.N. 134 = (1943) 1 M.L.J. 127 = 56 L.W. 125 = 210 Ind. Cas. 460.

——S. 37—Powers and duties of appointee—Hindu Joint family property—Son's share attached before vesting of father's assets in Official

Receiver—Official Receiver cannot sell son's share or utilize proceeds thereof to extent of attachment.

The attachment of the sons' shares in Hindu joint family property automatically prevents the father from exercising over those shares his power to sell the property and utilise the proceeds for the discharge of his own just debts. Similarly, when the shares of the sons have been attached by a creditor before the father's assets vest in the Official Receiver, the vesting in the Official Receiver of the power of the father to dispose of his sons' shares for the payment of his own debts cannot enable that power to be exercised over the properties so attached. Hence, when at the time of the re-vesting order, the sons' shares are under an attachment by a creditor, the re-vesting order would give to the Official Receiver no power to sell those shares or to use the proceeds of those shares for the satisfaction of the other debts of the father to the extent of the attachment. A.I.R. 1943 Mad. 94 = 1942 M.W.N. 470 = 207 Ind. Cas. 124.

——S. 37—Powers and duties of appointee—Sale without impleading appointee—Legality.

The only person entitled to represent the estate is the appointee under S. 37. A sale held without him on record is a sale without the estate being represented in the execution proceeding and is, therefore, null and void. A.I.R. 1942 Mad. 371 = 1942 M.W.N. 114 = (1942) 1 M.L.J. 311 = 203 Ind. Cas. 516.

——S. 37—Powers and duties of appointee.

The persons in whom property vests under S. 37 have full power to deal with the property vested in them and can proceed to distribute the estate. A.I.R. 1941 Lah. 316 = 43 P.L.R. 369 = I.L.R. (1942) Lah. 330 = 197 Ind. Cas. 564.

——S. 37—Powers and duties of appointee.

The question whether one creditor is entitled to appropriate the money which is intended for the distribution among all the creditors in priority to other creditors can only be adjudicated in the presence of the creditors by the Court which has jurisdiction in insolvency and the Official Receiver cannot be held to represent the creditors in regard to the decision on this question of priority. A.I.R. 1941 Mad. 753 = 1941 M.W.N. 489 = 200 Ind. Cas. 492.

——S. 37—Powers and duties of appointee—Vesting of assets of insolvent in Official Receiver—Execution proceeding against assets—Official Receiver, position of.

Where, in the execution proceedings against the insolvent's assets after the vesting of the same in the Official Receiver under S. 37, the Official Receiver acts in the belief that he held the property vested in him for the benefit of the insolvent and as his property, he cannot be deemed to have represented the creditors in the execution proceedings, and any order passed against him in those proceedings cannot be held to be an order passed in a representative capacity against him so as to bind the creditors. The order can only be said to bind the Official Receiver in his individual capacity, that is, as representing the debtor, if at all he represented him. A.I.R. 1941 Mad. 753 = 1941 M.W.N. 489 = 200 Ind. Cas. 492.

——S. 37—Powers and duties of appointee.

The person in whom the property is vested under S. 37 is in the position of a trustee for the creditors and in such a character, he has the power and is under the duty of administering the assets vested in him fairly and equally amongst all the creditors and in this matter he has to guide himself by the rules of administration contained in the Insolvency Act. A.I.R. 1936 Cal. 573 = 40 C.W.N. 1229 = I.L.R. (1937) 1 Cal. 264 = 166 Ind. Cas. 509.

——S. 37—Powers and duties of appointee—His function—Whether necessary party in suits.

Unlike a Receiver, an appointee is an unnecessary party to a suit in respect of debts proved in insolvency before annulment as his only duty is to be the custodian of the property so that it may be attached in his hands when decrees are obtained against the debtor. He is not even a proper party, as he could in no event pay up money except to persons who have obtained decrees and he is bound to do that whether he is a party to the decrees or not. A.I.R. 1936 Rang. 338 = 164 Ind. Cas. 412.

——S. 37—Powers and duties of appointee—Whether limited to holding asset pending suit against debtor's property—Whether has power to distribute assets vested in him to creditors or to anybody else.

The power of a person appointed under S. 37 (1) is limited to holding the assets pending suits against the property by the creditors, and he has no power to realize and distribute the assets among the creditors with or without directions to that effect by the Court. Although the appointee under S. 37 (1) is under a duty to take steps to preserve the estate of the debtor which vests in him, he has no right under the Insolvency Act to distribute the assets vested in him to the general body of creditors or to anybody else. A.I.R. 1936 Rang. 284 = 14 Rang. 254 = 163 Ind. Cas. 217 (F.B.).

——S. 37—Powers and duties of appointee.

The person appointed under S. 37 has no longer, by the mere fact of his appointment, the powers which a Receiver has under the Act. He has only such powers as are necessarily implied by the vesting order which are, to carry out the directions of the Court and those directions, should, so far as the realisation and distribution of the debtor's property are concerned, be in accordance with the provisions of the Insolvency Act.

Where an application by the Official Receiver under Ss. 53 and 54 is already pending when the order of annulment is passed under S. 43, and the person appointed under S. 37 is the Official Receiver who was Receiver under the Act before the annulment, the Receiver can continue to pursue his remedy. He cannot, however, initiate proceedings under Ss. 53 and 54 after the annulment. A.I.R. 1935 Mad. 826 = 1935 M.W.N. 886 = 69 M.L.J. 364 = 42 L.W. 386 = 58 Mad. 908 = 158 Ind. Cas. 1060 (F.B.).

——S. 37—Powers and duties of appointee—Status of appointee.

There is nothing in the Act which says that the appointee is to be ranked lower than an ordinary bailee. In this case, he is somewhat in the nature of

bailee for hire or reward, because provision has been made for the drawing of commission. Executing a decree and thereby preventing the right to draw the money being completely lost is a normal procedure in safeguarding the estate in his hands so that creditors may later on have recourse to it. There is, therefore, no legal reason why he should not take the very proper course of executing a decree in favour of the Receiver in insolvency. A.I.R. 1935 Rang. 328 = 14 R. 63 = 158 Ind. Cas. 651.

——Ss. 37, 43 and 64—Powers and duties of appointee—Annulment of adjudication—Order vesting property in Official Assignee—Winding-up of estate—Procedure—Power to issue notices calling for claims.

Where an adjudication is annulled under S. 43, and an order is made vesting the property of the insolvent in the Official Assignee undes S. 37, Official Assiguee should proceed to divide the amounts in his hands amongst the creditors whose claims have been admitted and entered in the schedule. He has no power to proceed under S. 64 and R. 24 (2) and issue notices calling for claims. A.I.R. 1931 Sind 31 = 25 S.L.R. 367 = 129 Ind. Cas. 898.

——S. 37—Powers and duties of appointee—Transferability of property vested under.

Persons vested with property under S. 37 or trustees under S. 39, Insolvency Act, have full power to deal with the property vested in them. A.I.R.1925 Sind 159, Foll. 108 Ind. Cas. 603 = 10 L.L.J. 180 = A.I.R. 1928 Lah. 453.

7. Powers of Court.

——S. 37—Powers of Court—Proof of debts not already proved.

The Court when passing the order under S. 37 retains control over the property of the debtor to the extent required to see that the distribution of the assets is made fairly between all the creditors of the insolvent. Hence creditors who had not already proved their claim in the insolvency can prove the same after the passing of the vesting order under S. 37. A.I.R. 1944 Mad. 150 = 56 L.W. 746 = 1943 M.W.N. 811 = (1943) 2 M.L.J. 655 = 212 Ind. Cas. 319.

——S. 37—Powers of Court.

From the date of the vesting order under S. 37, the funds of the insolvent pass completely under the disposal of the Insolvency Court to be administered according to the provisions of the insolvency law, and it is competent to that Court to direct a refund of any sum of money taken away by a creditor who is amenable to its jurisdiction in excess of what he is justly entitled to. The order of the executing Court that certain decree is executable against the insolvent's assets does not, in any way, affect the power of the Insolvency Court over the funds at its disposal. A.I.R. 1941 Mad. 753 = 1941 M.W.N. 489 = 200 Ind. Cas. 492.

——S. 37—Powers of Court.

Where the Court passes a vesting order under S. 37 restricted in a specific way, *e.g.*, by prescribing that the property is to be held for the satisfaction of one particular debt only, it cannot, on some future date, pass a fresh order removing those restrictions and providing for an entirely new scheme for the distribution of the assets by directing payment towards other debt. The Court has no jurisdidtion to alter its order merely because it is said to have worked hardship on some of the creditors. Its powers in respect of that order must be taken to be confined to the power to give such directions as are necessary to carry out its intention. A.I.R. 1940 Mad. 724 = 1940 M.W.N. 420 = 51 L.W. 612 = (1940) 1 M.L.J. 932.

——S. 37—Powers of Court—Duty to order annulment.

When an adjudication has taken place under the Prov. Insol. Act and it has been shown that no act of insolvency has been committed, the Court has no discretion in the matter. It must annul the adjudication. A.I.R. 1940 Mad. 375 = (1940) 1 M.L.J. 228 = 51 L.W. 231 = 1940 M.W.N. 157 = I.L.R. (1940) Mad. 441 = 189 Ind. Cas. 573 (F.B.).

——S. 37—Powers of Court—Court, if can proceed to distribute assets of insolvent among creditors—Proper procedure.

Section 37 (1) does not allow an Insolvency Court on annulling an insolvency to proceed to distribute the assets of the insolvent among any of the creditors. The distribution of assets is a proceeding in insolvency, and by annulling the insolvency, it means that the Court will not proceed with the insolvency. Therefore, the course open to the Court is either to return the property to the insolvent on condition that he furnishes security which will make it available to the creditors or for some other reason the Court may direct the property of the insolvent in the hands of Receiver to vest in a certain person. The words " to vest in such person " do not mean distribution of assets amozg the creditors. A.I.R. 1940 Oudh 260 = 1940 O.W.N. 400 = 1940 A.W.R. 198 = 15 Luck. 471 = 187 Ind. Cas. 729.

——S. 37—Powers of Court.

Where the bankruptcy is annulled, the authority of the Court will survive so far as may be necessary to complete the acts which were incomplete at the date when the order of annulment was passed. A.I.R. 1939 Oudh 55 = 1939 O.W.N. 32 = 1939 A.W.R. 17 = 14 Luck. 404 = 179 Ind. Cas. 764.

——S. 37—Powers of Court—Vesting order passed subsequent to order of annulment—Validity.

The order of the Court to the effect that the right, title and interest of the insolvent in the properties shall re-vest in the Official Receiver and that he should sell the same and distribute the proceeds among the creditors passed after the annulment is valid. A.I.R. 1938 Mad. 752 = 1938 M.W.N. 455 = 47 L.W. 587 = (1938) 1 M.L.J. 824 = 179 Ind. Cas. 564.

——S. 37—Powers of Court.

When the property of an insolvent is vested in the Official Receiver or any other appointee under S. 37, it is the Insolvency Court which retains control of it and the Insolvency Court must direct its disposal in the

interests of the general body of creditors. It is not open to a creditor to attach the insolvent's property in the Official Receiver's (or appointee's) hands. A.I.R. 1935 Mad. 835 = 1935 M.W.N. 677 = 69 M.L.J. 196 = 42 L.W. 446 = 59 M. 62 = 157 Ind. Cas. 917.

——S. 37—Powers of Court—Modification of order to protect creditors.

The order of annulment, on failure to apply for discharge is intended to punish the insolvent by withdrawing from him the protection which he gets by the order of adjudication and if, while passing the order of annulment, the Court, by some oversight or other, fails to pass orders for the protection of the creditors, there is no reason why the Court cannot do so when the mistake is pointed out to it, and there is nothing in the Prov. Insol. Act to prevent it. A.I.R. 1933 Pat. 84 = 13 P.L.T. 775 = 12 Pat. 163 = 141 Ind. Cas. 836.

——S. 37—Powers of Court—Power to make supplementary orders.

An order of annulment without making provision for the protection of the creditors is an order which would defeat the ends of justice and lead to an abuse of the process of the Court, and the Court is perfectly entitled to exercise its inherent powers by making supplementary orders. A.I.R. 1933 Pat. 84 = 13 P.L.T. 775 = 12 Pat. 163 = 141 Ind. Cas. 836.

——Ss. 37, 43 and 53—Powers of Court—Failure to apply for discharge—Annulment of adjudication—Proceedings for avoiding fraudulent transfers, whether abate—Power of Court to direct continuation of such proceedings—Order vesting property in Receiver, effect of.

Section 37 is intended to permit a Court to direct as one of the conditions of the annulment of an adjudication under S. 43 that proceedings begun with its permission under S. 53 or S. 54 shall not automatically cease because of the annulment, but may be continued. Such a direction, however, cannot be inferred from a mere order vesting the property in the Official Receiver where it was not the Official Receiver who was maintaining the proceedings under S. 53 but a creditor. In the latter case, a specific direction permitting the proceedings instituted by the creditor to be continued is necessary. A.I.R. 1932 Mad. 731 = 63 M.L.J. 414 = 36 L.W. 655 = 1932 M.W.N. 1105 = 139 Ind. Cas. 574 (2).

——S. 37—Powers of Court—Failure to apply for discharge—Annulment of adjudication—Distribution of assets among creditors, legality of—Proper procedure.

Section 37 does not allow an Insolvency Court on annulling an insolvency to proceed to distribute the assets of the insolvent among any of the creditors. The proper course open to the Court is either to return the property to the debtor on condition that he furnishes security which will make it available to the creditors to take their remedy under the ordinary civil law or pending such security, or for some other reason the Court may direct the property of the insolvent in the hands of the Receiver to vest in a certain person. But the words "to vest in such person," do not mean distributing the property among the creditors. A.I.R. 1931 All. 71 = 1931 A.L.J. 18 = 53 A. 313 = 134 Ind. Cas. 848.

——S. 37—Powers of Court.

Whenever the effect of the insolvents' failure to apply for discharge within the time prescribed is to prevent any inquiry into an allegation of fraudulent conduct, the Court can take hold of the fact and extend the time for applying for discharge. A.I.R. 1931 Mad. 10 = 32 L.W. 446 = 1930 M.W.N. 673 = 59 M.L.J. 710 = 129 Ind. Cas. 36.

——S. 37—Powers of Court—Order vesting property in Receiver—Failure to apply—On annulment under S. 43 vesting order in Official Assignee for benefit of creditors is valid.

Upon the annulment of adjudication under S. 43 the Court is competent to order under S. 37 that the property shall vest in the Official Assignee or any other person for the benefit of creditors. Case Law discussed. 31 M.L.W. 546 = A.I.R. 1930 Mad. 520 = 58 M.L.J. 658.

——S. 37—Powers of Court—Order vesting property in Official Receiver.

On an annulment of adjudication under S. 43 owing to the failure of the insolvent to apply for his discharge within the specified time the property of the insolvent does not necessarily revert to him. Under S. 37 the Court should, in proper cases, order the property to vest in the Official Receiver. In this way the insolvency proceedings not having come to an end, the proceedings started before the annulment by the Official Receiver to set aside a mortgage under S. 54 must be deemed to be pending, and, therefore, can be continued after the annulment. 122 Ind. Cas. 351 = 52 Mad. 648 = 1929 M.W.N. 489 = 29 M.L.W. 649 = A.I.R. 1930 Mad. 278 = 57 M.L.J. 116.

8. Re-vesting Order.

——S. 37—Vesting under—Effect—Insolvency proceedings if continued. *See* Pro. Insol. Act (V of 1920) Ss. 78 (2), Proviso and 37. (1949) 1 M.L.J. 209 = A.I.R. 1949 Mad. 683.

——Ss. 37 and 43—Re-vesting order—Annulment of adjudication on failure of insolvents to apply for discharge in time—Revesting of the properties in insolvents—Legality.

When an adjudication is annulled on the ground that the insolvents had not fulfilled their duty by applying for their discharge within the time fixed by the Court it would not be a proper exercise of discretion for the Court to re-vest the properties in the insolvents, for that would be allowing the insolvents to take advantage of their own default. It is obvious from the provisions of the Provincial Insolvency Act that the creditors who had already proved their debts would be seriously prejudiced by such an order as under S. 61 (5) of the Provincial Insolvency Act such creditors alone would be entitled to be rateably paid out of the amount realised by the assets of the insolvents, if the administration in insolvency were to continue. Whereas if the properties were re-vested in the insolvents there would be nothing to prevent other creditors who had obtained decrees subsequent to the annulment to come under S. 73, C.P. Code, and claim rateable distribution out of the assets realised in execution of any decree against the insolvents. 1948

M.W.N. 457 = 59 L.W. 349 = A.I.R. 1946 Mad. 388 = 227 Ind. Cas. 525 = (1946) 1 M.L.J. 262.

——S. 37—Re-vesting order.

An order under S. 37 vesting the property in some person need not be simultaneous with the order of annulment. It can be made afterwards. (1946) 12 Cut. L.T. 62.

——Ss. 37 and 35—Re-vesting order—Adjudication annulled—Vesting order, when should be made.

Where an adjudication is annulled under S. 35, no vesting order should be made under S. 37 except to the extent that any special circumstances render such vesting necessary. A.I.R. 1945 Mad. 257 = 58 L.W. 150 = (1945) 1 M.L.J. 292 = 1945 M.W.N. 206 = I.L.R. (1946) Mad. 54.

——S. 37—Re-vesting order—Scheme of composition approved by Court—Vesting order, if can be made—Bankruptcy proceedings, whether continue.

When the Court has approved of a scheme of composition, a vesting order can certainly be made, and in such cases, there is continuance of the bankruptcy proceedings though in another form. The control of the Court is still retained and the proceedings are moulded on the terms of the composition under the direction of the Court. A.I.R. 1943 Cal. 133 = 47 C.W.N. 74 = I.L.R. (1943) 1 Cal. 5 = 76 C.L.J. 460 = 206 Ind. Cas. 619.

——S. 37—Re-vesting order—What is.

Where, the Court, after dismissing the application for discharge for non-prosecution annuls the adjudication and directs the Official Receiver to deal with the insolvent's property and proceed with the sale, the order must be taken to have been passed under S. 37 vesting the property in the Official Receiver after annulling the adjudication under S. 43 (1) and will not be set aside merely because there are no clear words to show that the Official Receiver was made the appointee under S. 37 in whom the property of the debtor was to vest. A.I.R. 1943 Cal. 133 = 47 C.W.N. 74 = I.L.R. (1943) 1 Cal. 5 = 76 C.L.J. 460 = 206 Ind. Cas. 619.

——S. 37—Re-vesting order—Attachment before re-vesting—Creation of charge.

An attachment of the insolvent's property before the passing of a re-vesting order creates no charge and hence cannot prevent the property from being available to the Official Receiver. The attachment cannot make the property which belonged to the insolvent anytheless his property. A.I.R. 1943 Mad. 94 = 1942 M.W.N. 470 = 207 Ind. Cas. 124.

——S. 37—Re-vesting order—Effect—Property does not revert to insolvent.

When there is an order under S. 37, vesting the property in some one other than the debtor, there is no "reversion of the debtor's property to himself." The appointee continues to be subject to the directions of the Insolvency Court which appointed him. Those directions relate to the property of the insolvent and should be given in accordance with the policy and provisions of the Insol. Act. A.I.R. 1942 Mad. 371 = 1942 M.W.N. 114 = (1942) 1 M.L.J. 311 = 203 Ind. Cas. 516.

——S. 37—Re-vesting order—Effect.

Until the property is again re-vested in the insolvent, the insolvent has no title to the said property. On annulment of the adjudication, S. 37 provides that the property may re-vest in the insolvent provided the Court does not vest the property in any person whom it appoints. Therefore, if the Court chooses to appoint a person, and vests the property in him, the insolvent gets no title to the said property by reason of the said annulment. The property comes completely under the Insolvency Court and can only be disposed of under its direction and can only be distributed equally among all the creditors whose debts have been duly proved and no one creditor has got a right to appropriate the money of the insolvent to the exclusion of the other creditors. Thus, there is a statutory trust created by virtue of the order under S. 37 in favour of the creditors. Thus a creditor who obtains a decree against the property in the hands of the Official Receiver can have satisfaction of the decree from the moneys in the hands of the Official Receiver in accordance with the provisions of the insolvency law. A.I.R. 1941 Mad. 753 = 1941 M.W.N. 489 = 200 Ind. Cas. 492.

——S. 37—Re-vesting order.

Subsequent to vesting under S. 37, one of creditors who had proved his debt filing suit against insolvent and Official Receiver for recovery thereof and obtaining decree—Application by Official Receiver for expunging debt on which decree was obtained on ground that it was bogus and for refund—High Court holding said debt could not be expunged—Relief as to refund must also be deemed to have been negatived—High Court decision, held binding on creditors. A.I.R. 1941 Mad. 753 = 1941 M.W.N. 489 = 200 Ind. Cas. 492.

——S. 37—Re-vesting order—Time for making.

A vesting order under S. 37 can be made after the date of the annulment order. A.I.R. 1936 Cal. 573 = 40 C.W.N. 1229 = I.L.R. (1937) 1 Cal. 264 = 166 Ind. Cas. 509.

——Ss. 37 and 43—Re-vesting order—Annulment of adjudication—Order vesting property in Receiver—Creditor obtaining decree against debtor subsequent to annulment, whether entitled to share in property in Receiver's hand.

The rule that, if upon the annulment of an adjudication, the property of the debtor is made to vest in the Official Receiver or any other appointee, the property of the debtor is held by the Official Receiver or the appointee for the benefit of the whole body of the creditors of the insolvent does not mean that the debtor's property can only be distributed amongst those who would be entitled to it under the provisions of the Insolvency Act, that is amongst those whose debts are provable in the insolvency. The scheme of S. 37 is to enable an orderly distribution of the assets of the insolvent and to place those assets at the disposal of all those creditors who would be able to proceed against the debtor if the property had reverted to him and a creditor who holds a debt which came into existence subsequent to adjudication may also share

in the distribution. A.I.R. 1935 Mad. 931 = 1935 M.W.N. 733 = 69 M.L.J. 856 = 58 M. 1014 = 43 L.W. 71 = 157 Ind. Cas. 1007.

——S. 37—Re-vesting order—Effect of.

When a vesting order is made, the whole of that property in the hands of the Receiver in insolvency passes to the appointee, if there is one. If no appointee has the property vested in him, that property reverts to the debtor, but only to the extent of his right or interest therein and that must mean the extent of his right or interest as it existed on the date of his adjudication. A.I.R. 1935 Rang. 328 = 14 R. 63 = 158 Ind. Cas. 651.

——S. 37—Re-vesting order.

A Court has no option but to annul an adjudication when an insolvent fails to apply for an order of discharge within the time specified by the Court. But, with a view to protect the creditors the Court should pass an order under S. 37, Act 5, 1920, vesting the property of the debtor in a person appointed by it. A.I.R. 1926 Lah. 370 and 94 I.C. 234, Foll. 100 Ind. Cas. 137 = A.I.R. 1927 Lah. 914.

9. Scope.

— —Ss. 37 and 78 (2)—Scope—Unconditional order annulling adjudication — Absence of order vesting properties in any one—Effect—Power of Court to make order subsequently to make debtor's assets available for distribution to creditors on creditor's application—S. 78 (2), if bar.

In spite of the fact that the Insolvency Court passes an unconditional order of annulment on the failure of the insolvent to apply for discharge within the time fixed and that no order vesting the properties of the debtor in an appointee of the Court is passed simultaneously with the order of annulment, the Insolvency Court still retains seisin over the properties of the debtor and may make an order relating to his properties and make the assets available for distribution among the creditors. The fact that in the absence of any conditions imposed by the Court, the properties automatically vest in the debtor, under S. 37 of the Provincial Insolvency Act, on the annulment of the adjudication does not make the Court **functus officio** so as to be incapable of passing a subsequent order, making the debtor's properties, formerly vested in the Insolvency Court, available for distribution among the creditors. S. 78 (2) of the Act is no bar to the exercise of this power by the Insolvency Court. S. 78 (2) only provides for exclusion of the period of the insolvency proceedings in computing limitation for a suit or an application, and the provision as to limitation in that section is no bar to the exercise of the power by the Court, which has jurisdiction to make such orders as it may choose to make on the application of a creditor. 1936 Cal. 573; 1933 Pat. 84, Rel. I.L.R. (1950) Cut. 117 = A.I.R. 1950 Orissa 233.

——S. 37 (1)—Scope—If retrospective—Operation of, when begins.

Section 37 (1) is an express provision saving the intermediate sales, disposition of property and payments duly made or acts done before the annulment order whether made by the Court or the Receiver. This provision would be unnecessary if the reverter is not to be given retrospective effect. If retrospective effect is to be given, it must date back to the date of the insolvency petition. A.I.R. 1945 Mad. 388 = (1945)-1 M.L.J. 472=58 L.W. 289 = 1945 M.W.N. 745.

——S. 37—Scope.

Section 37 which provides that when an adjudication is annulled, all acts therefore done by the Court or Official Receiver shall be valid, only means that the order of annulment will not invalidate them, and not that they acquire a degree of sacrosanctity and immunity from attack by way of appeal which they could not have possessed had there been no order by annulment. A.I.R. 1935 Mad. 433 = 41 L.W. 461 = 1935 M.W.N. 494 = 156 Ind. Cas. 284 (2).

——S. 37—Scope—Applicability to composition scheme—Adjudication annulled—Debtor's property vesting in third person by order of Court—Transfer of the property by debtor—Validity.

Section 37 lays down that where an adjudication is annulled, the property of the debtor who was adjudicated insolvent shall vest in such person as the Court may appoint, or in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare. The provisions of S. 37 are applicable to composition scheme by virtue of S. 39 of the Act. A transfer made by the debtor of property which has vested by order of Court in a third person is, therefore, wholly ineffectual. A.I.R. 1934 Lah. 394 = 35 P.L.R. 522 = 150 Ind. Cas. 74.

——Ss. 37, 43, 53, 54 and 75—Scope—Application by creditor to set aside alienation—Expiry of time for applying for discharge—Annulment of adjudication and order vesting alienated property in creditor, legality of—Appeal by alienee, competency of—Proper order to be passed—Power to extend time for applying for discharge.

Certain persons were declared insolvents. An application was filed for setting aside an alienation made by them. While the petition was pending, the period given to the insolvents for applying for an order of discharge expired and on the expiry of the period, the Court passed **suo motu** an order annulling the adjudication. No notice was given either to the insolvents or to the creditors or to one of them specially authorised to conduct the proceedings in respect of the alienations. The particular creditor who was so authorised then filed an application for review of the order annulling adjudication. On this petition the Subordinate Judge passed an order modifying the order of annulment and ordering that the right, title and interest of the insolvents in the properties in dispute shall vest in that creditor. The alienee filed an appeal which was dismissed as incompetent:

Held, (*i*) that the alienee was a party aggrieved by the order of the Subordinate Judge and was entitled to prefer an appeal to the District Judge;

(*ii*) that the order vesting the alienated properties in the creditor who was carrying on the proceedings was not one contemplated by S. 37 and was irregular;

(*iii*) that the proper order to be passed under the circumstances was to set aside the order of annulment and to extend the time for applying for discharge. A.I.R. 1931 Mad. 10 = 32 L.W. 446 = (1930) M.W.N. 673 = 59 M.L.J. 710 = 129 Ind. Cas. 36.

10. Miscellaneous.

——S. 37—Appeal.

An appeal does lie from an order passed under S. 37, Act 5, 1920. 100 Ind. Cas. 137 = A.I.R. 1927 Lah. 914.

——Ss. 37 and 67—Miscellaneous.

Insolvency of father—Sale of son's shares for father's debts—Surplus to be returned to the sons. 32 Bom. L.R. 1362 = A.I.R. 1931 Bom. 50.

——S. 37—Miscellaneous.

Section 6 (*a*) of the Transfer of Property Act does not apply to the case of property vesting in a person under an order of the Court under Ss. 37 and 39 of the Provincial Insolvency Act. 80 Ind. Cas. 141 = 19 S.L.R. 286 = A.I.R. 1925 Sind 159.

——S. 38.

Synopsis.

1. Absence of notice.
2. Composition before adjudication.
3. Powers and duty of Court.
4. Scope.
5. Secured creditor.
6. Miscellaneous.

1. Absence of notice.

——S. 38—Absence of notice—Scheme of composition—Notice of.

Where the scheme of composition is approved by the Court without notice to "all" the creditors, it is not binding on the creditor without notice, even if the scheme is approved by the necessary majority of creditors. It is not open to Appellate Court to speculate as to what might or might not have happened if the creditor concerned had been given the opportunity to express his disapproval of the scheme. A.I.R 1944 Mad. 414 (2) = (1944) 1 M.L.J. 430 = 1944 M.W. N. 382 = I.L.R. (1945) Mad. 184 = 57 L.W. 332.

——S. 38—Absence of notice.

In order to succeed in his application under S. 4, the creditor who has not received a notice of the proposed composition of the insolvent's debts, has to bring his case under S. 38 (4) that the terms of the proposed composition are not reasonable or not calculated to benefit the general body of creditors. A.I.R. 1944 Mad. 327 = (1944) 1 M.L.J. 84 = 1944 M.W.N. 197 = 57 L.W. 48.

2. Composition before adjudication.

——S. 38—Composition before adjudication—Stage for submitting composition scheme.

Under S. 38, a composition scheme can only be submitted after an order of adjudication has been made.

Consequently, if a composition scheme is filed before the order of adjudication, it cannot be given effect to after the order of adjudication has been passed. A.I.R. 1933 Cal. 495 (2) = 37 C.W.N. 189 = 145 Ind. Cas. 185.

——S. 38—(1907), S. 27—Composition before adjudication.

Though S. 27 of the Act allows composition before or after yet composition is impossible before adjudication as the debts are not proved before. In sanctioning a composition a Court has a direction under S. 27 (*b*). It should sanction the composition if it is reasonable and calculated to benefit the general body of creditors, and is not against commercial morality. 9 S.L.R. 181 = 32 Ind. Cas. 565.

3. Powers and duty of Court.

——S. 38—Powers and duty of Court—Majority of creditors not accepting scheme—Right to dismiss application by insolvent under S. 38.

Where a majority in number and three-fourths in value of all the creditors, whose debts were proved, do not resolve to accept a scheme of composition, a Court would be justified in dismissing an application by the insolvent under Ss. 35 and 38 of the Provincial Insolvency Act. I.L.R. (1951) Mad. 237 = 63 L.W. 764 = 1950 M.W.N. 485 = A.I.R. 1950 Mad. 800 = (1950) 2 M.L.J. 162.

——Ss. 38 and 39—Powers and duty of Court—Acceptance of proposal—Court, if becomes functus officio.

On the acceptance of the proposal by the Court, it does not become **functus officio,** but retains control to see that the composition is given effect to. A.I.R. 1942 Mad. 474 = 1942 M.W.N. 202 = (1942) 1 M.L.J. 511 = 202 Ind. Cas. 565.

——S. 38—Powers and duty of Court.

When a proposal for a composition has not been duly accepted by the creditors under S. 38 (2), it is open to the Court to approve the proposal under S. 38 (7). But an Insolvency Court can reasonably approve a proposal that had been refused by the creditors in very extraordinary circumstances involving very unusual behaviour on the part of the creditors refusing, or circumstances as where the proposal was refused by numbers while the proposal was accepted by a minority representing far more in value than the creditors who refused. Some sort of exceptional circumstance would be necessary before the Court could properly approve a proposal that the creditors had refused. A.I.R. 1941 Nag. 355 = I.L.R. (1941) Nag. 764 = 1941 N.L.J. 523 = 199 Ind. Cas. 151.

——S. 38—Powers and duty of Court—Adjudication after death—Legal representative's right of composition.

Where a debtor has died before he has been adjudged insolvent and an order of adjudication is subsequently passed against him, his legal representatives can enter into a composition with his creditors in accordance with S. 38. Composition with creditors is one of the proceedings for the realisation and distribution

of the property of the debtor within the meaning of S. 17 and if the proposed composition is not a fair one to all concerned, the Court has ample power to refuse sanction to such composition. A.I.R. 1941 Nag. 238 = 1941 N.L.J. 218 = I.L.R. (1942) Nag. 710 = 196 Ind. Cas. 67.

——Ss. 38, 39, 40 and 42—Powers and duty of Court—Insolvency of Advocate—Application for discharge—Court must consider provisions in S. 42 together with Receiver's report—Agreement between parties—Procedure in S. 38 must be followed.

According to the rules of the Lahore High Court, the licence of an insolvent legal practitioner is only suspended till his discharge—whether absolute or conditional. An Insolvency Court has no jurisdiction to impose a penalty on the insolvent in the shape of suspension from practice. The suspension is the result of the rules framed by the High Court and the scope of the rules cannot be extended either by the agreement of the parties or by the order of the Insolvency Court.

When the application for discharge of an insolvent Advocate came up for hearing, he stated that he was prepared to deposit with the Official Receiver Rs. 20 per mensem till his creditors got eight annas in the rupee and that in default of any payment, he should be disallowed to practise as an Advocate. This was agreed to by the Official Receiver and the Counsel representing creditors and on the basis of this agreement, the Court passed an order, granting 'conditional discharge and for six years' subject to the condition that the insolvent should deposit a sum of Rs. 20 with Official Receiver every month. It was also ordered that in case of default, he would be liable to suspension of practise as provided by the High Court Rules and Orders. The proved debts amounted only to Rs. 181-8-0:

Held, that the Court was dealing, not with an application under S. 38, but with the insolvent's application for discharge and for that purpose, the Court was bound to consider the matters laid down in S. 42 along with the report of the Receiver and then decide what order was appropriate in the circumstances of the case. The order passed was not in accordance with law and was not fair to the parties. The order of the Court purported to be based on the agreement between the parties but the procedure laid down for a "composition" or "scheme of arrangement" in S. 38 was not followed. The proper order to pass would have been to annul the adjudication and if the insolvent had then failed to carry out the terms of the compromise, he would have been liable to be re-adjudged insolvent: *Vide* Ss. 39 and 40. A.I.R. 1939 Lah. 495 = 42 P.L.R. 92 = 187 Ind. Cas. 424.

——S. 38—Powers and duty of Court—Proposal of scheme—Duty of Court to consider whether scheme is beneficial to general body—Consent of majority, effect of—Approval of unjust scheme—Setting aside at last stage, propriety of—Putting creditors to terms, legality of—Prima facie duty of Court—Points to be considered before approving scheme—Failure to produce accounts—Failure to appear, etc.

The business of the Court in an insolvency is to see that the assets are administered through the ordinary and proper machinery of the Court, not to require not even invite any creditor or other person to take over the estate on certain terms, and carry out the functions of the Court for it.

Although S. 38 has provided that no scheme should be approved unless the requisite majority of the creditors consent; still even if there is that consent of the creditors, the Court must exercise its judicial discretion before approving of the scheme that is, a discretion founded on sufficient reasons after considering all aspects of the case and ascertaining the facts so far as possible. The wishes of the creditors, though undoubtedly an important matter to be taken into account, are by no means to be taken as conclusive or in any way as relieving the responsibility that rests upon the Court that any order it passes, whether in the matter of approving a scheme or otherwise, is supported by the evidence on record and is clearly for the general benefit of the creditors of the insolvent.

But if a scheme is once approved by the Court, the insolvency **ipso facto** ends and though the insolvent might have secured a most undeserved advantage by having the scheme approved, the Court will not, after the expiry of a long period set that right by anything which would be unjust to the creditors.

One of the most important points which have to be taken into consideration when there is a question whether an insolvent should be discharged or a scheme should be approved is the failure to maintain or produce proper accounts. If, as a matter of fact, the insolvent did not keep accounts, that circumstance shows the recklessness of the person in the matter of carrying on his business. If, on the other hand, he kept accounts but did not produce the same, then the Court should not be too ready to help such insolvents in the matter of getting their adjudications annulled.

Where the insolvent, after his adjudication, fails to appear before the Official Receiver when summoned to do so to assist him in the administration of the estate, that is a very serious matter to be taken into consideration in sanctioning a proposed scheme. A.I.R. 1931 Mad. 344 = 1931 M.W.N. 378 = 313 L.W. 620 = 61 M.L.J. 173 = 54 Mad. 823 = 132 Ind. Cas. 134.

——S. 38—Powers and duty of Court—Acceptance by creditors.

The proceedings prescribed by S. 38 should be strictly followed and the mere absence of objection by creditors to a proposal submitted by the insolvent and accepted by the Receiver does not give rise to a presumption that the creditors accepted it. 89 Ind. Cas. 740 = A.I.R. 1926 Lah. 87.

——S. 38—(1907), S. 27—Powers and duty of Court—Schedule, when to be settled.

In all insolvency matters schedules ought to be settled as soon as possible before a composition is finally accepted. 39 Ind. Cas. 953 (A ll.).

——S. 38—(1907) S. 27—Powers and duty of Court—Annulment of adjudication—Consent of creditors.

The consent of all the creditors is not of itself necessarily sufficient to justify an order for annulment of an adjudication. 23 C.L.J. 220 = 21 C.W.N. 936 = 34 Ind. Cas. 792.

——S. 38—(1907), S. 27—Powers and duty of Court—Scheme of arrangement—Rejection of.

Scheme of arrangement proposed by an insolvent can be rejected by the court, although three-fourth of creditors are in its favour. 18 O.C. 125 = 30 Ind. Cas. 694.

4. Scope.

——S. 38 (6)—Scope.

Section 38 (6) contemplates that before a composition scheme is sanctioned or details as to the persons who are preferential creditors settled, their preferential claims should be enquired into and decided. A.I.R. 1943 Sind 76 = I.L.R. (1942) Kar. 506 = 206 Ind. Cas. 262.

——Ss. 38 and 39—Scope—S. 39, if confers right of action—Applicability of amended S. 39 to pending proceedings—Object of amendment—S. 39, if retrospective.

Sections 38 and 39, Provincial Insolvency Act, deal essentially with procedure and prescribe wha tprocedure the Court should follow when an application for composition is presented to it. Section 39 itself does not confer any right of action; a mere right existing at the date of a repealing statute to take advantage of the provisions of the statute repealed is not a right accrued within the meaning of a saving clause, which saved all rights accrued under or by virtue of the said repealed statute. Therefore, since the enactment deals only with the procedure, the amended section will apply to the proceeding then pending. The object of the Legislature in amending S. 39 was to bring it into line with the provisions of the English Bankruptcy Act and the Presidency Towns Insolvency Act by rectifying the obvious omission. In view of the declared policy of the Act that no creditor should be given undue advantage and the debtor should not be harassed once the composition is accepted, the Legislature intended the section to be retrospective and it should apply to pending proceedings. A.I.R. 1942 Mad. 474 = 1942 M.W.N. 202 = (1942) 1 M.L.J. 511 = 202 Ind. Cas. 565.

——S. 38—Scope—Scheme and arrangement—Operation.

One method of arrangement of an insolvent debtor's affairs which the law recognises is an assignment of the debtor's property to a trustee for realization and distribution of the proceeds rateably amongst all the debtor's creditors, or amongst those who assent to and take the benefit of the assignment. Such an assignment operates in effect to place the administration of the debtor's estate in the hands of a trustee for the benefit of the creditors. The assignment is the voluntary act of the arranging debtor, and the trusts to which the assignment is subject are those which the debtor himself creates. The deed becomes operative to release or suspend the operation of creditors' claim by virtue of the assent of the creditors thereto: and it only binds those creditors who, in writing or otherwise, expressly or impliedly assent to it. Until the deed of assignment to a trustee has been executed by or come to the knowledge of the creditors, the trustee is an agent only for the debtor under a revocable authority to deal with the estate. When the instrument expresses the arrangement to be with the creditors generally, or all creditors who assent to it, any creditor who actually or by his conduct assents to and elects to take the benefit of the arrangement within the proper time is entitled to share in the benefits of the arrangement although he has not signed the deed; and in some cases, the Courts will allow a creditor to come in under the arrangement and share in its benefits notwithstanding that the proper time for accession has elapsed. On the other hand, a creditor entitled to the benefit of an arrangement must perform fairly all the conditions of the arrangement which apply to the creditors. If he takes any step which is inconsistent with or opposed to those conditions, as, for instance, by bringing an action against the debtor to recover his debt, he will be liable to be excluded from the benefit of the arrangement. This obligation is binding, not only on creditors who execute a deed of arrangement or expressly assent to it, but also on those who, by their conduct, put themselves in the same situation as if they had executed it. The principle is that if a creditor puts himself in the situation of having the benefit of the deed, he must bear its obligations although he has not literally executed the deed. There is, however, one benefit to which a secured creditor is entitled. If the composition deed reserves to creditors their rights over securities held by them on the property of the debtor, as by a mortgage charge, the terms of a general release contained in the deed of agreement will not prevent those creditors from realizing or dealing with and obtaining the benefit of their securities in reduction of the debts due to them. But this provision is limited to the extent of their securities which must be clearly reserved by the deed. A.I.R. 1938 Lah. 769 = 179 Ind. Cas. 570.

——S. 38—Scope.

Section 38 contemplates a proposal for a composition in satisfaction of the debt and implies a reduction in claim of the creditors. A.I.R. 1936 All. 102 = 1936 A.L.J. 44 = 1936 A.W.R. 41 = 58 All. 655 = 160 Ind. Cas. 994.

——S. 38 (2)—Scope—Composition—Nature of—Proposal, when can be deemed accepted.

A composition, in its essence, is an agreement, and agreement has been defined in sub-S. (2), S. 38, as an acceptance by a majority in number and three-fourths in value of all the creditors. Unless, therefore, this condition is satisfied the proposal cannot be deemed to be duly accepted; the proposal cannot be said to have reached the stage of agreement or a composition and there cannot, therefore, be a proposal for a composition before the Court for its consideration or acceptance. The fulfilment of the conditions laid down in sub-cl. (2) is, therefore, a condition precedent to the acceptance of the proposal by the Court. A.I.R. 1936 All. 102 = 1936 A.L.J. 44 = 1936 A.W.R. 41 = 58 All. 655 = 160 Ind. Cas. 994.

——S. 38—Scope.

The insolvent, so long as his insolvency lasts, cannot be allowed to challenge the correctness of the debts entered in the schedule and, therefore, his application

disputing the correctness of those debts and requesting the Court to enquire into the accounts of the creditors, cannot properly be a proposal or a composition within the meaning of S. 38. The proposal contemplated by S. 38 is a general proposal to satisfy the debts of the whole body of creditors, and not merely disputing the validity of the debts of particular creditors. 97 Ind. Cas. 556 = 24 A.L.J. 441 = A.I.R. 1926 All. 361.

——S. 38—(1907) S. 27—Scope.

S. 27 does contemplate neither enquiry into debts by trustees instead of by the Court nor stay instead of **ipso facto** disposal of the petition. 4 S.L.R. 222 = 9 Ind. Cas. 724.

5. Secured creditor.

——S. 38—Secured creditor — Arbitration — Proper procedure.

Where during the pendency of the insolvency proceedings the Receiver and the secured creditors referred the matter to arbitration and the award directed the Receiver to bring the insolvent's property which was ancestral and revenue paying, to sell and realize the sale proceeds through Court :

Held, the Insolvency Act has no provision to prevent secured creditors from acting according to the award but the better way would be to obtain the Insolvent's discharge under S. 38 and deal with the property outside the jurisdiction of the Insolvency Court. The Receiver would then cease to be a Receiver under insolvency but being a person vested by the arbitrator with authority to sell the property under the arbitration provisions would be able to sell the property under the terms of the award. 95 Ind. Cas. 416 = 48 All. 475 = 24 A.L.J. 480 = A.I.R. 1926 All. 501.

——S. 38—Secured creditor.

A secured creditor is unaffected by any composition scheme unless it is approved of by the Court and consented to by him. 63 Ind. Cas. 895 (Cal.).

6. Miscellaneous.

——S. 38—Appeal.

Generally, where proceedings have taken place under Ss. 38 and 39, there is no appeal as of right. Leave of the District Court or of the High Court must be obtained before any appeal can be admitted against the order generally approving the proposal or the order of annulment. But where, as part of the proceedings, an enquiry has been held under S. 50, anybody prejudiced by the expunging or reducing of a debt can in regard to that matter appeal as of right. 97 Ind. Cas. 556 = 24 A.L.J. 441 = A.I.R. 1926 All. 361.

——S.38—Miscellaneous—Appointment of trustee Right to apply for restoration of proceedings started by Receiver.

Where an Official Assignee has become **functus officio** on account of the property of the insolvent having vested in the trustees under S. 38 in consequence of which he withdraws from a suit for the cancellation of a transfer pending in a Court and the Court dismisses it under O. 9, R. 8, Civil P. C., the trustees cannot apply to be made the legal representatives of the Official Assignee and ask for the restoration of the suit. A.I.R. 1934 Pesh. 89 = 152 Ind. Cas. 380.

——S. 38—(1907), S. 27—Miscellaneous—Composition.

When an application under S. 27 of the Act is made before a proposal for composition is finally accepted, no creditor is entitled to note whose debt has not been proved and whose name has not been admitted on to the schedule by the Judge. In insolvency cases 'proof of debts' means that the creditor shall have proved his debt in some of the ways prescribed by the Act and that his name shall have been put by the Court, in the schedule of creditors. 15 A.L.J. 538 = 40 Ind. Cas. 156.

——S. 38—Miscellaneous—'Debtor', meaning of—Right to apply to Debt Conciliation Board.

Members of agricultural tribe, though the lands do not vest in the Receiver, even such persons though insolvents are 'debtors' within the meaning of S. 38. They can consequently apply to a Debt Conciliation Board set up under the Punjab Relief of Indebtedness Act for the settlement of their debts even after their adjudication as insolvents. A.I.R. 1937 Lah. 680 = 39 P.L.R. 338 = I.L.R. (1938) Lah. 120 = 173 Ind. Cas. 748.

——S. 38—Miscellaneous—Deed not signed by all.

All creditors not signing—No insolvency proceedings started—Debtor taking advantage of the deed—Composition is valid. 120 Ind. Cas. 577 = 56 Cal. 940 = 49 C.L.J. 212 = A.I.R. 1929 Cal. 358.

——S. 38—Miscellaneous—Distinction between composition and sale of assets through Receiver.

A composition between an insolvent and his creditors and a sale of an insolvent's assets by the Official Assignee are two distinct things and should be kept distinct. When the two are combined in one hybrid transaction, the issue of the unnatural union must necessarily be of doubtful character. A.I.R. 1937 Mad. 962 = 46 L.W. 449 = 1937 M.W.N. 942 = (1937) 2 M.L.J. 508 = I.L.R. (1938) Mad. 426 = 175 Ind. Cas. 158.

——S. 38—Miscellaneous—Effect of composition.

Composition deed is binding on the scheduled creditors only. 76 Ind. Cas. 250 = 17 S.L.R. 300 = A.I.R. 1924 Sind 122.

——Ss. 38, 39 and 40—Miscellaneous—Object of insolvency law—Debtor adjudicated—Remedies of creditor.

The insolvency law is merely an administrative or adjectival law. The object of the law is to provide equal distribution of the insolvent's property among all the creditors and to prevent an undue advantage being taken by any creditor to the detriment of other creditors. Therefore, when the debtor is adjudged insolvent all remedies which the creditor and his

assignee have in respect of the debt due by the insolvent become subject to the provisions of the Provincial Insolvency Act. His right is, therefore, to receive a **pro rata** distribution of the proceeds of the insolvent's property equally with the other creditors of the insolvent. A.I.R. 1942 Mad. 474 = 1942 M.W.N. 202 = (1942) 1 M.L.J. 511 = 202 Ind. Cas. 565.

——S. 39—Annulment.

An insolvent was given permission to mortgage his property to the petitioning creditor and he did so, but thereafter none of the parties appeared on the day fixed for hearing and the Court passed an order, "Parties absent." It is said that the case is settled out of Court. Property be released. Proceedings filed.

Held, that the order did not amount to an order annulling the order of adjudication. 121 Ind. Cas. 663 = A.I.R. 1930 Nag. 34.

——S. 39—Applicability.

All the creditors excepting **C** who was **ex parte,** signified their assent to the composition. In addition to the admission of **C's** debt in the insolvency petition, the insolvent also admitted the debt and mentioned the amount owing to him in his application for composition. The other creditors did not raise any objection in regard to the genuineness of this debt or otherwise. The Court, before passing the final order approving the composition and annulling the order of adjudication, directed that the dividend due and payable to **C** in pursuance of the composition should be deposited into Court and such a deposit was made:

Held, that though no formal proof was tendered by **C,** the debt must be deemed to have been proved and admitted by the Court. It was only on that basis a dividend was declared in his favour. Therefore, even if S. 39, as it stood before it was amended should govern the right of **C,** he must be held to be bound by the composition having regard to the fact that his name was entered in the schedule prepared under S. 33. A.I.R. 1942 Mad. 474 = 1942 M.W.N. 202 = (1942) 1 M.L.J. 511 = 202 Ind. Cas. 565.

——S. 39—Composition Scheme—Binding effect.

A scheme of composition under S. 38 imposing an obligation upon one creditor to give up his claim against another creditor cannot, under S. 39, be binding upon the creditor, who did not consent to the scheme. A.I.R. 1942 Mad. 345 = 1942 M.W.N. 140 = 55 L.W. 172 = (1942) 1 M.L.J. 316 = 203 Ind. Cas. 574.

——S. 39—Composition Scheme—Binding effect.

Under S. 39, a composition or scheme is binding only on such creditors as have been entered in the schedule and so far as relates to debts entered therein. A creditor who is not entered in the schedule and whose debt is not mentioned in it, is not therefore precluded from having recourse to other remedies besides those provided by insolvency law. (1936) 159 Ind. Cas. 865 = 1935 M.W.N. 1202 = 69 M.L.J. 793 = 43 L.W. 333.

——S. 39—Composition Scheme—Binding effect.

S. 39 of the Provincial Insolvency Act makes the composition binding, on creditors entered in the schedule, but there is no provision making the same binding on unscheduled creditors. 87 Ind. Cas. 348 = 7 L.L.J. 158 = 26 P.L.R. 117 = A.I.R.1925 Lah. 376.

——S. 39—Composition and discharge distinguished.

The main distinction between an order of discharge and an order approving a composition is that an order of discharge releases the insolvent from all debts provable under the Act whether those debts have been entered in the schedule contemplated by S. 33 of the Act or not, but a composition is binding only on creditors who cause their debts to be entered in the schedule contemplated by S. 39. 95 Ind. Cas. 204 = 8 L.L.J. 286 = 27 P.L.R. 588 = A.I.R. 1926 Lah. 489.

——S. 39—Debts not proved—Order of discharge and order of annulment—Effect of.

Under the Provincial Insolvency Act of 1907 if creditor did not prove his debt and was not included in the schedule he could even after the discharge enforce his claim. The new Act of 1920 is the same except that an order of discharge under it does release the insolvent from all provable debts. But there is nothing in the Act to show that the order of annulment can prevent a creditor who has not proved his debt from proceeding to enforce it in a Civil Court. 120 Ind. Cas. 84 = A.I.R. 1929 Sind 204.

——S. 39—Notice.

When a notice under S. 39 is prescribed by the rules made under the statute a strict compliance with the rule is necessary before the creditor's claim to share in the final dividend can be disallowed. Where the Court did not send the necessary notice as required by the section the creditor should be allowed to re-open the matter and he should be given an opportunity of proving his debt. 80 Ind. Cas. 620=20M.L.W. 163= 47 Mad. 916 = A.I.R. 1924 Mad. 709 = 47 M.L.J. 240.

——S. 39—Powers of Court to execute its order.

A debtor was adjudicated an insolvent. During the course of the proceedings, he proposed a composition scheme, which scheme the creditors accepted and the Court sanctioned. The order sanctioning the scheme provided for payment of the insolvent's debts by certain annual instalments and required the debtor to deposit the amounts of instalments in Court. The debtor failed to comply with this order. The creditor sought to execute the order requiring the debtor to deposit the amount. A contention was raised that the Insolvency Court had no jurisdiction to proceed against the debtor's property:

Held, that the Insolvency Court could execute its order without setting aside the order annulling adjudication. A.I.R. 1942 Nag. 97 = I.L.R. (1942) Nag. 732 = 1942 N.L.J. 313 = 202 Ind. Cas. 135.

——S. 39—Court's power to enforce liability of surety by summary orders.

A Court exercising jurisdiction under the Provincial Insolvency Act has power to enforce the liability of a surety by passing summary orders without assigning

the surety bond to the creditors and leaving them to sue on the bond, even though there is no express provision in the Act corresponding to S. 30 (2).

The annulment of an adjudication under S. 39 does not put an end to the jurisdiction of the Insolvency Court and the Court may pass an order for enforcing a surety bond even after annulment of the adjudication under S. 39. A.I.R. 1936 Mad. 424 = 43 L.W. 194 = 1936 M.W.N. 197 = 71 M.L.J. 733 = 161 Ind. Cas. 717.

——Ss. 39, 28 (2) and 40—Scheme proposed—Parties agreeing to leave out debt on particular promissory note—Separate suit by holder, if can be maintained—Power of the Court to dispense with schedule of creditors and debts.

There is nothing in the Provincial Insolvency Act to show that a scheme may not, by the consent of all parties interested, exclude a particular debt or debts which are not urgent or the burden of which on the insolvent is very problematical and may never arise. Moreover, in the case of a scheme, S. 28 (2) has to be read with S. 39 and the protection is taken away by S. 39 in respect of debts not included in the scheme. Consequently, where a holder of a promissory note agrees that the promissory note be left out of consideration in the settlement proposed and should not form an obstacle to it, but at the same time does not give up rights in it, the holder is not precluded from recovering the debt on the promissory note by a suit.

The Court cannot dispense with the schedule of the creditors and debts included in the approved composition. It is made by the Act a requisite part of the procedure for effectuating a composition. The importance of the schedule is that the section says that the creditors whose names and debts are entered in the schedule shall be bound by the composition. The meaning of this is that a creditor whose debt is not entered in the schedule will not be bound by the composition arrangement. A.I.R. 1934 Mad. 529 = 40 L.W. 110 = 57 M. 1082 = 67 M.L.J. 843 = 153 Ind. Cas. 916.

——S. 39—Secured creditor—Annulment on the sanctioning of a composition—Secured creditor not a party to the arrangement—No steps taken to realise his security before annulment—His rights, how affected by the composition approved by the Court.

On a question as to the rights of a secured creditor of an insolvent when the adjudication has been annulled as the result of the Court having sanctioned a composition, the creditor not being a party to the arrangement and having taken no steps to realise his security before the annulment :

Held, before the amendment in 1935, S. 39 of the Provincial Insolvency Act made the composition scheme binding on all creditors entered in the schedule so far as it related to a debt entered therein. Now it expressly binds all the creditors so far as debts provable under the Act are concerned. Until an order of discharge is passed a secured creditor can at any time come in and prove the balance owing to him after the realisation of his security. In the case of annulment the position is very different from the position which arose when the insolvent has obtained an unconditional order of discharge.

Therefore, where there has been no order discharging the insolvent, but merely an annulment of the order of adjudication, a secured creditor is bound by a composition of which the Court has approved in so far as the balance of his debt is concerned after the realisation of his security. The fact that he has taken no part in the composition proceedings makes no difference. He can realise his security at any time, but when he does and there is a deficiency he can only get payment on the basis of the composition, because the unsatisfied portion of the debt is "provable" in the Insolvency Court in the absence of an unconditional order of discharge. I.L.R. (1947) Mad. 798 = 60 L.W. 127 = 1947 M.W.N. 113 = A.I.R. 1947 Mad. 300 = (1947) 1 M.L.J. 134 (F.B.).

——S. 39—Transferability of prperty vested by Courts order.

Section 6 (*a*) of the Transfer of Property Act does not apply to the case of property vesting in a person under an order of the Court under Ss. 37 and 39 of the Provincial Insolvency Act. 80 Ind. Cas. 141 = 19 S.L.R. 286 = A.I.R. 1925 Sind 159.

——Ss. 41 and 42—

Synopsis.

1. Absolute discharge.
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3.(*a*) Burden of proof.
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1. Absolute discharge.

——S. 42 (1)—Absolute discharge—Scope of—Duty of insolvent to satisfy Court—Absolute discharge—What has to be proved—Petitioning creditor partner with debtor—If a ground for absolute discharge.

The provisions of S. 42 (1) of the Provincial Insolvency Act place a burden upon the insolvent, when his assets are less than 8 annas in the rupee, to satisfy the Court not that his liability has arisen from circumstances beyond his control, but from circumstances for which he cannot justly be held responsible.

A business man must generally be held justly responsible for his business debts unless some unforeseen calamity has overtaken him. The mere fact that a petitioning creditor was a partner in business with the debtor is not in any way sufficient to support a case that the debtor is not justly responsible for his liabilities. I.L.R. (1946) Kar. 265 = 224 Ind. Cas. 536 = A.I.R. 1946 Sind 156.

——Ss. 42 and 75—Absolute discharge—Discretion under S. 42 in granting absolute discharge when may be interfered with, stated.

A Court should be very slow to interfere with the exercise by a Judge, in a matter of insolvency, of his discretion in granting an absolute discharge to the insolvent. But where the provisions of S. 42 have not been strictly followed but wrongly applied the discretion may be interfered with. A.I.R. 1946 Sind 156 = I.L.R. (1946) Kar. 265 = 224 Ind. Cas. 536.

——S. 42—Absolute discharge—Refusal to grant absolute discharge on ground of hazardous speculation in shares.

The insolvent who was a graduate of the University started the business of purchasing and selling shares sometime in 1936 with an original capital of about Rs. 4,000 and made considerable profits during the year 1936 and the earlier part of 1937. Sometime in April 1937, there was great fluctuation in the share market and he went on incurring continual losses till his liability stood at the staggering figure of Rs. 1,71,000. The insolvent had absolutely no experience in the share business and the profits which he earned just after entering the business might have made him unduly optimistic :

Held, that every man must be deemed to be responsible for the way in which he conducts his business and although the type of speculation into which the insolvent entered could not be said to be dangerous to society, the Insolvency Court was not wrong in saying that the speculation was of a rash and hazardous character and, therefore, under S. 42 (1) (*f*), Provincial Insolvency Act, the Judge had every right to refuse to pass an order of absolute discharge. A.I.R. 1944 Cal. 63 = 77 C.L.J. 63 = 47 C.W.N. 458 = 211 Ind. Cas. 289 (D.B.).

——S. 41—Absolute discharge—Effect.

The administration of insolvency comes to an end by absolute order of discharge. A.I.R. 1943 Mad. 26 = 1942 M.W.N. 551 = 55 L.W. 561 (2) = (1942) 2 M.L.J. 714 = I.L.R. (1943) Mad. 213 = 205 Ind. Cas. 569.

——S. 41—Absolute discharge.

There is nothing to prevent the Court granting an absolute order of discharge when it has been satisfied for instance, that the insolvent had placed all his property within the control of the Official Receiver so that from his (insolvent's) point of view nothing more remains to be done. A.I.R. 1943 Mad. 26 = 1942 M.W.N. 551 = 55 L.W. 561 (2) = (1942) 2 M.L.J. 714 = I.L.R. (1943) Mad. 213 = 205 Ind. Cas. 569.

——S. 42—Absolute discharge—When operates.

Where the order granting discharge is absolute, it comes into operation at once. If the discharge is suspended, then obviously it does not come into operation at once but it does automatically come into operation at the end of the specified time. A.I.R. 1942 Lah. 240 = 44 P.L.R. 324 = I.L.R. (1943) Lah. 526 = 202 Ind. Cas. 421.

——S. 42—Absolute discharge—Insolvent having no assets—Whether should be granted absolute discharge.

Absolute discharge cannot be granted where it has been found that the insolvent has no assets to meet his debts. He is responsible for incurring debts in such circumstances and the purpose of keeping him an insolvent is to make plain to the world that his credit is gone so that he cannot cause loss to creditors in the future. His credit will return to some extent when he is discharged. That time will be postponed unless he pays 8 annas in the rupee. A.I.R. 1942 Nag. 83 = 1942 N.L.J. 246 = I.L.R. (1942) Nag. 714 = 200 Ind. Cas. 524.

——Ss. 41 and 42—Absolute discharge—Insolvent directed to apply for discharge within certain time, making delay in applying—If ground for refusing absolute order of discharge.

Where a person is adjudged insolvent and directed to apply for his discharge within certain time, the delay in so applying is not one of the grounds specified in S. 42 at all for refusing to grant an absolute order of discharge. It may be a ground for annulling the adjudication. A.I.R. 1941 Pat. 2 85 = 7 B.R. 559 = 193 Ind. Cas. 546.

——Ss. 41 and 42—Absolute discharge—Court's duty to grant.

The effect of S. 42 is such that the Court must grant an absolute order of discharge, provided that the insolvent pays eight annas in the rupee and is not guilty of the misconduct specified in S. 42 (*b*) to (*h*). A.I.R. 1939 Lah. 183 = I.L.R. (1939) Lah. 429 = 41 P.L.R. 78 = 185 Ind. Cas. 551.

——S. 41—Absolute discharge—Insolvent paying five pies in a rupee—Absolute discharge after 11 years.

A person was adjudged insolvent on 27th Novembe 1927 and was allowed one year's time in which to apply for discharge. In 1928, he applied for extension of time. An inquiry was ordered to be held in the matter which disclosed that during a period of nearly eight years of insolvency, the creditors had succeeded in recovering only five pies in the rupee. On 4th January 1936, he was granted a discharge on condition of his paying Rs. 1,000 to the creditors within two years. This the insolvent failed to do. On 26th April 1938, he applied for an absolute order of discharge :

Held, that whatever be the facts, the insolvent ought to be allowed to make a fresh start after 11 or 12 years of insolvency and hence he should be granted an absolute discharge. A.I.R. 1939 Lah. 432.

——S. 41—Absolute discharge—Effect of order

The Court granted absolute discharge to the insolvent under S. 41 in order to enable him to take advantage under U.P. Encum. Estates Act. The Judge, bearing in mind the interests of the creditors, ordered the insolvent to include in his application under the Encum. Estates Act all debts which had been proved in the insolvency proceedings and had not been discharged :

Held, that under S. 44 (2) of the Prov. Insol. Act, an order of discharge released the insolvent from all debts provable under the Act; save as otherwise provided by S. 44 (1); the contents of sub-s. (1) did not apply in the present case, so that the effect of the absolute order of discharge was to release the insolvent.

from all the debts that were provable in the insolvency proceedings. The result was that no proceedings under the Encum. Estates Act could properly be taken to liquidate these debts. Quite apart from this aspect of the matter was the fact, that there would be nothing to prevent the insolvent from withdrawing the application made under the Encum. Estates Act. Consequently, the order of discharge ought not to be allowed to stand. A.I.R. 1937 Oudh 450 = 1937 O.W.N. 923 = 1937 R.D. 469 = 170 Ind. Cas. 540.

——S. 42—Absolute discharge—Grounds for.

Though, while granting discharge, other circumstances can be taken into consideration, it would be going too far to grant an absolute discharge on grounds that at the time of the transactions, the person was a young man of 20 years of age or thereabout and was carrying on business with his father which, in the circumstances, was under his direction and control. A.I.R. 1936 Lah. 381 = 38 P.L.R. 1164 = 157 Ind. Cas. 935.

——S. 42—Absolute discharge—Matters to be considered.

Whether the Court shall grant or refuse an absolute order of discharge under S. 42 must be determined with reference to the terms of the said section and an application for discharge cannot be rejected on grounds not indicated in or warranted by that section.

Where the Court rejected an application for absolute discharge on the ground that the insolvent had got very extensive credit and had uttered a falsehood :

Held, that these were not grounds for refusing absolute discharge.

The mere fact that an insolvent had obtained extensive credit does not lead to an inference of fraud. A.I.R. 1936 Mad. 800 = 44 L.W. 284 = 71 M.L.J. 371 = 1936 M.W.N. 1229 = 165 Ind. Cas. 83.

——S. 42 (1), (*a*), (*d*)—Absolute discharge—Ground for refusal– Shop belonging to applicant— Applicant actually working therein—Held, not entitled to absolute discharge.

Where the evidence shows that the petitioner is the owner of the **arhat** fruit shop, and actually works there along with his son, in view of the provisions of S. 42, he is not entitled to an absolute order of discharge. His case clearly falls within Cls. (*a*) and (*d*) of sub-s. (1) of S. 42. A.I.R. 1935 Lah. 919 = 160 Ind. Cas. 529.

—— S. 41—Absolute discharge—Ground for refusal.

If the insolvent's inability to pay his unsecured creditors eight annas in the rupee is due to cause directly under his own control, that is a reason for refusing to grant an absolute discharge. A.I.R. 1935 Mad. 646 = 1935 M.W.N. 414 = 41 L.W. 809 = 68 M.L.J. 699 = 156 Ind. Cas. 453.

—— S. 42—Absolute discharge—Grounds for refusal—Inability to produce account books—Inference— Onus of proof.

Where the insolvent has not shown that his liability has arisen from circumstances for which he cannot be held responsible and is unable to produce account books or to explain satisfactorily the alleged loss of the books, the Court should not grant an absolute order of discharge inasmuch as at the time of contracting the debts, the insolvent must have known that he had no reasonable or probable ground for expecting that he would be able to repay the debts.

Where, in an application for discharge, the report of the Official Receiver is in favour of granting a discharge, the onus is on the opposing creditors to prove the contrary. A.I.R. 1933 Lah. 812 = 34 P.L.R. 991 = 146 Ind. Cas. 532.

——S. 42—Absolute discharge—Failure to keep proper accounts.

It must always be borne in mind in dealing with questions of books of account even where they are false or so badly kept, as to amount not merely to negligence, but to a suggestion of dishonesty, that S. 42 itself provides and defines a **quasi** offence, with regard to the keeping of books, which, if established, is a ground for a kind of penal order, postponing the absolute discharge of the insolvent when he applies for it. 100 Ind. Cas. 550 = 25 A.L.J. 331 = A.I.R. 1927 All. 352.

2. Appeal.

——S. 41—Appeal—Death of creditor—Substitution of heirs.

Where during the course of discharge proceedings started by the insolvent, a creditor who is a party to such proceedings dies, the criterion which should be adopted for the purpose of deciding whether the heirs of such creditor should be substituted is to ascertain whether or not the interest of such persons are likely to be adversely affected by their non-substitution.

Held, that the non-substitution of the heirs did not adversely affect their interest and therefore, the failure to substitute did not render the appeal incompetent. A.I.R. 1939 Cal. 490 = 69 C.L.J. 229 = 42 C.W.N. 1153 = 185 Ind. Cas. 145.

—— S. 41—Appeal.

A creditor has a right of appeal from an order of discharge. A.I.R. 1937 Oudh 450 = 1937 O.W.N. 923 = 1937 R.D. 469 = 170 Ind. Cas. 540.

——S. 41—Appeal—Appeal from refusal of discharge—Death of one creditor during pendency of appeal—Heirs not impleaded—Appeal, if abates as a whole.

Where, on the death of one of the creditors during the pendency of an appeal from order refusing an insolvent's application for discharge, his representatives are not brought on record, the appeal abates as a whole, the effect of non-substitution of a necessary party being that the appeal as a whole becomes infructuous and incompetent. The fact that that creditor had not raised any objection to the discharge is immaterial as no effective order for discharge of an insolvent as contemplated by law could be passed in the absence of any of the creditors before the Court. An order of discharge is contemplated by S. 41 could only be made in the interest of the general body of creditors of the insolvent, and the fact that one of

them only raised objection to the discharge was not material for the purposes of the Courts making an order which was to affect the entire body of creditors. If, however, there was a Receiver in the insolvency appointed in the case the absence of heirs of one of the creditors would not have rendered the appeal infructuous and incompetent, if the Receiver representing all the parties concerned was on record. A.I.R. 1935 Cal. 644 = 39 C.W.N. 1292 = 158 Ind. Cas. 398 (2).

——S. 41—Appeal.

The mere fact that a creditor takes out money deposited in Court, uneer the Court's order, does not debar him either by equity or estoppel from appealing against an independent order or conditional discharge. 91 Ind. Cas. 760 = A.I.R. 1926 Cal. 529..

3. Application for discharge.

——S. 41—Application for discharge—Necessary parties.

To an application for discharge unscheduled creditors are not necessary parties. Therefore, the failure to give **talbana** for such a creditor or to bring the representatives of such a deceased creditor on the record does not affect the proceedings and does not result in the annulment of adjudication. A.I.R. 1937 Lah. 752 = 39 P.L.R. 344 = 173 Ind. Cas. 601.

——S. 41—Application for discharge—Continuance of proceedings already taken—Leave of High Court.

The provisions of S. 171, Companies Act, are very wide and though an application for discharge may not start independent proceedings, the section would require leave of the High Court even for the continuation of insolvency proceedings already taken. 39 P.L.R. 717 = 169 Ind. Cas. 625.

——S. 41—Application for discharge—Continuance of insolvency proceedings—Duty of insolvent to be present and help.

The insolvency proceedings do not end on mere adjudication. The insolvent s presence and help would be greatly needed so long as the estate has not been fully administered, but continues to be in the hands of the Official Receiver. Simply because the judgment debtor has been adjudicated insolvent and he has applied for discharge, it cannot be said that the proceedings in insolvency have terminated; and so long as the insolvency proceedings are really pending and so long as no order of discharge has been obtained, the surety should be under an obligation to produce the judgment-debtor whenever called upon to do so by the Court. A.I.R. 1933 Mad. 360 = 145 Ind. Cas. 531.

(a) Burden of proof.

——S. 42—Burden of proof—Fraudulent transfer—Onus to prove fraud.

In an application by debtor for discharge if the creditors allege that the debtor's case comes under S. 42 (1) (i) by reason of some fraudulent transfers effected by him, the onus would lie upon the creditors to prove fraud, if any, in respect of the transaction. A.I.R. 1939 Cal. 490 = 69 C.L.J. 229 = 42 C.W.N. 153 = 185 Ind. Cas. 145.

——S. 42—Burden of proof.

Unless the circumstances mentioned in S. 42 (1) (*a*) are shown to exist, no order of discharge can be passed. It is for the debtor to prove the existence of those circumstances. There is no burden on the creditors or on the Official Receiver to show that the debtor could justly be held responsible for the deficiency of assets. A.I.R. 1938 Mad. 590 = 47 L.W. 653 = (1938)-1 M.L.J. 760 = 1938 M.W.N. 528 = 176 Ind. Cas. 973.

——S. 42—Burden of proof.

The provisions of S. 42 are imperative and the burden of proof lies on the insolvent, and in the event of failure on his part to satisfy the Court in this respect, the Insolvency Court has no jurisdiction to pass an order of discharge A.I.R. 1937 Nag. 37 = I.L.R. (1937) Nag. 461 = 166 Ind. Cas. 956 (2).

——S. 42—Burden of proof—Application for absolute discharge—Onus of proof.

On an application by an insolvent for an absolute discharge, under S. 42 (*b*) it is incumbent on the insolvent to show that the fact that he was not able to pay eight annas in the rupee on the amount of his unsecured liabilities had arisen from circumstances for which he could not be justly held responsible. It is not necessary for the creditor to show in the first instance that the insolvent was guilty of fraud or dishonesty. A.I.R. 1934 Lah. 109 = 148 Ind. Cas. 971.

——S. 42—Burden of proof.

Where it is clear that the bankrupt is not paying a sum equal to eight annas in the rupee on the amount of unsecured liabilities, the onus is upon him according to S. 42 (1) (*a*) to show that the reason for this state of affairs had arisen from circumstances for which he could not be justly responsible. Where no evidence to discharge the onus is given, the Court has no jurisdiction to pass an order of discharge. 119 Ind. Cas. 4 = A.I.R. 1929 All. 858.

4. Conditional discharge.

——S. 41—Conditional discharge—Suspension order—There is nothing either in cl. (b) or cl. (c) of S. 41 (2) to authorise the Court in making the order of discharge subject to any conditions with respect to the property then vested in Court.

A conditional discharge under S. 41 (2) (*c*) is just as much a discharge as an absolute order of discharge and concludes in insolvency proceedings with respect to the insolvent's property except his after-acquired property.

The suspension order comtemplated in cl. (*b*) is of an absolute order of discharge and that too is required to be made for specified time.

The cls. (*b*) and (*c*) are exclusive. The Court may either suspend the operation of the order is point of time or grant it subject to any of the condition authorised by the section. But the Court has not the power to make the order of discharge conditiona and also to suspend its operation. A.I.R. 1946 Nag 111 = 1945 N.L.J. 607 = I.L.R. (1945) Nag. 878.

——S. 41—Conditional discharge—Findings of fact—Interference by High Court.

Per **Sale, J.** (in order of reference).— In the case of a conditional order of discharge, concurrent findings of fact arrived at by the lower Courts that conditions of discharge have not been fulfilled, must be accepted in revision. A.I.R. 1942 Lah. 240 = I.L.R. (1943) Lah. 526 = 44 P.L.R. 324 = 202 Ind. Cas. 421.

——S. 41—Conditional discharge—When operates:

As regards the conditional discharge under S. 41 (2), the order operates immediately. It is an altogether different question how or by what means the conditions imposed can or cannot be enforced if they have not been complied with. Since the insolvency proceedings are not terminated by an order of discharge granted subject to conditions, the Insolvency Court has power to vary the conditions which it has imposed although it cannot revoke the order of the discharge, as no such power exists either in the Prov. Insol. Act or in the Presy. Towns Insol. Act. Section 42 in the Presi. Towns Insol. Act giving power to revoke, which is not in the Prov. Insol. Act, refers to totally different matter, namely, the obstruction or concealing of property by the insolvent, which has vested in the Official Receiver. That section, therefore, has no bearing on the point whether the Insolvency Court can revoke an order of conditional discharge. A.I.R. 1942 Lah. 240 = 44 P.L.R. 324 = I.L.R. (1943) Lah. 526 = 202 Ind. Cas. 421.

—— S. 41—Conditional discharge—Improper condition.

The object of an adjudication in insolvency is to free the debtor from the claims of his existing creditors which are to be satisfied out of the property of the debtor which the Court takes possession of and distributes among the creditors; and for the Court to discharge the insolvent but to leave him liable to debts incurred before insolvency, defeats the object of the adjudication. Such conditional discharge amounts to a refusal to grant discharge. A.I.R. 1939 Bom. 344 = 41 Bom. L.R. 583 = I.L.R. (1939) Bom. 493 = 185 Ind. Cas. 542.

——S. 41—Conditional discharge—Effect of such order.

When there is no evidence that since his insolvency, the insolvent has, or is likely to have, any income, or has acquired, or is likely to acquire, any property, an order of conditional discharge asking the insolvent to deposit all his subsequent earnings or his after-acquired property in Court is not likely to be of any value to the creditors and, therefore, is not good. Such an order ought not to be made because it destroys the very motive which moves a man to attempt to obtain income or to acquire property; it has the effect that he has no incentive either to work or to acquire property. A.I.R. 1939 Rang. 58 = 179 Ind. Cas. 983.

——S. 41—Conditional discharge—Order to pay a fixed proportion of debt—Legality of—Proper order to be passed.

Where an insolvent was granted a discharge on condition that he should pay eight annas in the rupee to his scheduled creditors, the Court holding that he was not entitled to an absolute discharge on two grounds, **i.e.**, that he has not kept proper books of account and on a previous occasion, he had made a composition with his creditors:

Held, that a condition that the insolvent should pay a fixed proportion of the debts without regard to his income or his property could not be imposed and hence the condition that he should pay eight annas in the rupee could not be sustained; but the proper order to pass would be one asking him to pay a proportion of his monthly income for a fixed period and that any property acquired by him during this period shall also vest in the Official Receiver. A.I.R. 1937 Lah. 304 = 174 Ind. Cas. 878 (2).

——S. 41—Conditional discharge—Condition in regard to after-acquired property—Effect of.

A conditional discharge under the provisions of cl. (*c*), S. 41 (2), is just as much a discharge as an absolute order of discharge, and concludes the insolvency proceedings. The fact that a condition in regard to after-acquired property is imposed merely gives the creditor a right to proceed against such property when it is acquired by the discharged insolvent. A.I.R. 1936 Rang. 2 = 161 Ind. Cas. 342.

——S. 41—Conditional discharge—Legality.

Under S. 41 (2) (*c*), when granting a discharge to an insolvent, the Court is competent to impose a condition that he shall hand over to the Official Receiver all the assets which he might inherit from his father. The possibility of the insolvent's father not dying for a long time or not leaving any property for his son is no ground for making the discharge unconditional. A.I.R. 1934 Lah. 659 (1) = 35 P.L.R. 786 = 153 Ind. Cas. 114.

——S. 41—Conditional discharge—Powers of Court.

Under S. 41, it is open to Court discharging an insolvent to grant the discharge subject to any condition as regards after-acquired property. A.I.R. 1932 Cal. 623 = 55 C.L.J. 94 = 138 Ind. Cas. 745.

——S. 41—Conditional discharge—'Life sentence'—Undesirability.

A conditional order of discharge should be, as far as is reasonable, for the benefit of the creditors.

Where the lower Court ordered the insolvent to pay Rs. 25 per month for a period of 30 years:

Held, that the order amounted practically to a 'life sentence.' (The High Court directed the insolvent to contribute Rs. 50 out of his monthly salary of Rs. 100 for a period of five years, and to make over any property he may acquire by inheritance.) A.I.R. 1931 Lah. 591 = 32 P.L.R. 298 = 133 Ind. Cas. 553.

——S. 41—Conditional discharge—Legality.

Under S. 41 all that the Court can do is to suspend the operation of the order for a specified time or grant an order of discharge subject to any condition with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property; but an order stating that he shall remain in bankruptcy until he pays a particular proportion in the rupee is a bad order. 122 Ind. Cas. 112 = A.I.R. 1929 Lah. 461.

——S. 41—Conditional discharge—Discretion of Court.

Ordinarily, when an insolvent in India whose case is governed by the provisions of the Provincial Insolvency Act, has paid up 8 annas in the rupee he is entitled to be free from the disabilities of an insolvent unless it is established that his case falls under the provisions of S. 42 (*b*) to (i). The removal of his disabilities as an insolvent need not be accompanied by an absolute acquintance in respect of the liabilities which he has not discharged, for S. 41, gives to the Court a discretion similar to the discretion given in S. 26 of the English Act to impose conditions for the payment of the balance of the liabilities which will bind the insolvent after discharge. In re **Kutner**, (1921) 3 K.B. 93, Foll. 109 Ind. Cas. 633 = 3 Luck. 588 = 5 O.W.N. 347 = A.I.R. 1928 Oudh 263.

——S. 41—Conditional discharge—Payment of greater portion of debts by Insolvent—Order of conditional discharge is not improper.

The overriding intention of the Legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood and having the ordinary inducements to industry. Sometimes it is not right that the bankrupt should be free immediately; he must pass through a period of probation, and theoretically there may be cases in which he ought not to be free at all; but **prima facie** he is to give up everything he has; and on doing that he is to be made a free man: **(Gaskell,** In re **Gaskell** Ex parte, (1904) 2 K.B. 478, Foll.) The period for which the discharge should be suspended as the punishment for his misconduct in incurring debts beyond his means is not to be measured by the amount of his debts. 91 Ind. Cas. 760 = A.I.R. 1926 Cal. 529.

——S. 41—Conditional discharge—Subsequent proof of debt is not debarred.

A conditional order of discharge does not debar the creditor from proving his debt in insolvency. A creditor is entitled to tender proof of his debt at any time during the administration so long as there are assets to be distributed and no injustice is done to third parties. A.I.R. 1924 Mad. 163, Foll. 85 Ind. Cas. 543 = 4 Pat. 128 = 6 P.L.T. 410 = A.I.R. 1925 Pat. 438.

5. Discharge.

——S. 41—Discharge—Effect of order on proceedings under Ss. 53 and 54.

The granting of an absolute order of discharge has no immediate effect upon any proceedings which may be pending under either S. 53 or S. 54 whether in the Insolvency Court itself or in the Court of appeal. After an absolute discharge has been granted, proceedings which were pending under S. 53 or S. 54 could be continued by the Official Receiver unless, of course there were definite orders of the Insolvency Court to the contrary. A.I.R. 1943 Mad. 644 = 56 L.W. 408 = (1943) 2 M.L.J. 134 = 1943 M.W.N. 438 = 210 Ind. Cas. 93.

——S. 42—Discharge—Starting point of limitation for application for discharge.

The order of the Insolvency Court specifying the period of one year within which an application for discharge was to be made is not a final order when the same was challenged originally by way of an appeal to the District Judge and later by a revision petition to the High Court. In such a case, the order passed by the High Court in revision must be deemed in law to be the final order furnishing the starting point of the limitation for an application of discharge. In this respect, no distinction can be drawn between orders and decrees passed under the Civil Procedure Code, and an order passed under the provisions of the Provincial Insolvency Act specifying the time within which an insolvent must apply for discharge. A.I.R. 1941 Oudh 308 = 1941 O.W.N. 587 = 193 Ind. Cas. 776.

——S. 41 (2) (c)—Discharge—Conditions for.

The only conditions that can be imposed under S. 41 (2) (*c*), Prov. Insol. Act, are conditions with respect to any earnings or income which may afterwards become due to the insolvent or with respect to his after-acquired property. It is not possible to impose a condition that the insolvent shall pay any specified proportion of his debts. A.I.R. 1939 Mad. 890 = (1939) 2 M.L.J. 555 = 1939 M.W.N. 975 = 50 L.W. 632 = 186 Ind. Cas. 231.

——S. 41—Discharge—Ground for refusal.

Where, an insolvent applies for an order of discharge, an absolute refusal by the Court to grant such an order on the ground that a suit had been filed to have it declared that the insolvent still owns considerable property is not justified by S. 41. A.I.R. 1939 Oudh 129 = 1939 O.W.N. 193 = 14 Luck. 442 = 179 Ind. Cas. 1001.

——S. 41—Discharge—Effect of.

Per **Roberts, C.J. (Bagley, J., doubting).**— The discharge of an insolvent does not put an end to the Court's power to give directions as to the distribution of assets among the creditors. It must often occur that valuable assets are still in the hands of the Official Assignee and in process of realization at the date when the insolvent applies for his final discharge. An order of discharge, therefore, does not necessarily put an end to the proceedings in insolvency. A.I.R. 1937 Rang. 276 = 14 R. 704 = 170 Ind. Cas. 471.

——S. 42—Discharge—Refusal to grant discharge on ground of speculation by insolvent.

Mere specualtion would not disentitle an insolvent from asking the Court for a discharge. Many people induldge in all kinds of speculations but the thing which debars an insolvent from claiming his discharge is rash and hazardous speculation. When the finding of the Court is not to this effect, it cannot be said that the discharge of the insolvent should be refused under the provisions of S. 42 (1) (*f*) on this ground. A.I.R. 1936 Lah. 840 = 38 P.L.R. 218 = 164 Ind. Cas. 1087.

——S. 41—Grounds for refusal.

Where an insolvent who has obtained an order of unconditional discharge paying virtually nothing to his creditors although his assets were nil and there was a finding that his debts were contracted recklessly, again presents an application for adjudication

twenty-eight months later and it is found, he has incurred his debts recklessly, the case is one in which it is the duty of the Court to refuse a discharge. A.I.R. 1936 Rang. 412 = 9 Rang. 211 = 165 Ind. Cas. 384.

——S. 41—Discharge—Right to apply for.

In the case of a debtor who had been declared insolvent after his death and whose minor sons were brought on the record, the minor sons can ask the Court for a discharge. A.I.R. 1935 Lah. 935 = 160 Ind. Cas. 708.

——S. 41—Discharge—Effect on mortgage by insolvent.

In the case of a mortgage by an undischarged insolvent, on the passing of an order of discharge, the property re-vests in the mortgagor and the mortgagee can then enforce the mortgage by sale of the property.

A distinction must be drawn between cases in which because of a statutory prohibition, a person is incompetent to contract or to transfer his property and cases where the person entering into a contract or transferring his property is under no such disability. In the former case, the contract or the transfer would be wholly void but in the latter class of cases, it would only be voidable and not void **ab initio**. A.I.R. 1933 All. 449 = 1933 A.L.J. 475 = 55 A. 503 = 143 Ind. Cas. 836,

——S. 41 (2)—Discharge—Absolute refusal, legality of.

Section 41 (2) (*a*) does not contemplate that there may be an order absolutely refusing to discharge an insolvent. It contemplates only an order either granting or refusing an absolute order of discharge as distinguished from an order of discharge subject to a condition.

Where an order under S. 41, cl. (2) (*a*) was passed 'refusing discharge absolutely':

Held, that the order must be regarded as merely an order by which the Judge refused to make an absolute order of discharge and not as an order refusing discharge for ever. A.I.R. 1931 Cal. 392 = 53 C.L.J. 41 = 132 Ind. Cas. 640.

——S. 41—Discharge—Grounds for refusal—Suit against Receiver pending—Whether sufficient reason for refusing discharge.

That a suit is pending against the Receiver should not alone prevent an Insolvency Court from granting an application for discharge. A.I.R. 1931 Lah. 725 = 33 P.L.R. 524 = 135 Ind. Cas. 511 (2).

——S. 41—Discharge—Grounds for refusal.

Where the insolvent's assets were not found to be equal to eight annas in the rupee and the insolvent had failed to prove that his liabilities arose out of circumstances for which he could not justly be held responsible,

Held, that he could not legally be granted an order of discharge under S. 41. A.I.R. 1931 Oudh 356 (1) = 8 O.W.N. 843 = 134 Ind. Cas. 607 (1).

——S. 42 (A)—Discharge—Expenditure on death and marriages.

Insolvent spending excessively on death and marriages—Very small fraction of his debt could be paid from sale-proceeds of his estate—Although he cannot be granted absolute discharge under S. 42 (*a*), order of discharge under S. 41 (*b*) or (*c*) can be made. 117 Ind. Cas. 662 = A.I.R. 1929 Lah. 281.

——S. 41—Discharge—Effect of.

An order under S. 41 does not necessarily put an end to the proceedings in the insolvency. A.I.R. 1925 Rang. 105. Foll. 117 Ind. Cas. 582 = 7 Rang. 126 = A.I.R. 1929 Rang. 168.

——S. 41—Discharge—Examination of insolvent.

Before passing an order of final discharge under S. 41 it is necessary for a Court to examine the insolvent and to be satisfied of certain facts which are to be found in S. 42. A.I.R. 1929 Cal. 576.

——S. 42—Discharge—Contents of order.

Merely stating in the order that there is nothing in the report of the Receiver to stand in the way of the insolvent's discharge is not sufficient. The Judge must be satisfied that the assets were not of the requisite value from circumstances for which the insolvent could not be held to be justly responsible. The order is not legal in absence of such finding. 115 Ind. Cas. 585 = 48 C.L.J. 550 = A.I.R. 1928 Cal. 843.

——S. 42—Discharge—Effect of refusal of discharge.

On the refusal of an insolvent's discharge, his property which vested on adjudication in the Court or a Receiver, does not re-vest in the insolvent; and the insolvent can renew his application for discharge in case fresh circumstances might justify him in doing so and the leave of the Court is necessary before any suit can be brought against the insolvent. A.I.R. 1926 Rang. 2, Not foll. 109 Ind. Cas. 769 = 6 Rang. 27 = A.I.R. 1928 Rang. 109.

——S. 42—Discharge—No automatic discharge.

Without an order of the Insolvency Court the insolvent is not discharged automatically at the end of the period fixed in the order of adjudication for an application for discharge. A.I.R. 1924 Cal. 777, Rel. on. 100 Ind. Cas. 320 = 49 All. 201 = 25 A.L.J. 152 = A.I.R. 1927 All. 418.

——S. 42—Discharge—Arrest of insolvent.

When the Court under the provisions of S. 42 refuses the discharge of the insolvent, as far as that Court is concerned the proceedings have terminated. The insolvent is liable to be arrested in execution of any decree notwithstanding S. 28 (2). 92 Ind. Cas. 142 = 3 Rang. 492 = A.I.R. 1926 Rang. 2.

——S. 41—Discharge—Obstruction to receiver in paying debts.

Where an insolvent's assets are not of a value equal to 8 annas in the rupee and the insolvent, far from helping the Receiver to pay his debts obstructs him.

Held, that it was improper to grant him a discharge. 80 Ind. Cas. 54 = A.I.R. 1925 Oudh 112.

——S. 41—(1907) S. 44—Discharge—Foreign Bankruptcy—Order of discharge—Effect in British India.

A discharge from debt or liability under the Bankruptcy laws of a foreign country or one of the British Colonies such as Ceylon, where the debt or liability has been contracted or has arisen is a valid discharge therefrom in British India. The fact that the parties intended the debt to be paid in British India does not affect its validity. 31 M.L.J. 386, Foll. 26 M.L.T. 88 = 9 L.W. 535 = 51 Ind. Cas. 38.

(a). Interpretation.

——S. 42—Interpretation—' Assets ', meaning of.

If the word " assets " used in relation to insolvency proceedings is not qualified in any way, as in the expression " future assets ", it is generally understood to mean the amount actually in existence available for division among the creditors of the insolvent. A.I.R. 1939 Lah. 183 = I.L.R. (1939) Lah. 429 = 41 P.L.R. 78 = 185 Ind. Cas. 551.

6. Notice.

——S. 41—Notice.

The procedure as regards the issue of notices on creditors is prescribed primarily in order to afford them a reasonable opportunity to appear at the time of the hearing of the application for discharge. A.I.R. 1939 Cal. 490 = 69 C.L.J. 229 = 42 C.W.N. 1153 = 185 Ind. Cas. 145.

——S. 41—Notice—Necessity of.

The omission to give notice of the application for discharge as required by S. 41 (1) is not an irregularity if none of the creditors had proved his debt. The notice is only required to be given to those creditors who proved their debts. A.I.R. 1939 Nag. 103 = I.L.R. (1939) Nag. 478 = 1939 N.L.J. 96 = 182 Ind. Cas. 214.

7. Powers and duty of Court.

——S. 41—S. 41 (2) (b) and (c)—Powers and duty of Court—Distinction between, explained—Court cannot pass conditional order of discharge in respect of vested property.

Under S. 41 (2) (*c*) the Court can grant an order of discharge subject to any conditions regarding earnings or income which may afterwards become due to the insolvent or as regards the after-acquired property of the insolvent. There is nothing in cls. (*b*) and (*c*) of sub-s. (2) of S. 41 to authorise the Court in making the order of discharge subject to any conditions with respect to the property then vested in the Court. The suspension of the order contemplated by cl. (*b*) is of an absolute order of discharge, and even that is required to be made for specified time. Moreover, the Court has no power to make the order of discharge conditional and also to suspend its operation. Hence cls. (*b*) and (*c*) in sub-s. (2) of S. 41 are distinct and exclusive. A.I.R. 1946 Nag. 111 = I.L.R. (1945) Nag. 878 = 1945 N.L.J. 607.

——S. 42—Powers and duty of Court—Application for absolute discharge.

Under S. 42 (1) (*a*), the Court, before it can grant an absolute order of discharge has to be satisfied that the fact that the assets were not equal to eight annas in the rupee on the amount of the insolvent's unsecured liabilities had arisen from circumstances for which he could not justly be held responsible. Where the insolvent, applying for absolute discharge, does not place before the Court materials to so satisfy it, it is bound to refuse to grant an absolute order of discharge. A.I.R. 1944 Mad. 16 = 56 L.W. 531 = (1943) 2 M.L.J. 366 = 1943 M.W.N. 562 = 211 Ind. Cas. 272.

——S. 41 (2)– Powers and duty of Court.

The fixing of the terms under S. 41 (2) (*c*) is a matter for discretion of the lower Court, and the High Court will not interfere, unless it considers that those terms were grossly unreasonable. A.I.R. 1944 Mad. 16 = 56 L.W. 531=(1943)-2 M.L.J. 366 = 1943 M.W.N. 562 = 211 Ind. Cas. 272.

——S. 41—Powers snd duty of Court.

If the Judge is of opinion that an absolute discharge should be refused under cl. (*a*) of S. 41 (2), then he should consider the possible application of cls. (*b*) or (*c*), or both, to the case and pass an order accordingly. A.I.R. 1941 Pat. 285 = 7 B.R. 559 = 193 Ind. Cas. 546.

——S. 42—Powers and duty of Court—Refusal of discharge — Grounds — Which transfers to be considered.

Section 42 gives the Court wide authority to examine the insolvent's conduct whether before or after the insolvency. Fraudulent transfers by the insolvent prior to insolvency come within the purview of S. 42 (1) (*i*). But there must be some limit regarding the alleged fraudulent transfers upon which the order of discharge can be refused and the Judge ought not to take into consideration conduct which could not have had anything to do with the bankruptcy either in producing it or in affecting it in any way after its commencement. Only such conduct or affairs as may or can have had some effect upon the bankruptcy ought to be taken into consideration. But where the transfers have considerable effect upon the insolvency, then an order refusing discharge can be based on such transfers although they might have been effected long before the application for insolvency. A.I.R. 1939 Cal. 490 = 69 C.L.J. 229 = 42 C.W.N. 1153 = 185 Ind. Cas. 145.

——S. 42—Powers and duty of Court.

In view of the wide powers conferred upon the Court by S. 42, the Court has power generally to review any questionable transactions covered by that section which are in any way relevant to the insolvency even if such transactions could not be expressly avoided under Ss. 53 and 54 of the Act. A.I.R. 1939 Cal. 490 = 69 C.L.J. 229 = 42 C.W.N. 1153 = 185 Ind. Cas. 145.

——S. 41—Powers and duty of Court—Application by insolvent for order of discharge—Absolute refusal to grant such order, if justified.

Sub section (2), S. 41 gives discretion to the Court to grant or refuse an absolute order of discharge but does not give the same discretion to pass or refuse to pass an order of conditional discharge. On the other hand, cls. (*b*) and (*c*) provide that the operation of the order of discharge may be suspended for a specified time or an order of discharge may be granted subject to certain conditions. A.I.R. 1939 Oudh 129 = 1939 O.W.N. 193 = 14 Luck. 442 = 179 Ind. Cas. 1001.

——S. 42—Powers and duty of Court.

Court cannot refuse discharge of insolvent on grounds not indicated or warranted by the section. A.I.R. 1936 Mad. 800 = 44 L.W. 284 = 71 M.L.J. 371 = 1936 M.W.N. 1229 = 165 Ind. Cas. 83.

——Ss. 41 and 42 (1) (a)—Powers and duty of Court—Directions in S. 42 (1) (a) imperative—Onus—Statutory obligation of debtor.

The provisions of S. 42 (1) (*a*), are imperative and it is the duty of the Court before passing a final order of discharge to satisfy itself that the insolvent whose assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, proves that it is not due to his fault that his assets do not reach that percentage. The burden of proof then is on the insolvent. In the event of failure on the part of the insolvent to satisfy the Court in this respect, the Insolvency Court has no jurisdiction to pass an order of discharge, neither can it do so in the absence of any evidence on the record. There is a statutory obligation on the debtor and unless he discharges it, no order of discharge under S. 41 can be passed. A.I.R. 1936 Nag. 17 = 31 N.L.R. 13 Sup.= 160 Ind. Cas. 35.

——S. 41—Powers and duty of Court—Application for discharge should not ordinarily be rejected entirely—Conditional order should be considered.

An application by an insolvent for an order of discharge should not ordinarily be entirely rejected, and if the Court is of the opinion that the insolvent should not be granted an absolute order of discharge, it should consider whether a conditional order of discharge should not be passed, or whether an order of discharge, with a provision that its operation be suspended for a specified time, should not be made. A.I.R. 1935 Lah. 919 = 160 Ind. Cas. 529.

——S. 41—Powers and duty of Court—Annulment of adjudication—Application for discharge—Power to annul adjudication—Insolvent unable to pay eight annas in the rupee—Refusal of absolute discharge.

In an application under S. 41, the Court has no power to order the annulment of the adjudication. The sections which relate to annulment are Ss. 35 and 43. A.I.R. 1935 Mad. 646 = 1935 M.W.N. 414 = 68 M.L.J. 699 = 41 L.W. 809 = 156 Ind. Cas. 453.

——S. 41—Powers and duty of Court.

Under S. 41 (2), it is open to the Court to pass one of the three kinds of orders specified therein. If the Court considers that the insolvent is not entitled to an absolute order of discharge, it must consider the question whether a conditional order under cl. (*b*) or cl. (*c*) of S. 41 (2) cannot be suitably passed. In most cases, such an order is found to be suitable and cases where a Court refuses a discharge unconditionally and for ever are rare. A.I.R. 1934 Lah. 109 = 148 Ind. Cas. 971.

——S. 41—Powers of Court after discharge.

The discharge does not necessarily end the insolvency proceedings and the Insolvency Court has jurisdiction to give directions as to the distribution of assets among the creditors and such power is not taken away on account of the insolvent's discharge. A.I.R. 1931 Lah. 725 = 33 P.L.R. 524 = 135 Ind. Cas. 511 (2).

——S. 41—Powers and duty of Court—Assets less than eight annas in the rupee—Refusal to grant absolute discharge—Discretion of Court—Interference in revision—Second application, competency of.

Where an Insolvency Court passed an order refusing absolute discharge on the ground that the assets of the insolvent were insufficient to pay eight annas in the rupee and the insolvent appealed contending that the Court should under the circumstances, have granted a conditional order of discharge:

Held, that under S. 41, the Court had a discretion in the matter and the question whether it would have exercised a better discretion if it had acted under cl. (*b*) or cl. (*c*) of S. 41 (2), was not one which could properly be raised in revision. A.I.R. 1931 Lah. 672 = 32 P.L.R. 476 = 132 Ind. Cas. 525.

——S. 41—Powers and duty of Court—Time not stated in adjudication order—Addendum specifying time added—Addendum cannot be considered.

Where no time is stated in the adjudication order within which the insolvent has to apply for his discharge but an addendum is added at the foot of the order stating that the insolvent should apply within two years for his discharge, the addendum cannot be considered a part of the order and the court should not pass an order annulling the adjudication of the insolvent for his failure to apply for his discharge within two years. 92 Ind. Cas. 235 = 7 L.L.J. 553 = 26 P.L.R. 837 = A.I.R. 1926 Lah. 24.

——S. 41—(1907) S. 44—Power of Court—Courts Power to vary its order.

The Court cannot set aside or vary its order made by it under insolvency jurisdiction. 9 S.L.R. 132 = 32 Ind. Cas. 575.

——S. 41 (2) (c)—(1907) S. 44 (2) (c)—Power and duty of Court.

The Court when giving an order of discharge may, under the section, make the conditions as to future earnings and it can make an order as to earnings after adjudication but before discharge. 7 N.L.R. 19 = 10 Ind. Cas. 698.

8. Scope.

——S. 41—Scope—Clauses (a), (b) and (c) of S. 41 (2) cannot be combined.

The provisions in S. 41 (2) (*a*) (*b*) and (*c*) are strict alternatives and a mixed order combining the kinds of order contemplated in the several sub-sections is not permissible. A.I.R. 1944 Mad. 16 = 56 L.W. 531 = (1943)2 M.L.J. 366 = 1943 M.W.N. 562 = 211 Ind. Cas. 272.

——S. 42—Scope—Failure to carry out composition—Composition, if should be previous to adjudication.

Section 42 (1) (9) means that there should be no discharge of an insolvent who has done one of two things, both previous to the adjudication of insolvency. One of those things is to have been previously adjudged an insolvent, and the other is to have previously made a composition or arrangement with his creditors. The intention of the Act is that where a man has been

reelived of his liabilities on a previous occasion by one of those methods, he is not entitled to be relieved of his liabilities a second time by the Court of insolvency granting him a discharge after a second adjudication as an insolvent, but in such a case, he shall remain permanently as an undischarged insolvent and have the disadvantage of not being able to obtain further credit without disclosing the fact that he is an undischargedinsolvent. The composition must be governed by the words "on any previous occasion" and these words must mean a composition previous to the adudication.

Where the applicants are cultivators and it appears that the failure to carry out the composition is probably due to the agricultural depression which has resulted in special legislation in the United Provinces and it is the policy of the Legislature not to keep a burden of debt on cultivators, the order discharging them is in accordance with that policy. A.I.R. 1937 All. 526 = 1937 A.W.R. 384 = 1937 A.L.J. 387 = 168 Ind. Cas. 159.

——S. 41—Scope.

Where an order is passed directing an insolvent to pay a certain amount every month and to apply for discharge after one year, the order imposes conditions but does not grant any discharge subject to those conditions and consequently does not come within any of the clauses of S. 41. A.I.R. 1933 Sind 151 = 144 Ind. Cas. 247.

——S. 42—Scope and applicability.

The mere fact that an insolvent was unsuccessful in trade does not warrant a supposition that his assets are not of value equal to eight annas in the rupee due to circumstances for which he cannot justly be held responsible. Section 42 was not intended to apply to such cases. A.I.R. 1932 Cal. 623 = 55 C.L.J. 94 = 138 Ind. Cas. 745.

——S. 41—Scope—Principle on which Ss. 41 and 27 are based.

The overriding intention of legislature in enacting Ss. 41 and 27 is that the debtor on giving up the whole of his property shall be free man again, able to earn his livelihood and having the ordinary inducement to industry. Sometimes it is not right that bankrupt should be free immediately; he must pass through a period of probation and theoretically there may be cases in which he ought not to be freed at all, but **prima facie** he is to give up everything he has and on doing that he is to be made a free man. 124 Ind. Cas. 410 = 1930 A.L.J. 316 = A.I.R. 1930 All. 471.

——S. 42—Scope.

Where it is true that the assets of the insolvent are less than annas eight in the rupee on the amount of unsecured liabilities but it has not been shown that this state of things has been brought about by any fraudulent act on the part of insolvent or by circumstances which he could have controlled, S. 42 (*a*) does not stand in the way of the insolvent procuring the discharge. 119 Ind. Cas. 16 = A.I.R. 1929 All. 843.

——S. 41—Scope—Provisions are mandatory.

The debtor has complete discretion to apply when he likes, provided he applies within the period specified by the Court. The word "shall", in S. 41 imposes a duty upon the insolvent, the breach of which involves consequences pointed out in S. 43. A.I.R. 1925 Pat. 355, Foll. 105 Ind. Cas. 912 = 4 O.W.N. 993 = A.I.R. 1927 Oudh 506.

——S. 41 (2) (b), 42—(1907) S. 44 (2), Cl. (b) and Cl. (3)—Scope of.

S. 44 does not restrict the discretion of a Bankruptcy Court with regard to his period of suspension under S. 44 (2) (*b*) or the condition to be laid down with respect to any earnings of income which may hereafter become due to the insolvent. Under S. 44 (5) the power of suspending and of attaching conditions to an insolvent's discharge may be exercised concurrently. 39 Ind. Cas. 916 (All.).

——S. 42—(1907) S. 44 (3)—Scope—Operation of section—Honest and reckless debtors.

Petitioner should not be discharged though his creditors are guilty of misconduct in advancing him money. His own conduct should be considered. He should not be discharged when his assets are proved to be low unless he satisfies that he has no control over the circumstance. The Act is meant for honest debtors and not for reckless ones. S. 44 (3) is imperative. 3 Bur.L.T. 122 = 5 L.B.R. 189 = 8 Ind. Cas. 950.

9. Second appeal.

——S. 41—Second appeal.

No second appeal is competent from an order refusing discharge, but where the order in appeal is passed upon points not taken in grounds of appeal and is not supported by evidence on the record, it may be treated as revision. A.I.R. 1934 Lah. 198 = 35 P.L.R. 114 = 150 Ind. Cas. 80.

10. Second application.

——S. 41—Second application for discharge—Competency.

When an insolvent applies for discharge within the period specified in the order of adjudication znd his application is refused, he is not precluded from making a further application for discharge and so remain undischarged for life. A.I.R. 1939 Lah. 432.

——S. 41—Second application.

There is nothing in S. 41 to justify the view that when an application for discharge of an insolvent is refused, no later application for discharge can be made. A.I.R. 1932 Lah. 478 = 33 P.L.R. 620 = 138 Ind. Cas. 33.

——S. 41—Second application.

Held, that an order refusing discharge did not prevent the insolvent from applying for discharge again. A.I.R. 1931 Lah. 672 = 32 P.L.R. 476 = 132 Ind. Cas. 525.

——S. 41—Second application—Fresh application.

Per **Mukerji J.**—Ordinarily no second application for discharge by an insolvent is contemplated by law, the first application being sufficient.

Per **King J.**—When an insolvent applies for discharge within the period specified in order of adjudication under S. 27 (1) and his application has been refused, he is not precluded from making a further

application for discharge and so remain undischarged insolvent for life. 124 Ind. Cas. 410 = 1930 A.L.J. 316 = A.I.R. 1930 All. 471.

——S. 41—Second application.

Sub-section 2, S. 41, appears to allow the mere dismissal of the application for discharge but that will not prevent the insolvent from presenting further applications for discharge at any later time. 109 Ind. Cas. 636 = 1928 M.W.N. 175 = A.I.R. 1928 Mad. 609.

——S. 41—Second application.

There is nothing in S. 44 of the Act to warrant the suggestion that the application for discharge, when refused, is refused for ever and that no later application can be made, or no renewal of the former application can be had. 91 Ind. Cas. 31 = 22 M.L.W. 202 = 1925 M.W.N. 612 = A.I.R. 1925 Mad. 915 (F.B.).

11. Suspension of discharge.

——S. 41—Suspension of discharge—Order postponing insolvent's discharge till he paid eight annas in rupee cannot be made under Ss. 41 and 42.

The order of the Insolvency Court postponing the discharge of the insolvent till he paid eight annas in the rupee is not warranted by the provisions of the Provincial Insolvency Act; such an order does not come either under cls. (*b*) and (*c*) of S. 41, sub-s. (2) or both of them taken together. The disdharge is not suspended for a specified period but for an indefinite length of time, till eight annas in the rupee is paid. Such an order cannot be made under Ss. 41 and 42, Provincial Insolvency Act. A.I.R. 1944 Cal. 63 = 77 C.L.J. 63 = 47 C.W.N. 458 = 211 Ind. Cas. 289.

——S. 41—Suspension of discharge—Legality.

An order directing that the insolvent's discharge should be suspended until such time as his scheduled debts are fully paid, is one without jurisdiction. A.I.R. 1939 Lah. 183 = I.L.R. (1939) Lah. 429 = 41 P.L.R. 78 = 185 Ind. Cas. 551.

——S. 41—Suspension of discharge.

The operation of an order of discharge can only be suspended after an order has come into existence. A.I.R. 1939 Mad. 890 = (1939) 2 M.L.J. 555 = 1939 M.W.N. 975 = 50 L.W. 632 = 186 Ind. Cas. 231.

——S. 41—Suspension of discharge—Order of absolute discharge suspended until sale of property—Sale of property—Subsequent order to distribute proceeds of sale—Insolvency proceedings when terminate—Subsequent order, if operates as unconditional discharge.

In an insolvency matter, the Court passed the following order on 6th October, 1922: "It is useless to carry on this insolvency longer and it does not appear that insolvent is to blame. His offer to pay in instalments has been refused by the chief creditor and so a composition is not possible. The property mentioned by insolvent will be sold and after the proceeds have been distributed, the order of unconditional discharge will be written. If insolvent can arrange to sell this property in co-operation with the creditors, it will be so much the better." The property was sold and another order of the Court passed in 1924 stated that the property had been sold and ordered the proceeds to be distributed at once. Subsequently, an application was made by the creditor for attachment and sale of assets acquired by the debtor after that date:

Held, that the order of 6th October 1922, was an order of absolute discharge which was suspended for a specific time, that is, until the property had been sold, and that the insolvency proceeding terminated in 1924 with an unconditional discharge and the insolvency proceedings could not be revived. A.I.R. 1935 All. 272 = 1935 A.W.R. 38 = 1935 A.L.J. 274 = 153 Ind. Cas. 869.

——S. 41—Suspension of discharge—Order suspending discharge for fixed period—Application for final discharge—Notice to creditors, whether necessary.

When the discharge of an insolvent is suspended for a period under S. 41 (2) (*b*), on the expiry of the period, there is no necessity to apply for an order of final discharge. Therefore, an insolvent can be granted his final discharge in such a case on an application made by him on the expiration of the period without notice of the application to the creditors. A.I.R. 1931 Rang. 188 = 131 Ind. Cas. 721.

——S. 41—Suspension of discharge—Validity of order under.

There is no provision for the adding of any other order to an order refusing a discharge under S. 41 (2) (a). S. 41 (2) (*b*) permits suspension of a discharge for a specified time only. Therefore where the Court refuses an insolvent his discharge and at the same time directs him to pay certain amount to the receiver until the had apid all his debts, his order is illegal. A.I.R. 1930 Rang. 236 = 126 Ind. Cas. 529.

12. Time fixed for discharge.

——S. 41—Time fixed for discharge—Extension of time—Powers of Court—Extension by implication.

No doubt even in a case where the application for discharge had not been filed until after the expiry of the time fixed, it is still open to the Court in a proper case to allow time, provided that the adjudication has never been actually annulled under S. 43. But whether that should or should not be done upon the merits is a question for consideration.

An insolvent applied for his discharge beyond the time within which he was directed to so apply, explaining his failure to apply in time. Upon this petition the order passed by the Court was: "Separate petition showing cause of delay filed. Admit the discharge petition. Issue notice to creditors fixing 19th February for hearing." When the matter came up for hearing, the Court refused the final discharge on the ground that the application was time-barred and no sufficient cause was shown for the delay:

Held, that the order of the Court admitting the discharge petition and directing issue of notice for hearing could not be taken to mean that the time was extended by the Court and the delay condoned. Until the order refusing discharge was passed, the question of the sufficiency of the cause for delay had never received judicial consideration from the Court at all and the order in the order sheet was a mere routine order

placing the whole matter for consideration after notice. A.I.R. 1941 Pat. 285 = 7 B.R. 559 = 193 Ind. Cas. 546.

——S. 41—Time fixed for discharge—Omission to file talbana—Effect.

Where an insolvent who has applied for an order of discharge within the time specified by the Court has failed to file **talbana,** his failure to do so cannot be considered as a failure to apply for the discharge. 128 Ind. Cas. 273 = 7 O.W.N. 941 = A.I.R. 1930 Oudh 474.

13. Miscellaneous.

——S. 42—Miscellaneous—Inquiry into fraudulent actions.

If the debts entered in the list attached to the application are not bogus debts and if it is found that the property which the insolvent is now possessed of is not enough to pay his debts, he would clearly be entitled to present the application for insolvency under S. 10 and the Court will be bound to adjudicate him insolvent under S. 25. The fraudulent acts of the insolvent and the mala fide transfers made by him are to be enquired into by the Court, after the insolvent has been adjudged as such and not at the initial stage. A.I.R. 1922 Bom. 80 and A.I.R. 1916 P.C. 64, Foll. 113 Ind. Cas. 20 = 4 Luck. 52 = 5 O.W.N. 776 = A.I.R. 1929 Oudh 371.

——Ss. 42 (2) and 69—(1907), Ss. 44 (4) and 43—Miscellaneous—Receiver's report—Admissibility as evidence.

The report of a Receiver of an insolvent's property that the insolvent had fraudulently transferred his property to his wife before declaration of insolvency is not admissible in evidence to convict the insolvent under S. 43. 37 All. 429 = 13 A.L.J. 642 = 29 Ind. Cas. 998.

——S. 43.

Synopsis.

1. Annulment of adjudication.
2. Effect of annulment.
3. Extension of time.
4. Notice.
5. Persons entitled to apply.
6. Provision, whether mandatory.
7. Scope.
8. Miscellaneous.

1. Annulment of adjudication.

——S. 43—Annulment of adjudication.

The default of a debtor under S. 43 does not bring about an automatic annulment nor does it require the Court to pass an order of annulment immediately after the default occurs. Section 43 allows as insolvency Court to postpone annulment after default either by extending the time in which the debtor is to apply for his discharge or by merely postponing the actual pronouncement after the default has occurred. A.I.R. 1941 Lah. 316 = I.L.R. (1942) Lah. 330 = 43 P.L.R. 369 = 197 Ind. Cas. 564.

——S. 43—Annulment of adjudication—Jurisdiction of Insolvency Court.

After an adjudication is annulled under S. 43, the Insolvency Court continues to have jurisdiction in the matter of distribution of the assets of insolvent, the Official Receiver being the proper person to take control of any remaining estate. A.I.R. 1941 Lah. 316 = I.L.R. (1942) Lah. 330 = 43 P.L.R. 369 = 137 Ind. Cas. 564.

——S. 43—Annulment of adjudication—Powers of Court placing insolvent in possession of property.

Section **37** gives the Court a wide discretion. The annulment of the adjudication does not mean that the debtor who is adjudicated is necessarily to be placed in possession of the property which is in the hands of the Official Receiver at the time the adjudication is set aside. The directions of the Court must depend on the circumstances in each case. A.I.R. 1940 Mad. 375 = (1940) 1 M.L.J. 228 = 51 L.W. 231 = 1940 M.W.N. 157 = I.L.R. (1940) Mad. 441 = 189 Ind. Cas. 573).

——S. 43—Annulment of adjudication—Procedure—Court's discretion.

Section 43 does not operate automatically to terminate insolvency proceedings when the time fixed for the application for discharge is up. An order of annulment is necessary, and the Court, before making such an order, should exercise its discretion as to whether or not it is not better to extend the time. The word "shall" in S. 43 (1) is not mandatory.

There were two applications by a creditor, one under S. 53 and the other for extension of time for making application for discharge. Neither the insolvent nor the creditor appeared on the date of hearing. But the transferer was present. The application of insolvency was dismissed for default.

Held, that the order did not amount to an order of annulment, for the application which the Court described as dismissed for default, that is to say, the "application of insolvency" was not before the Court and could not be before the Court, so as no such application is known to the law. A.I.R. 1940 Nag. 4 = 1939 N.L.J. 465 = I.L.R. (1941) Nag. 500 = 186 Ind. Cas. 615.

——S. 43—Annulment of adjudication—Duty of Court—Annulment of insolvency proceedings—Proceedings under Ss. 53 and 54, if can be continued.

Orders of annulment should be very carefully worded, because where the Court annuls insolvency proceedings to avoid very considerable hardship to the creditors (where the annulment is founded on a failure on the part of the insolvent to take the necessary steps in the insolvency), it is necessary to make provision for what is to happen to the assets. A Court should be very chary about annulling insolvency proceedings where there are proceedings pending under Ss. 53 and 54, Insolvency Act.

Quaere.—Whether the Court has power, notwithstanding the annulment, to continue proceedings under Ss. 53 and 54. A.I.R. 1940 Nag. 4 = I.L.R. (1941) Nag. 500 = 1939 N.L.J. 465 = 186 Ind. Cas. 615.

——S. 43—Annulment of adjudication.

In view of S. 27 (2) and S. 5 read with S. 148, Civil P. C., the Insolvency Court has power to extend time under S. 43 (1) and the mere lapse of time originally

fixed by the Court without an application for discharge having been made by the insolvent cannot automatically bring about the annulment of the order of adjudication. A.I.R. 1939 Nag. 103 = 1939 N.L.J. 96 = I.L.R. (1939) Nag. 478 = 182 Ind. Cas. 214.

——S. 43—Annulment of adjudication—Procedure.

Though the provisions of S. 43 are mandatory, still the annulment of adjudication does not occur as a matter of course, but has to be the subject of a specific order of the Court; in other words it does not operate as an automatic annulment on the failure of the debtor to apply for a discharge. A.I.R. 1938 Oudh 122 = 1938 O.W.N. 377 = 14 Luck. 40 = 174 Ind. Cas. 607 (F. B.).

——S. 43—Annulment of adjudication.

When the debtor has applied for his discharge within the prescribed period and S. 27 does not apply, then the provision in S. 43 must apply and the order of adjudication must be annulled if thereafter the debtor does not appear on the days fixed for hearing his application for discharge. A.I.R. 1937 Nag. 37 = I.L.R. (1937) Nag. 461 = 166 Ind. Cas. 956 (2).

——S. 43—Annulment of adjudication.

The order of adjudication is not automatically annulled on insolvent's failure to apply for discharge within the time fixed by the Insolvency Court. A.I.R. 1935 Lah. 606 = 37 P.L.R. 144 = 159 Ind. Cas. 667 (1).

——Ss. 43 and 37—Annulment of adjudication—Receiver, if ceases to be Receiver in insolvency.

From the moment of the annulment of an order of adjudication and onwards, the Receiver ceases to be Receiver in insolvency, but if he is appointed to receive the property of the insolvent, he becomes a mere appointee with reference to such property and thus a mere custodian of the property which comes into his hands. Therefore, a bare appointee (i.e., an appointee under a vesting order which does not impose any condition relating to the property of the debtor), has no authority to deal with the estate of the insolvent as agent or on behalf of the insolvent except as regards realization of the insolvent's claims against others. When the Court vests the property of the insolvent in an appointee, the property is put out of the control of the insolvent, but the appointee is no more than the custodian of such property. Consequently, the creditors are not entitled to any relief against the appointee. All that they are entitled to do as regards him is to execute any decree that they may obtain against the insolvent by getting a garnishee order on account of his custody of the property belonging to the insolvent. A.I.R. 1935 Rang. 152 = 156 Ind. Cas. 783.

——S. 43—Annulment of adjudication.

Although the provisions of S. 43 are mandatory, the annulment of adjudication does not occur as a matter of course, but has to be the subject of a specific order of the Court. A.I.R. 1933 Rang. 133 = 144 Ind. Cas. 869.

——S. 43—Annulment of adjudication—"Annulled under the Act", meaning of.

The expression "annulled under the Act" in S. 43 means annulment by virtue of the power conferred under the Act. A.I.R. 1937 Cal. 158 = I.L.R. (1937) 1 Cal. 628 = 171 Ind. Cas. 280.

——S. 43—Annulment of adjudication—Discharge application—Debtor absent—Adjudication, if automatically cancelled.

If the debtor fails to apply for an order of discharge within the period specified by the Court, or having made such an application, he does not appear on the date of hearing, the adjudication does not stand cancelled automatically but that the Court must make an express order annulling the order of an adjudication. A.I.R. 1934 Lah. 468 = 15 L. 693 = 36 P.L.R. 499 = 153 Ind. Cas. 993.

——S. 43—Annulment of adjudication—Conditional annulment.

The annulment of adjudication under S. 43 is merely a continuation of the insolvency in another form and it is open to the Court to pass either a conditional or unconditional order of annulment. 31 M.L.W. 546 = A.I.R. 1930 Mad. 520 = 58 M.L.J. 658.

——S. 43—Annulment of adjudication—No automatic annulment.

Section 43 of the Act does not operate as an automatic annulment on the failure of the debtor to apply for a discharge. A.I.R. 1924 Cal. 777, Foll. 124 Ind. Cas. 61 = 31 M.L.W. 365 = 53 Mad. 288 = A.I.R. 1930 Mad. 389 = 58 M.L.J. 369 (F.B.).

——S. 43 (1)—Annulment of adjudication—Application by Receiver under S. 53—Adjudication annulled simultaneously with disposal of application—Legality.

A person was adjudicated on a creditor's petition on 5th January 1929 and was directed to apply for the discharge within six months from that date. He applied on 4th July 1929. Before his application the Receiver had already applied under S. 53 questioning the validity of the deeds executed by the insolvent. During the pendency of the application the insolvent applied for his discharge and objections having been filed the following order was made: 'Let it be placed with the application for an order of discharge.' Put up when any order is passed on the said application after the disposal of the Receiver's application. The creditors appealed questioning the correctness of the orders passed.

Held, that as the Court had not really fixed any date for the hearing of the insolvent's application for discharge and as that application was to be heard only after the disposal of the Receiver's application under S. 53 the lower Court was wrong in annulling the order of adjudication. 128 Ind. Cas. 273 = 7 O.W.N. 941 = A.I.R. 1930 Oudh 474.

——S. 43—Annulment of adjudication.

Insolvent, not paying large amount of his debts applying for discharge—Court directing him to pay certain sum monthly and to renew his application "six months hence"—Court's order is under S. 42 (1) (a) and hence if insolvent neither pays nor renews application as ordered, his adjudication cannot be annulled. 118 Ind. Cas. 332 = A.I.R. 1929 Pat. 184

——S. 43—Annulment of adjudication—Protecting creditors after annulment.

Insolvent failing to apply for discharge—Court must annul adjudication, but to protect creditors, order vesting of his property in some third person, under S. 37, must be passed. 94 Ind. Cas. 234 = A.I.R. 1926 Lah. 370.

——S. 43—Annulment of adjudication.

The phrase "the order of adjudication shall be annulled" in S. 43, means that it is to be annulled at the instance of the opposite party or by the Court itself, and does not mean that it is cancelled automatically on the expiry of the period. 81 Ind. Cas. 584 = 51 Cal. 337 = A.I.R. 1924 Cal. 777.

2. Effect of annulment.

——Ss. 43 and 61 (5)—Effect of annulment—Insolvent not applying for discharge within time fixed by Court—Adjudication annulled—Properties cannot be re-vested in insolvent—Effect of such order indicated.

When an adjudication is annulled on the ground that the insolvents had not fulfilled their duty by applying for their discharge within the time fixed by the Court it would not be a proper exercise of discretion on the part of the Court to revest the properties in the insolvents, for that would be allowing the insolvents to take advantage of their own default; and the creditors who had already proved their debts would be seriously prejudiced by such order, as under S. 61 (5) such creditors alone would be entitled to be rateably paid out of the amount realised by the assets of the insolvent if the administration in insolvency were to continue, whereas if the properties were re-vested in the insolvents there would be nothing to prevent other creditors who have obtained decrees subsequent to the annulment to come in under S. 73, Civil P. C., and claim rateable distribution. A.I.R. 1946 Mad. 388 = (1946) 1 M. L. J. 262 = 59 L. W. 349 = 1946 M.W.N. 457.

——S. 43—Effect of annulment—Suit to enforce mortgage—Receiver representing estate of insolvent—Annulment pending suit—Decree is not binding on mortgagor.

Since no one is bound by an order made in a proceeding to which he was not a party, if it is sought to bind him on the ground that his interest was sufficiently represented by another person, it must be shown that at the time the order was made, the representative character of the latter was still subsisting. Hence a decree passed in a mortgage suit in which the Receiver was impleaded as a party cannot bind the mortgagor insolvent if before the date of the decree, the adjudication was annulled, as on annulment, the Receiver becomes *functus officio* and ceases to represent the estate of the deceased. The re-vesting of property in the insolvent during the pendency of the suit is not affected by the doctrine of *lis pendens*. A.I.R. 1943 Mad. 381 = 1943 M.W.N. 89 = I.L.R. (1943) Mad. 702 = (1943) 2 M.L.J. 539 = 56 L.W. 756 = 213 Ind. Cas. 406.

——S. 43—Effect of annulment of adjudication on proceedings under Ss. 53 and 54.

The annulment of an adjudication under S. 43 does not operate so as to cause the abatement of the proceedings already instituted under Ss. 53 and 54. A.I.R. 1941 Lah. 316 = I.L.R. (1942) Lah. 330 = 43 P.L.R. 369 = 197 Ind. Cas. 564.

——S. 43—Effect of annulment.

A person whose adjudication is annulled under S. 43, Provincial Insolvency Act, is not disqualified for election as a member of a Local Board as an "undischarged insolvent" under S. 55 (2) (*b*), Madras Local Boards Act, 1920. A.I.R. 1941 Mad. 22 = 52 L.W. 527 = (1940) 2 M.L.J. 590 = 1940 M.W.N. 1011 = 193 Ind. Cas. 147.

——S. 43—Effect of annulment—Order of annulment in force—Insolvency Court's jurisdiction to demand refund.

Once an order of annulment of adjudication has been passed under S. 43, there ceases to be an insolvent or any Receiver. All acts theretofore done by the Court are valid and subject to that the property of the debtor vests in such person as the Court may appoint, and in default of any such appointment, in the debtor himself.

Consequently, so long as the order of annulment of adjudication is in force, the Insolvency Court has no jurisdiction to demand a refund of money from the creditors to whom a dividend had been distributed. It is at least doubtful whether the District Judge has jurisdiction to entertain an appeal against the order refusing to enter claims of a particular debt in the schedule after the adjudication had been annulled. A.I.R. 1935 Nag. 246 = 31 N.L.R. Sup. 36 = 161 Ind. Cas. 981.

——S. 43—Effect of annulment on proceedings under Ss. 53 and 54.

In a case where an insolvency has been annulled under the provisions of S. 43, and the Receiver has, before the order of annulment, applied to the Court to have a transfer of property set aside under the provisions of S. 53 or S. 54, the Court has no jurisdiction after the order of annulment of the insolvency proceedings to continue the proceedings under S. 53 or S. 54.

Quaere.—Whether the provision of S. 43, Provincial Insolvency Act, are mandatory? A.I.R. 1933 Rang. 223 = 11 Rang. 287 = 145 Ind. Cas. 320 (F.B.).

3. Extension of time.

——S. 43—Extension of time.

The provisions of S. 43 are subject to those of S. 27 (2) and it is open to the Court to extend time instead of annulling the adjudication. A.I.R. 1942 Oudh 97 = 1941 O.W.N. 1190 = 1941 A.W.R.C.C. 335 = 17 Luck. 271 = 199 Ind. Cas. 390.

——S. 43—Extension of time.

After annulment of adjudication under S. 43, no extension of time can be granted. A.I.R. 1937 All. 686=1937 A.L.J. 773 = 1937 A.W.R. 654 = I.L.R. (1937) All. 855 = 171 Ind. Cas. 594.

——S. 43—Extension of time for applying for discharge.

The time for making an application for discharge can be extended even after the expiry of the period

originally fixed ; it is open to the Court to do so **suo motu** or at the instance of an aggrieved party. 132 Ind. Cas. 223.

——**S. 43 (1)—Extension of time—Power of Court**

If a Court from the proceedings before it is of opinion that the period allowed to a debtor for applying for his discharge ought to be extended, the Court has power to extend the time of its own motion. 128 Ind. Cas. 841 = 8 Rang. 506 = A.I.R. 1931 Rang. 27.

——**S. 43—Extension of time—Form of order extending time.**

In granting an extension of time for applying for discharge on the ground that another petition has to be inquired into, the order should be made in the following terms :

" The order of annulment is set aside and the time for applying for discharge is extended up to such time as is necessary for disposal of petition under Ss. 52 and 53." 1930 M.W.N. 673 = 32 M.L.W. 446 = 129 Ind. Cas. 36 = A.I.R. 1931 Mad. 10 = 59 M.L.J. 710.

——**S. 43—Extension of time.**

Whenever the effect of the insolvent's failure to apply for discharge within the time prescribed is to prevent any inquiry into allegation of fraudulent conduct, the court can take hold of the fact and extend the time for applying for discharge. 1930 M.W.N. 673 = 32 M.L.W. 446 = 129 Ind. Cas. 36 = A.I.R. 1931 Mad. 10 = 59 M.L.J. 710.

——**S. 43—Extension of time—Discretion of Court.**

Where the court which orders amendment reviews its order and grants extension of time for applying for discharge, the High Court will not interfere in revision with the discretion exercised by the lower court. 1930 M.W.N. 673 = 32 M.L.W. 446 = 129 Ind. Cas. 36 = A.I.R. 1931 Mad. 10 = 59 M.L.J. 710.

——**S. 43—Extension of time.**

Extension of time under S. 148, C.P. Code cannot be granted in cases where the insolvent fails to appiy for discharge within the time fixed by Court, since the provisions of S. 43 (1) are mandatory and the powers given by S. 5 are to that extent limited. A.I.R. 1926 Mad. 942. Foll. 125 Ind. Cas. 346 = 8 Rang. 187 = A.I.R. 1930 Rang 166.

——**S. 43—Extension of time.**

Although the provisions of S. 43, that if the debtor fails to apply within specified time for annulment of adjudication order, the adjudication shall be annulled, are mandatory, under S. 27 (2), the period within which the debtor shall apply for his discharge, should be extended so that the operation of S. 43 is delayed until the insolvency proceedings have had time to be carried to completion. 91 Ind. Cas. 467 = A.I.R. 1926 Sind 94.

4. Notice.

——**S. 43—Notice—Construction — Adjudication as insolvent on petition by creditors—Steps to initiate proceeding under Ss. 53 and 54—Notice to petitioning creditors.**

Section 43 should be read with S. 27 and where a person is adjudged insolvent on a petition by his creditors and steps are apparently being taken with a view to initiate proceedings under S. 53 or S. 54, notice ought to be issued to the petitioning creditors before the adjudication is annulled. A.I.R. 1937 All. 686 = I.L.R. (1937) All. 855 = 1937 A.L.J. 773 = 1937 A.W.R. 654 = 171 Ind. Cas. 594.

——**S. 43—Notice to creditors.**

When annulling adjudication, a Court ought to give specific notice of it to a creditor, as an interested party who may have instituted legal proceedings in relation to the insolvent's property. 101 Ind. Cas. 589 = 6 Bur. L.J. 44 = A.I.R. 1927 Rang. 173.

5. Persons entitled to apply.

——**S. 43—Persons entitled to apply.**

Per **Venkatasubba Rao J.**—From S. 27 and S. 43 read together it is clear that the party who can make the application for discharge is the debtor and no one else. It is equally clear that the Court has power to extend the period and it may be so done not merely at the instance of the debtor but on the application of anybody interested. S. 27 (2) merely requires sufficient cause shall be shown, but it does not say, that the debtor alone may apply for extension or shall show sufficient cause. If then before the expiry of the term fixed, an application is made under S. 27 (2), it is obvious that it is not obligatory upon the Court under S. 43 to annul the adjudication. To this extent it is plain that the word " shall " is not imperative. 122 Ind. Cas. 351 = 52 Mad. 648 = 29 M.L.W. 649 = 1929 M.W.N. 489 = A.I.R. 1930 Mad. 278 = 57 M.L.J. 116.

——**S. 43—Persons entitled to apply.**

Though S. 43 (1) does not specify by whom the application should be made, a creditor who is affected by the adjudication is certainly a " person aggrieved if his claim is dismissed without proper reason.

An order of adjudication prevents an unsecured creditor from realising his debt except by receiving the dividend ; he is therefore certainly affected by the proceedings in insolvency, *viz.*, by the refusal to annul the order of adjudication. 83 Ind. Cas. 955 = 19 M.L.W. 418 = 34 M.L.T. 170 = 1924 M.W.N. 331 = A.I.R. 1924 Mad. 635.

6. Provisions whether mandatory.

——**S. 43—Provisions whether mandatory.**

Per **Reilly, J.**—It is one thing to provide that on a certain thing happening or not happening the next step shall be such and such ; it is quite another thing to provide that if a certain order of the Court is not carried out within a certain time a certain consequence shall follow. The latter provision is much more clearly mandatory than the former. It is very difficult to suggest any reasonable explanation why the words " shall be annulled " are used in S. 43, if something other than their plain meaning is intended, and it is not disputed that the plain meaning is mandatory. 122 Ind. Cas. 351 = 52 Mad. 648 = 1929 M.W.N. 489 = 29 M.L.W. 649 = A.I.R. 1930 Mad. 278 = 57 M.L.J. 116.

——**S. 43—Provisions whether mandatory.**

The provisions of S. 43 (1) are mandatory, there being no discretion to the Court to enlarge the time after the expiry of the period fixed by the Court for

an application for an order of discharge. Unless the debtor applies for his discharge within the time fixed the adjudication must be annulled. 125 Ind. Cas. 346 = 8 Rang. 187 = A.I.R. 1930 Rang. 166.

——S. 43—Provisions whether mandatory.

Where the insolvent fails to apply for an order of discharge, the Insolvency Court has no option but to annul the order of adjudicati on. A.I.R.1926 Lah. 370, Foll. 112 Ind. Cas. 768 (Lah.).

——S. 43—Provisions whether mandatory.

Section 43 is mandatory and the Court has no power to extend the time after the period specified in the order. The word "shall" in S. 43 is mandatory —**(Cases discussed.)** 109 Ind. Cas. 581 = 51 Mad. 839 = 1928 M.W.N. 177 = 27 M.L.W. 311 = A.I.R. 1928 Mad. 265 = 54 M.L.J. 344.

——S. 43—Provisions whether mandatory.

The words "shall be annulled" in S. 43 are to be construed as directory and discretionary and not mandatory or peremptory. So the Court in its discretion in the circumstances of a particular csase, where the debtor has failed to apply for his discharge within the time originally fixed, has power to extend the time within which the debtor must apply for his discharge. 91 Ind. Cas. 467 = A.I.R. 1926 Sind 94.

——S. 43—Provision whether mandatory—Section is mandatory.

The word "shall" in S. 41 of the Act imposes a duty upon the insolvent the breach of which involves the consequences pointed out in S. 43. The provisions of S. 43 are mandatory. The Court has no discretion to enlarge the time after the expiry of the period fixed by the Court for an application for an order of discharge. 88 Ind. Cas. 70 = 4 Pat. 51 = 6 P.L.T. 776 = A.I.R. 1925 Pat. 355.

——S. 43—Provision if mandatory—Setting aside annulment—C.P. Code, O. 9—S. 10 (2) if applies.

When an order of annulment has been passed under S. 43 (1) it is not open to the Insolvency Court to set aside its order by virtue of the provisions of O. 9 of the C.P. Code, but the provisions of S. 10 (2) will apply: C.R.P. No. 554 (**Madras**) of 1925, Dist. A.I.R. 1924 Mad. 635, Foll.

S. 43 is mandatory. 97 Ind. Cas. 706 = 49 Mad. 935 = 1926 M.W.N. 674 = A.I.R. 1926 Mad. 942 = 51 M.L.J. 209.

(7) Scope.

——S. 43—Scope and object—Annulment of adjudication and property ordered to continue to vest in Official Receiver—Alienation by insolvent set aside in the mean time—Alienees depositing sufficient money to pay all creditors—Insolvent also depositing sufficient money to pay off creditors and the alienees—Person entitled to the property under the set aside alienation.

On 22nd June, 1937, **B**, then in insolvent circumstances alienated his property in favour of **N** and others. On 13th August, 1938, the alienee sold some of the property to **R** and on 10th August, 1944, **R** transferred some of his rights to **T**. **B** was adjudicated insolvent on 8th March, 1938. At the instance of the Official Receiver the alienations of 22nd June, 1937, and the consequent alienations were set aside On 9th February, 1940, the adjudication was annulled under S. 43 of the Provincial Insolvency Act; but the property was ordered to continue to vest in the Official Receiver. Subsequently the alienees deposited in Court a sufficient sum of money to pay off all the creditors and asked that the property be delivered to them. The insolvent also subsequently deposited money sufficient to pay off the creditors as well and to pay the alienees what was due to them under the deed of 22nd June, 1937.

On a question whether **B**, the insolvent or his alienees were entitled to the properties,

Held, the alienees should be given possession of the property since it was not necessary to sell them for meeting the debts of the creditors despite the fact that the alienation had to be set aside in its entirety. The insolvent should be allowed to withdraw the amount deposited by him.

An insolvency Court administers the assets of the insolvent in equity for the benefit of the creditors and restores it to the person to whom it is properly due, if the claims of the creditors do not necessitate the sale of the property. 61 L. W. 850 = A.I.R. 1949 Mad. 472 = (1948) 2 M.L.J. 590.

——S. 43—Scope and object—Effect of vesting order under S. 37, explained.

Section 43 is a penal provision and its object is to punish the debtor if he does not, with due diligence, apply for his discharge. When the Court annuls an adjudication under S. 43 (1), and makes an order vesting the property of the ex-insolvent in some other person, it still retains control over the debtor's properties and though the annulment of adjudication puts an end to the insolvent's state of insolvency, it does not terminate the insolvency proceedings for all purposes. It cannot be said that the last act which the Court can do in exercise of its insolvency jurisdiction, is to make an order vesting the property of the debtor in some other person, and it becomes **functus officio** after that. That would be to frustrate the very object for which adjudication was annulled. Nor can it be said that the appointee is merely a passive trustee for the debtor, and must retain the properties for the benefit of the latter, subject to any order of attachment and sale that might be obtained at the instance of any creditor. The word "vest" as used in S. 37 connotes much more than physical custody or detention. It means that the title of the debtor inheres in the appointee, and he has the power to deal with the property. The purpose of "vesting", though not clearly expressed in the section, must be the distribution of the assets amongst all the creditors of the ex-insolvent and that is the only way of fulfilling the object for which the annulment order was made. The appointee, therefore, is to hold the estate of the debtor till it is completely administered, in accordance with the principles recognised in insolvency laws. It is true that all the provisions of the Insol. Act may not be made applicable and the appointee may not have all the powers of the Receiver in insolvency, but the general principles of distribution embodied in the insolvency laws which are based on broad principles of equity and justice can certainly be applied. The appointee has got to administer the estate under the control and guidance of the Court which can direct him from time to time as to how he should proceed. A.I.R. 1943 Cal. 133 = 47 C.W.N. 74 = I.L.R. (1943) 1 Cal. 5 = 76 C.L.J. 460 = 206 Ind. Cas. 619.

——S. 43—Scope and object.

Section 43 is intended to act as a deterrent to insolvents who try to avoid discharge, and this was the expressed object with which the section was introduced. A.I.R. 1941 Lah. 316 = 43 P.L.R. 369 = I.L.R. (1942) Lah. 330 = 197 Ind. Cas. 564.

——S. 43—Scope and construction.

Section 43 cannot be interpreted in such a way as to favour the insolvent. A.I.R. 1941 Lah. 316 = I.L.R. (1942) Lah. 330 = 43 P.L.R. 369 = 197 Ind. Cas. 564.

——S. 43—Scope—Annulment intended as punishment—Such punishment cannot be used in favour of insolvent.

The annulment of the adjudication under the conditions defined under S. 43 is intended as a punishment to the insolvent. The protection conferred on him by reason of his adjudication is withdrawn but it does not necessarily follow that he is to get back from the control of the Court his assets. The punishment provided in S. 43 cannot be used in favour of the insolvent. A.I.R. 1939 Oudh 55 = 1939 O.W.N. 32 = 1939 A.W.R. 17 = 14 Luck. 404 = 179 Ind. Cas. 764.

——S. 43—Scope and applicability—Discharg—Effect on after-acquired property.

Although the property vests in the Receiver, if he never claims it in the insolvency proceedings, in the absence of any order to the contrary, the property in question must be considered to have re-vested in the mortgagor on his discharge, and the principle laid down in S. 43, T.P. Act, would be applicable and on the re-vesting of the property in the mortgagor, themortgagee will be entitled to enforce the mortgage. A.I.R. 1934 Lah. 809 = 36 P.L.R. 185 = 16 Lah. 392 = 155 Ind. Cas. 938.

——S. 43—Scope and object.

The penalty of annulment under S. 43 is not intended for insolvent coming before the Court in time and applying for extension of time for applying for discharge. If the Court is not prepared to extend time in such a case, it may properly treat the application as one for discharge or should allow the insolvent to make an immediate application for discharge. A.I.R. 1931 Mad. 325 = 60 M.L.J. 339 = 33 L.W. 448 = 131 Ind. Cas. 150.

(8) Miscellaneous.

——S. 43—Miscellaneous—Death of insolvent—Termination of proceedings.

The insolvency proceedings do not come to an end on the death of the insolvent. A.I.R. 1934 Lah. 468 = 15 Lah. 698 = 36 P.L.R. 499 = 153 Ind. Cas. 993.

——S. 43—Miscellaneous—Expiry of time for applying for discharge—Sale of property by Receiver—Right of insolvent to object.

Where the time for applying for discharge has expired, the Court is not bound to make the property vest in the insolvent. The Court may vest it in the Receiver for the benefit of the creditors. If the Receiver sells the property or distributes it among the creditors, it is for the creditors to object and the insolvent has no right to object to it. A.I.R. 1933 Lah. 1008 = 147 Ind. Cas. 778.

——S. 43—Miscellaneous—Fresh adjudication.

Under the Provincial Insolvency Act once a person has been declared an insolvent, it is not open to him to apply for a second order of adjudication until he has obtained an order of discharge or until his previous adjudication has been annulled. 26 Bom. 171, Dist. 115 Ind. Cas. 107 = 6 O.W.N. 100 = A.I.R. 1929 Oudh 149.

——S. 43—Miscellaneous—Transfer set aside as fraudulent—Transferee's right to prove as unsecured creditor.

Where a sale is set aside on the ground that it was in fraud of creditors, the transferee may be allowed to prove as an unsecured creditor to the extent of the consideration which has been used for paying just debts of the debtor. A.I.R. 1933 Lah. 211 = 34 P.L.R. 127 = 141 Ind. Cas. 336.

——S. 43 (S. 359)—Provincial Insolvency Act—Imprisonment, whether to be simple or rigorous—Omission to specify the nature of the imprisonment when passing order under S. 359—Power to subsequently declare it to be rigorous—Jurisdiction—S. 622, C. P. C.

The imprisonment ordered under S. 359, C.P.C., may be either simple or rigorous, but the nature of the imprisonment must be specified when the order is made. 18 W.R. Cr. 3 Ref. to. When the Judge in passing orders under S. 359, C.P.C., omits to state whether the imprisonment awarded is to be simple or rigorous it must be taken to be simple imprisonment. After the Judge has made an order under S. 359, his power under that provision of the law is exhausted and he has no jurisdiction subsequently by an administrative order passed without notice to the petitioner to determine that the imprisonment is to be rigorous. If he does so his order is liable to be discharged by the High Court in the exercise of its revisional jurisdiction. 11 C.W.N. 740 = 5 C.L.J. 445. See 13 M.L.J. 467.

——S. 43 (ii)—Provincial Insolvency Act—Imprisonment of insolvent—Offence committed on specific occasion—Evidence, nature of.

An insolvent cannot be committed for an offence under S. 43 of the Provincial Insolvency Act unless he is shown by legal evidence to have committed an offence on some specific occasion. 17 C. 219 Ref. to. An insolvent cannot be punished on the evidence given on behalf of the creditors when they were opposing his application for adjudication of insolvency but that evidence ought to be received **de novo** after the charges are framed. 7 A.L.J. 602 = 32 A. 547 = 6 Ind. Cas. 870.

——S. 44.

Synopsis.

1. **Debt incurred by fraud.**
2. **Effect of discharge.**
3. **Fraudulent forbearance.**
4. **Liability of surety.**
5. **Maintenance order.**
6. **Scope and applicability.**
7. **Miscellaneous.**

(1) Debt incurred by fraud.

——S. 44 (1) (b)—Debt incurred by fraud—Fraud —What is—Effect of fraud.

The fact that a person conceals an important circumstance but for which concealment another person would not have acted as he did and does so with the intention of causing him so to act is equally a fraud. It constitutes the offence of cheating as much as an actual untrue representation would.

Where an insolvent executes a promissory note after having filed a petition for adjudication, without disclosing that he had done so, his act is not only dishonest but also amounts to fraud within the meaning of S. 44 (1) (*b*), and Insolvent is not by reason of his subsequent discharge in insolvency, discharged from his liability to pay the debt on the promissory note. A.I.R. 1937 Mad. 677 = 1937 M.W.N. 404 = 172 Ind. Cas. 797.

(2) Effect of discharge.

——Ss. 44 (2) and 34 (2)—" Debts provable under this Act "—Liability of member of Co-operative Society for contribution to Society's assets—Member discharged by Insolvency Court before Society was wound up and Liquidator appointed —Liability for contribution—If wiped out—Co-operative Societies Act, S. 42.

Penalty imposed under S. 44 (2) of the Provincial Insolvency Act relates only to those debts which are " provable " under S. 34 (2) of the Act and where they are so, they must be proved and entered in the schedule. In the case of any debt which is " incapable of being fairly estimated " the Court may not include it in the schedule. This is a matter entirely within the discretion of the Insolvency Court. Where the debt or liability exists at the time of adjudication or arises before the discharge in consequence of any obligation incurred before the date of such adjudication, it shall not cease to be " provable debt " because it was not immediate or was contingent. The only requisite condition is that it must be in existence.

Under the Co-operative Societies Act, there is no doubt a possibility, howsoever remote it might be, of a member becoming liable for contribution to the Society's assets, but this remote possibility could hardly be said to be a liability existing at the time of adjudication or discharge. Until the Society is wound up and a liquidator is appointed, it cannot be said that there is any debt or liability, certain or contingent, which can affect the member. The liability of a member of a co-operative society for the contribution to the assets of the Society on its dissolution imposed by the statute is not, therefore, wiped out by the fact that he had been discharged by the Insolvency Court before the Society had been wound up and the Liquidator appointed. 1941 N.L.J. 412 and 1939 Lah. 275, Rel. on. Pak. L.R. (1949) Lah. 192 = A.I.R. 1949 Lah. 167.

——S. 44 (2)—Effect of discharge—Order of discharge—Effect of —Position of Receiver thereafter.

The effect of S. 44 (2), Provincial Insolvency Act, is not to extinguish the debts of the insolvent. The only limitation imposed is that the creditors who have got debts provable under the Act can, after the order of discharge, look only to those particular assets which the insolvent was possessed of and had accordingly vested in the Court of the Receiver on the date of the filing of the application for adjudication. The claims of the creditors cannot be directed against any other property which may be acquired by the insolvent after an order of discharge is made. It cannot, therefore, be contended that after an order of discharge, the Receiver in insolvency becomes **functus officio.** A.I.R. 1950 Cal. 487.

——S. 44 (2)—Effect of discharge—Re-vesting of property in insolvent on his discharge.

It is not correct to say that debts proved in insolvency up to the date of discharge are discharged under S. 44 (2). They are no more debts but are claims before a Court administering an estate which the Court, through its proper officer, will discharge in a certain order out of the assets in its hands. Under the circumstances, the property remains vested in the Court and will not re-vest in the insolvent. A.I.R. 1944 Nag. 28 = 1943 N.L.J. 544 = I.L.R. (1944) Nag. 14 = 215 Ind. Cas. 100.

——S. 44 (2)—Effect of discharge—Discharge—Effect on contingent liability as surety.

Though the liability of an insolvent to indemnify his surety is contingent liability, it is a liability which is provable under the Act and consequently under S. 44 (2) an order of discharge absolves the insolvent from that liability also. A.I.R. 1942 Mad. 745 = (1942) 2 M.L.J. 626=55 L.W. 726=1942 M.W.N. 678 = 204 Ind. Cas. 248.

——Ss. 44, 47, 34, 28 (2) and (6)—Effect of discharge —Secured creditor not realising, abandoning or valuing his security before insolvent's discharge —There is no provable debt—Creditor, if entitled to personal decree against insolvent even after his unconditional discharge.

By reason of the provisions of S. 47, the debt of a secured creditor is not provable until he has realised his security or has abandoned it or valued it. Until one of these events has happened, there is no debt provable in the insolvency proceedings. The real position is that a secured creditor may prove in the insolvency proceedings, but his right is a contingent one and until the contingency happens, he is outside the Act. If the secured creditor has not, during the insolvency proceedings, realized his security, or surrendered or valued it, S. 44 (2) cannot affect him, because no portion of the debt due to him has become provable and the section only applies to debts which are provable in the insolvency. This means that he is entitled to a personal decree under O. 34, R. 6, Civil P. C., if the security has not been realized before the discharge of the insolvent. If it has and there is a deficiency, the balance of the debts constitutes a debt provable in the insolvency and S. 44 (2) will operate to cancel it. A.I.R. 1942 Mad. 273 = 54 L.W. 741 = (1942) 1 M.L.J. 11 = 1942 M.W.N. 134 = I.L.R. (1942) Mad. 448 = 201 Ind. Cas. 407.

(Overruling A.I.R. 1942 Mad. 151 = 201 Ind. Cas. 384.)

——S. 44 (2)—Effect of discharge—Application to decretal debts.

Any liability arising from a provable debt disappears when the order of discharge is made. It cannot be said that that protection under S. 44 (2) is taken away from him merely because the liability takes the form of a decree.

Where, therefore, a member of a co-operative society applies in insolvency after the society has gone into liquidation and obtains his discharge, a decree passed by the liquidator under S. 42 (2) (*b*) Co-operative,

Societies Act, cannot be executed against the insolvent even if the liquidator was competent to make a decree and the liability could not be challenged by the executing Court on the ground that it was a decree made by a competent Court, as the liability must be deemed to have disappeared by force of S. 44 (2). A.I.R. 1941 Lah. 314 = 43 P.L.R. 422 = 198 Ind. Cas. 627.

——S. 44 (2), (3)—Effect of discharge.

By virtue of S. 44 (2), on discharge of the insolvent, the debt which the insolvent owed to his creditors becomes unenforceable. Consequently, creditors of an insolvent who has been released from all liabilities ro his creditors' debts are not entitled to enforce payment by the sale of a previously attached house belonging to the insolvent's wife when she herself is under no personal liability to pay the debt and she does not come within any of the categories mentioned in sub-s. (3) of S. 44. A.I.R. 1941 Mad. 620 = (1941) 1 M.L.J. 565 = 1941 M.W.N. 388 = 53 L.W. 494 = 198 Ind. Cas. 787.

——S. 44 (2)—Effect of discharge—Personal liability under mortgage—Debt provable—Release.

A creditor having a mortgage decree against the insolvent, realized his security before the passing of the discharge order. He did not, however, value the security and prove the balance personally due from the insolvent :

Held, that since the mortgage-debt was provable under the Provincial Insolvency Act, the discharge order released the insolvent from personal liability under the mortgage and the creditor could not subsequently claim a personal decree for the balance against the insolvent. A.I.R. 1938 Lan. 217 = 40 P.L.R. 514 = 178 Ind. Cas. 272.

——S. 44 (2)—Effect of discharge.

On an order of discharge so far as the debts due from the insolvent at the time of the order of adjudication are concerned, he is released from them. But the power of the Official Receiver to deal with the property which vests in him at the time of the order of discharge does not cease with the passing of the order of discharge. A.I.R. 1937 Lah. 87 (88) = 171 Ind. Cas. 610 = 17 Lah. 775.

——S. 44 (2)—Effect of discharge.

An order of discharge does not re-vest property. A.I.R. 1937 Sind 306 = 31 S.L.R. 506 = 173 Ind. Cas. 40.

——S. 44 (2)—Effect of discharge—Alienation pending attachment—Subsequent insolvency and discharge of judgment-debtor—Attaching creditor, whether debarred from executing his decree—Effect of discharge.

An alienation in contravention of an attachment is not void absolutely and the transferee does not stand in a better position by reason of transferor's subsequent adjudication and discharge by the Insolvency Court. The discharge of the transferor in such a case will not operate to relieve the property in the hands of the transferee from subjection to the claims under the attachment.

A person's property was attached before judgment and a decree was passed against him. He sold the property to a third person in spite of the attachment and was subsequently adjudicated an insolvent. The decree-holder proved his debt but obtained nothing. He sought to execute his decree against the attached property after the discharge of the debtor :

Held, that notwithstanding the provisions of S. 44 (2), the decree-holder was entitled to execute his decree against the attached property. A.I.R. 1936 Mad. 100 = 42 L.W. 834 = 69 M.L.J. 799 = 1935 M.W.N. 1328 = 159 Ind. Cas. 1027.

——S. 44 (2)—Effect of discharge.

Where, after the discharge of an insolvent, a decree-holder who had obtained a decree before the discharge and who was ignorant of the insolvency proceedings put his decree into execution :

Held, that the effect of discharge was to release the insolvent from all such debts. A.I.R. 1933 All. 340 = 144 Ind. Cas. 888.

——S. 44 (2)—Effect of discharge—Discharge—Effect on debt contracted after petition.

After discharge, a suit to recover a debt contracted by the insolvent after filling of petition but before adjudication is barred under S. 44. A.I.R. 1932 Bom. 511 = 34 Bom. L.R. 980 = 141 Ind. Cas. 466.

——S. 44 (2)—Effect of discharge.

Where A executed a promissory note in B's favour and after 3 years, became an insolvent but was subsequently discharged by order of Court and a few months after discharge, A executed in B's favour another promissory note the consideration for which was the money due on the peior promissory note plus a sum of money advanced to him, and B sued on the second promissory note :

Held, that by virtue of the provisions of S. 44 (2), the amount due under the first promissory note which was provable under the Act was discharged and B would be entitled to a decree only for that part of the consideration of the second promissory note which represented the amount advanced on the date of its execution with ineterst thereon. A.I.R. 1932 Mad. 416 = 35 L.W. 449 = 137 Ind. Cas. 320.

——S. 44—Effect of discharge—Surety paying for insolvent.

Where a debtor is adjudicated insolvent and discharged and the surety pays his debts contracted before the adjudication the surety cannot recover the amount so paid, from the debtor as he is released from the debt, the debt being a provable one under the Insolvency Act. 109 Ind. Cas. 421 = 50 All. 506 = 26 A.L.J. 425 = A.I.R. 1928 All. 306.

——S. 44—Effect of discharge—Release from debt.

If an attaching creditor does not prove his debts under S. 34, an order of discharge releases the insolvent from such a debt. 110 Ind. Cas. 893 = A.I.R. 1928 Nag. 336.

——S. 44 (2)—(1907) S. 45 (2)—Effect of discharge—Order of discharge—Operation of.

An order of discharge frees debtors only from the debts entered in the schedule. 17 O.C. 267 = 25 Ind. Cas. 708.

(3) Fraudulent forbearance.

——S. 44 (1) (c)—Fraudulent forbearance—Applicability—Debtor concealing debt of particular insolvent—Effect.

If a debtor filing an insolvency petition deliberately conceals the existence of a debt and thereby prevents his creditor from obtaining his share from the assets, his case is within the ambit of S. 44 (1) (c). A.I.R.

1941 Mad. 100 = (1940) 2 M.L.J. 279 = 52 L.W. = 1940 M.W.N. 913.

(4) Liability of surety.

——S. 44 (3)—Liability of surety.

Even if the adjudication has not been annulled and the principal debtor discharged, this discharge under S. 44 (3) will not release the surety from liability. (1936) 160 Ind. Cas. 603 = 18 N.L.J. 145.

——S. 44 (3)—Liability of surety.

In the Provincial Insolvency Act, there is no statutory bar to a suit against a surety, if the principal debtor has become insolvent. Section 28 is the only section which bars suits against an insolvent when he has been adjudged a bankrupt, but its words do not, in any way, show that the suit against the surety is also barred. Normally, a surety is discharged which the principal debtor is discharged from the liability for paying the debt. But S. 44 (3) implies that the surety continues to be liable throughout the insolvency proceedings and makes explicit that even after discharge, his liability does not cease to exist. For these reasons, the suit is competent against the surety. A.I.R. 1936 Pesh. 150 = 163 Ind. Cas. 625.

(5) Maintenance order.

——S. 44 (1) (d)—Maintenance under S. 488, Cr.P.C.—Effect on maintenance order under S. 488, Criminal P. C.

Under S. 44 (1) (8), an order of discharge shall not release the insolvent from any liability under an order for maintenance made under S. 488, Criminal P. C. A.I.R. 1935 Lah. 758 = 36 P.L.R. 191 = 37 Cr.L.J. 207 = 159 Ind. Cas. 939.

(6) Scope and applicability.

——S. 44—Scope and applicability—Order go discharge, whether divests Official Receiver of property placed in his hands for distribution among creditors.

The discharge of the insolvent cannot possibly mean the divesting of the Official Receiver. It cannot be argued that the Insolvency Court becomes **functus officio** as soon as the insolvent is discharged, for it is not necessary for the Court to wait until all the assets of the insolvent have been realized and distributed amongst the creditors in order to discharge the Insolvent. The proceeding in insolvency can undoubtedly go on in respect of the property in the hands of the Official Receiver in spite of the order of discharge. A.I.R. 1939 All. 114 = 1938 A.L.J. 1151 = A.W.R. 801 = 179 Ind. Cas. 909.

——S. 44—Scope and applicability—Applicability—Discharge, order of—Release of insolvent from all debts provable under the Act—Notice to creditor, if necessary—Omission of notice—Absence of fraud—Effect.

The rule of law that an order of discharge shall release the insolvent from all debts provable under the Provincial Insolvency Act is not qualified by any rule that the creditor should have notice of the proceedings. The rule is based on a policy of law and not any rule of constructive notice. Notice or no notice, S. 44 comes into play and release the insolvent from the debt in question whihc could undoubtedly have been proved under the Act. Section 44 applies even where the omission of the name of the creditor is deliberately made by the insolvent if no question of fraud is insolved. A.I.R. 1933 All. 600 = 55 All. 636 = 1933 A.L.J. 1340 = 146 Ind. Cas. 765.

——S. 44 (2)—Scope and applicability.

Section 44 (2) protects the insolvent and not the assets in the hands of the Official Receiver. A.I.R. 1939 Lah. 300 = 42 P.L.R. 243 = 184 Ind. Cas. 472.

——S. 44—Scope and applicability—Discharge order, if terminates insolvency proceedings—Insolvent's property, if becomes available to creditors.

Until the insolvency proceedings are terminated by a formal order or the order of adjudication is annulled the property which is vested in the Insolvency Court under S. 28 (1) cannot revert to the insolvent. Consequently, after the discharge order, the property of the insolvent cannot become available to his creditors to be proceeded against in the ordinary civil Court. A.I.R. 1939 Nag. 103 = 1939 N.L.J. 96 = I.L.R. (1939) Nag. 478 = 182 Ind. Cas. 214.

——S. 44 (2)—Scope—Re-vesting of property in insolvent.

Under S. 44 (2) an order of discharge shall release the insolvent from all debts provable under the Act. There is no provision that property which is vested in the Insolvency Court should re-vest in the insolvent on the passing of the order of absolute discharge and it was never contemplated that an insolvent should get an order of absolute discharge and yet retain part of his property. Section 44 (2) means that the order of discharge frees the insolvent from liability for all debts provzble under the Act but does not free his property from such liability. A.I.R. 1937 Nag. 171 = I.L.R. (1937) Nag. 380 = 170 Ind. Cas. 161.

——S. 44 (2)—Scope and applicability.

The effect of S. 44 (2) is not to extingusih altogether the claims of the creditors whose claims are provable under the Act but to limit their remedy for the purpose of realizing the same from the assets vested in the Court or Receiver according to the provisions of S. 28. A.I.R. 1936 Cal. 434 = I.L.R. (1937) 1 Cal. 127 = 166 Ind. Cas. 886.

——S. 44 (2)—Scope and applicability—Adjudication of firm—Discharge of parnets—Subsequenct arrest of partner for private debts, legality of—Adjudication, effect of.

It is not only incumbent on the creditors of a firm which has been adjudicated an insolvent but also on the creditors of each individual partner to prove their claims in the insolvency proceedings, and a partner whose property has vested in the Official Receiver for the benefit of his creditors should not be allowed to be harassed again by one of such creditors merely and solely because the order of adjudication was not passed in an application directed agsinst him but against a firm in which he was a partner or because, for the sake of convenience, the Court passed an order against the firm and did not pass a specific order against each individual partner in such firm. A.I.R. 1932 Sind 39 = 25 S.L.R. 422 = 135 Ind. Cas. 815.

(7) Miscellaneous.

——S. 44—(1907) S. 45—Miscellaneous—Aggrieved person—Receiver if.

A Receiver appointed under the insolvency law is not an aggrieved person within S. 40 and he cannot apply for revising the order annulling adjudication. "Person aggrieved" os not a man who is disappointed of a benefit which the might have received if some other order had been passed but must be a man who has a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something or wrongly affected his title to something. 93 P.R. 1917 = 38 P.W.R. 1917 = 41 Ind. Cas. 96.

——S. 44—(1907) S. 45—Miscellaneous—Insolvents judgment debtor—Proceedings in Insolvency, not appearing to be closed—Whether final discharge—Protection if available.

Where a judgment-debtor was declared insolvent in 1878 and there is nothing to show what had since happened or anything to prove that he was discharged it was held that he was not entitled to protection from execution under a decree obtained in 1891. 36 Cal. 543 = 9 C.L.J. 271 = 1 Ind. Cas. 168.

——S. 46—Applicability.

The privileges and rights which are given in S. 46 apply to proceedings under S. 229, Companies Act, and are based on equity and fair play. A.I.R. 1940 Mad. 266 = 1939 M.W.N. 1231.

——S. 46—(1907) S. 30—Doctrine of set off—How applied—Fraudulent claim—English law.

The equitable doctrine of set-off has for its object not merely avoiding cross-actions bot doing substantial justice and would apply to prevent the great injustice arising from the same person's being the insolvent's creditor under one account and debtor under another and thereby compelled to pay 16 annas in the rupee on what he owed and receive less on what was due to him. But it could be not cover cases where a debtor of the insolvent fraudulently buys up a third person's claim against the inolsvent with a view to relieve himself in the matter of his debt. 95 P.L.R. 1914 = 53 P.R. 1914 = 118 P.W.R. 1914 = 23 Ind. Cas. 927.

——S. 46—Interpretation—' Due '—Meaning.

Held, that the Official Receiver has no right to set-off against the creditor's claim a time-barred claim against the creditor.

Per **Reilly J.**—The word 'due' in S. 46 means 'legally recoverable' and not "justly due". 1930 M.W.N. 837 = 32 M.L.W. 443 = 59 M.L.J. 525 = 128 Ind. Cas. 879 = A.I.R. 1930 Mad. 998.

——S. 46—Mutual dealings.

Liability of principal debtor and surety to company joint and several—Surety himself creditor of company in separate dealing—Dealings between company and surety are mutual as contemplated by S. 46—Surety can claim set off under S. 229, Companies Act. A.I.R. 1940 Mad. 266 = 1939 M.W.N. 1231.

——S. 46—' Mutual dealings '—C. P. Code, O. 8, R. 6.

Suit for dues under personal account by liquidators —Money due by Bank under the joint account claimed to be set off—Such dealings are not " mutual dealings " under S. 30 of Act 3 of 1907—Set-off disallowed. 101 Ind. Cas. 762 = 8 Lah. 105 = 28 P.L.R. 427 = A.I.R. 1927 Lah. 228.

——S. 46—" Mutual dealings "—Joint debt cannot be set-off against separate debt.

A joint debt cannot be set-off against a separate debt either under the English Bankruptcy Act or under the Indian Insolvency Acts. The dealings of a person on deposit account and on a promissory note executed by him jointly with another, are of a different character, and so cannot come within the term " mutual dealings " within S. 30. 63 Ind. Cas. 906 = 45 Bom. 1219 = 23 Bom. L.R 537 = A.I.R. 1921 Bom. 66.

——S. 46—Scope—Joint and several debts—Set-off—Rule—Partnership debt and debt of partner —When can be set-off—Rule.

The rule of law embodied in S. 46, Provincial Insolvency Act, is identical with the rule of English law, and it is well settled that a debt due to joint creditors cannot be set off against a separate debt due from one of the joint creditors. But a debt which is joint and several, being capable of being set off against a several debt, and the members of a partnership incurring a debt being jointly and severally liable, the amount due to one of the partners can be set off against the amount due from the partnership itself. The converse of this is not, however, true and the amount due to the firm cannot be set-off against the separate debt of one of the partners. 1927 Lah. 228; 1928 Lah. 316, considered and explained. 1940 Mad. 436, 1941 Mad. 454; 1942 Mad. 351, relied. 1949 Com. C. 236.

——S. 46—Scope.

The Official Receiver has no right to set-off against the creditor's claim a time-varred claim against the creditor. 1930 M.W.N. 837 = 32 M.L.W. 443 = 59 M.L.J. 525 = 128 Ind. Cas. 879 = A.I.R. 1930 Mad. 998.

——S. 46—Scope.

The section applies only where there are mutual dealings between the parties. 83 Ind. Cas. 135 = A.I.R. 1925 Sind 153.

——S. 47—

Synopsis.

1. Interpretation.
2. Non-compliance—Effect.
3. Official Receiver—Powers of.
4. Options to secured creditor.
5. Rights of secured creditor.
6. Secured creditor—Who is.
7. Miscellaneous.

(1) Interpretation.

——S. 47—Interpretation—" Relinquish " meaning.

In the expression "relinquishes his security" in S. 47 (2) the word "relinquish" is sufficient to cover an abandonment by conduct. 119 Ind. Cas. 189 = 31 Bom. L.R. 463 = A.I.R. 1929 Bom. 258.

(2) Non-compliance—Effect.

——S. 47—Construction—Non-compliance—Effect.

Section 47 must be read as corollary to and subject to S. 62. Before the Official Receiver is required to make any reserve, the claim must be submitted in the required form and the Official Receiver cannot reasonably be expected to retain any assets when he is not in a position to know the extent of the debt he is to provide for: consequently, where there is no compliance with S. 47, there is no debt provable in respect of which the Official Receiver can have retained monies in his hands. A.I.R. 1935 Sind 57 = 29 S.L.R. 241 = 156 Ind. Cks. 421.

——S. 47—Non-compliance with provisions—Effect.

The holder of a mortgage decree against an insolvent is not entitled to be entered in the schedule of creditors if he has not complied with the provisions of S. 47, Civil P. C. A.I.R. 1932 Lah. 84 = 32 P. L. R. 698 = 133 Ind. Cas. 876.

(3) Official Receiver—Powers of.

——S. 47—Official Receiver—Powers of—House of agriculturist insolvent—Power of Official Receiver to sell—Insolvent residing in house as lessee—House, if vests in Official Receiver.

Although ordinarily, the Official Receiver can sell the equity of redemption of a mortgaged property, where the property is the house of agriculturist, he cannot sell it, as under S. 60, Civil P. C., it does not vest in him. Section 47 does not empower the mortgagee to authorise the Official Receiver to sell property not vested in him. Even where the house is one in which the agriculturist insolvent is residing not as owner but as lessee, the house cannot be sold, as the word used in S. 60, Civil P. C., is 'occupied' which implies a physical fact and not 'possessed.' A.I.R. 1933 Lah. 1010 = 35 P.L.R. 143 = 147 Ind. Cas. 640 (1).

——Ss. 47 and 48—Official Receiver—Powers of.

Where the money which remains in the Receiver's hand consists entirely of rents and profits of the property which was the subject matter of mortgage in favour of a Bank which subsequently went into liquidation, the provisions of Ss. 47 and 48 of the Provincial Insolvency Act are not in anyway material to the claim of the liquidator of the Bank and the Receiver in insolvency has no right to deal with the said money. A.I.R. 1935, P.C. 104 = 1935 O.W.N. 610 = 68 M.L.J. 744 = 61 C.L.J. 274 = 1935 M.W.N. 669 = 42 L.W. 146 = 1935 A.L.J. 785 = 37 Bom.

L.R. 874 = 40 C.W.N. 33 = 1 B.R. 491 = 155 Ind. Cas. 426 (P.C.).

(4) Options to secured creditor.

——S. 47—Options to secured creditor.

Section 47, Provincial Insolvency Act, makes provision for a secured creditor to come under the Act if he chooses, but the provision is optional and if the secured creditor does not choose to come under the Act and apply in the Insolvency Court he may remain apart and rely upon his security in ordinary proceedings by suit and execution. He can rely entirely on his decree and execution proceedings and he is not in any way barred by any provisions of the Insolvency Act. An order of discharge, therefore, will not release the insolvent from proceedings taken against him under O. 34, R. 6, Civil P. C. A.I.R. 1939 All. 401 = 1939 A.L.J. 238 = I.L.R. (1939) All. 492 = 1939 A.W.R. 265 = 184 Ind. Cas. 868.

——S. 47—Options to secured creditor—Secured creditor—Courses open to—Enunciated.

A secured creditor may adopt one of three alternatives. He can give proof for the whole debt and abandon his security: or he may value his security, and prove for the balance: or he may ignore the insolvency proceedings altogether and rely on him security.

Where the secured creditor not only has given proof for the whole debt but has actually received a dividend on the whole debt, the correct view to take is that by his conduct the creditor must be taken to have relinquished his security, because, unless he did so, he had no right to take the step, which he did, of proving, and still less had he any right whatever to receive the dividend, which he did receive. 119 Ind. Cas. 189 = 31 Bom. L.R. 463 = A.I.R. 1929 Bom. 258.

——S. 47—Options to secured creditor.

A secured creditor may do one of three things: he may enforce his security and prove for the balance that may be due to him, or he may relinquish his security for the general body of creditors, and prove for the whole debt that may be due to him; or he may value his security, and receive a dividend for the balance that may be due to him, subject to the right of the Court to redeem the security. He may also ignore the Insolvency Court altegether, in which case he must be content only with his security, and will be debarred from claiming any dividend, if his security should prove to be insufficient.

Where a creditor has not elected at any time to relinquish his security for the general body of the creditors, Court cannot direct that the property should be sold and that creditor should merely be given priority in the payment of the debts. 77 Ind. Cas. 589 = 2 Pat. 724 = A.I.R. 1924 Pat. 259.

(5) Rights of secured creditor.

——S. 47 (2)—Rights of secured creditor—Mortgagee relinquishing security—Effect.

A mortgagee may, by his conduct, relinquish his security and if he does so he will merely be entitled to rateable distribution like other creditors:

Held, on the facts of the case that the mortgagee had relinquish his security. A.I.R. 1944 Oudh 203 = 1944 O.W.N. 73 = 1944 A.W.R..C.C. 76 = 19 Luck. 611 = 217 Ind. Cas. 124.

——S. 47—Rights of secured creditor—Mortgagee's failure to prove for balance—Effect.

If a secured creditor does not assess under S. 47 and does not even ask the Court to say that, under the powers conferred by S. 34, the debt is of such a nature that its valuation is incapable of being fairly estimated and allows the insolvent to be discharged without any proof having been put in for the balance, then, he (the secured creditor) must be content with his security. If a secured creditor ignores the Insolvency Court altogether, he must he content with his security and will be debarred from cljimi g any dividend if his security should prove insufficient. A.I.R. 1940 Nag. 252 = 1940 N.L.J. 221 = I.L.R. (1940) Nag. 512 = 192 Ind. Cas. 572.

——Ss. 47 (4) and 28 (6)—Rights of secured creditor—Secured creditor getting his security valued to get himself scheduled as creditor in insolvency with respect to balance due is not decree-holder under S. 11, C.P. Money-lenders' Act—Courts' cannot compel him to accept payment of secured debt by instalments.

Section 11, C.P. Money-lenders Act, is applicable to a case where a decree has been passed and an application is made in respect of that decree by the judgment-debtor. The creditors who prove their debts in an Insolvency Court and get the same entered in a schedule of the Insolvency Court may be said to be decree-holders but a secured creditor who only gets his security valued in order to get himself scheduled as a creditor in insolvency proceedings with respect to the balance due to him cannot be regarded as a decree-holder with respect to the amount of the valuation of the security. His right of realising his security is unaffected under S. 28 (6). The Courts, therefore, cannot campel the secured creditors to accept payment of their secured debt by instalments in the manner proposed by the insolvents. A.I.R. 1940 Nag. 369 = 1940 N.L.J. 387 = I.L.R. (1940) Nag. 675 = 188 Ind. Cas. 695.

——S. 47—Rights of secured creditor—Balance due after realizations.

Secured creditor can obtain decree under O. 34, R. 6 and utilize this decree as a proof of the balance. But even if his application for a decree under O. 34, R. 6 is refused it is still open to him under the special remedy provided by S. 47, Provincial Insolvency Act, to prove for the balance due. Under this special provision no question of limitation arises. Under the provisions of S. 28 (6), Provincial Insolvency Act nothing affects the power of a secured creditor to reaslize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if S. 28 had not been passed: A.I.R. 1925 Pat. 438, Rel. on. 121 Ind. Cas. 903 = 6 O.W.N. 982 = A.I.R. 1930 Oudh 20.

——S. 47—Rights of secured creditor—Secured creditor whose dues exceed realizations can prove balance.

A secured creditor who has advantage of security may remain outside the Act. He can realize upon his security. To the extent to which he realizes on his security will reduce the estate in insolvency. But he obtains at first no part in the dividend and is unaffected by the proceedings. Should, however, the amount of realization be less than the amount due to him he is given the special privillege of proving for the balance. This balance is the difference between the decretal amount and the amount realized. When he has proved he will not obtain any more than his proportionate share in the estate. He will be put then on the footing of an unsecuerd creditor. 121 Ind. Cas. 903 = 6 O.W.N. 982 = A.I.R. 1930 Oudh 20.

——S. 47—Rights of secured creditor—Creditor getting name removed from list—Right of.

The fact of a secured creditor's getting his name removed from the list of scheduled creditors and proceeding to realise his security will not debar him of the statutory right to prove for the balance due to him in the insolvency proceedings. 85 Ind. Cas. 543. = 4 Pat. 128 = 6 P.L.T. 410 = A.I.R. 1925 Pat. 438.

——S. 47—Rights of secured creditor—Relinquishment of security.

Where the mortgagee desires that the mortgaged property of the insolvent mortgagor should be sold free from the mortgage rights and the mortgage debt should be recovered from the sale proceeds the Insolvency Court is competent to comply with his request: 122 Ind. Cas. 374 = A.I.R. 1930 Nag. 196.

——S. 47—Rights of secured creditor—Interest.

Interest due after date of adjudication is not to be excluded from the balance which is allowed to be proved under S. 47 (i). S. 48 has no application to secured creditors. 121 Ind. Cas. 903 = 6 O.W.N. 982 = A.I.R. 1930 Oudh 20.

——Ss. 47 and 48—(1907), Ss. 31 and 32—Rights of secured creditor.

A mortgagee is not a person proving in the bankrupt's estate. He is a secured creditor and is entitled to look to his security to realise the amount of the debt secured thereon, with interest at the contractual rate up to the date of payment. 41 All. 481 = 17 A.L.J. 480 = 51 Ind. Cas. 192.

(6) Secured creditor—Who is.

——S. 47—Secured creditor, who is.

Mahomedan Law—Mahomedan heir becoming insolvent subsequent to decree against estate of his ancestor in his hands—No lien or charge exists on property in Official Receiver's hands and so creditors must prove as ordinary creditors. 7 All. 822 (F.B.); 18 M.L.T. 147, Rel. on.; 4 Cal. 402. (P.C.) and 40 Mad. 243 (F.B.), Cons.; 120 Ind. Cas. 889 = 1929 M.W.N. 168 = A.I.R. 1929 Mad. 609.

——S. 47—Secured creditor—Who is—Simple mortgagee.

A simple mortgagee is just as much a secured creditor as a mortgagee with possession. 103 Ind. Cas. 398 = A.I.R. 1927 Lah. 904.

——S. 47—(1907), S. 31—Secured creditor—Who is.

When under an agreement with a debtor one of his creditors was appointed sole agent for the sale of all books published and to be published by the debtor on condition that the sale proceeds after deducting the commission were to be credited towards the debt.

Held, that the creditor was a secured creditor. A secured creditor is one holding a mortgage, charge or lien upon the property of the debtor or any part thereof as security for the debt due to him. 37 All. 383 = 13 A.L.J. 521 = 29. Ind. Cas. 263.

(7) Miscellaneous.

——S. 47 (4)—Non-acceptance of composition—Rateable distribution ordered.

Where all creditors, secured as well as unsecured, decline to accept the composition scheme as proposed by the insolvent, the order of the Insolvency Court under S. 47 (4), that the property be sold with a view to paying off the secured creditors and applying the balance towards the debts of the unsecured creditors is proper. A.I.R. 1940 Nag. 369 = 1940 N.L.J. 387 = I.L.R. (1940) Nag. 675 = 188 Ind. Cas. 695.

——Ss. 47 and 51—(1907) Ss. 31 and 34—Miscellaneous—Secured creditor—C.P. Code, S. 63 (2)—Rateable distribution of assets.

P obtained a decree for money against E and attached certain moveable of his judgment-debtor. Subsequently B sued E and obtained an order for attachemnt before judgment of a portion of the same property which P had attached. In B's suit an ex-parte decree was passed against E. B asked for action being taken under S. 63 of the C.P. Code after putting his decree into execution. He consented to the sale being held in execution of P's decree and the assets being rateably distributed. This being done, E applied to have the ex-parte decree set aside and it was ordered that the proceeds of the sale should be "security" for the satisfaction of the decree which might ultimately be passed. E then applied to be adjudicated an insolvent.

Held, that P was entitled to rateable distribution, the sale in execution of his decree being neither illegal nor invalid having regard to S. 63, Cl. (2) of the C.P. Code; that B was a secured creditor within Ss. 31 and 34 of the Act the money set apart for him as a condition precedent to the setting aside of the ex-parte decree being a security to him which he might draw out and appropriate to his own use. 13 A.L.J. 893 = 30. Ind. Cas. 779.

——Ss. 48, 28 (6), 47 (3) and 61—Secured creditor assessing security and proving for balance—Amount assessed paid on sale—Further interest on principal—Procedure.

A secured creditor is not affected by reason of an order of adjudication as stated in S. 28 (6), but if a secured creditor steps into the insolvency proceedings and takes action under S. 47 (3) by assessing his security and proving for the balance the position is different. He does this so that he may be entitled to receive dividend in respect of the balance due to him after deducting the value so assessed. In such a case, the Insolvency Court gets the power of redeeming his mortgage, on payment to the creditor the assessed value, and if it proceeds to sell the security, the Court first pays the amount at which the security is valued to the secured creditor out of the sale proceeds, but for purposes of the balance which was ascertained when the assessment was made and accepted by the Insolvency Court the secured creditor ranks as an ordinary secured scheduled creditor and he will be entitled only to such interest as the Court may determine under Ss. 48 and 61. He is not entitled to any interest on the principal after the date of assessment but only on the scheduled amount. For purposes of dividend, the rate of interest is only 6 per cent. per annum and where it is not shown that all the debts proved have been paid in full, the secured creditor is not entitled to any higher rate though stipulated for in the security. A.I.R. 1945 Nag. 276 = I.L.R. (1945) Nag. 1009 = 1945 N.L.J. 370.

——S. 48—Compound interest.

Compound interest as such is not open to objection and it is well known that transactions amongst Chetties, both when they are lenders and also when they are borrowers, carry compound interest. A.I.R. 1935 Mad. 468 = 1935 M.W.N. 408 = 157 Ind. Cas. 232.

——Ss. 48, 61 and 67—Surplus assets—Right to contract rate of interest—Power of Court to reduce.

When there is a sufficient surplus of assets in the hands of the Official Receiver after paying the amount of debts included in the schedule, a creditor of the insolvent to whom money is due under a promissory note which provides for a higher rate of interest than 6 per cent. per annum is entitled to get interest, on the principal amount due to him on the date of the adjudication at the contract rate mentioned in the promissory note for the period between the date of adjudication and the date of payment of the principal amount by the Official Receiver unless there is some special reason for reducing that rate.

The Insolvency Court has jurisdiction if a proper case be made out, to reduce the rate of interest.

Per **Ananthakrishna Ayyar J.**—To regularise proceedings, it is necessary that when it is seen that the debts proved exceed the amount of assets which are

expected to be realised, then the Court should, in the first instance, fix the rate of interest as contemplated in S. 48, for the purpose of calculating dividend, and thus comply with the instructions contained in S. 48. A.I.R. 1931 Mad. 729 = 34 L.W. 163 = 1931 M.W.N. 937 = 134 Ind. Cas. 169.

——S. 48—Secured and unsecured creditors—Right to interest.

Where Court is administering insolvent's estate, the unsecured creditors are entitled to interest from the sale proceeds up to the date of the preliminary decree, while the secured creditors are entitled up to the date of payment. 41 All. 481, Rel. on. 112 Ind Cas. 621 = A.I.R. 1929 Mad. 242.

——S. 48—Subsequent interest.

Under S. 48, Sub-Clause 2 the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled is not prejudiced after all the debts proved have been paid in full. Subsequent interest though it cannot be taken into account at the time of the first distribution of the dividends, has to be paid out of the assets, if sufficient, and is therefore a part of the debt. 92 Ind. Cas. 514 = 48 All. 272 = 24 A.L.J. 244 = A.I.R. 1926 All. 289.

——S. 48—Rule of damdupat.

If applicable in insolvency proceedings—Applicability after decree—C.P.C., Ss. 351 and 352. The rule of damdupat operates only so long as the contractual relation of debtor and creditor exists but not when the contractual relation has come to an end by reason of a decree. Proof of a claim in insolvency amounts to a decree and the rule of damdupat would not apply to a claim so proved. Moreover, the uniform practice of the Calcutta High Court has been not to apply the rule of damdupat in insolvency proceedings. (1906) 10 C.W.N. 884 = 33 C. 1269.

——Ss. 49, 64 and 33—Proof of debt.

Creditor filing affidavit in time specifying amount and particulars of decretal debt—Affidavit returned for representation along with copy of decree—Affidavit represented along with copy of decree when final dividend was declared and distributed among creditors —Creditor's name omitted from schedule of creditors —Application by creditor for including his name in schedule—**Held** creditor must be deemed to have proved his debt within the meaning of S. 49 and therefore was entitled to dividend under S. 64. A.I.R. 1946 Mad. 500 = 59 L.W. 317 = 1946 M.W.N. 425 = (1946) 2 M.L.J. 105 = 227 Ind. Cas. 258.

——S. 49—Section provides one mode—Creditor can prove in any other way.

Section 49 provides only one of the modes in which a debt may be proved. A certified copy of the decree which is legally acceptable in evidence, is a sufficient 'proof' of the decree debt under S. 78 (2) of Provincial, Insolvency Act. Creditor has the option of proving the debt in any other way. (1946) 12 Cut. L.T. 53.

——S. 49—Proof of debt, what is.

It is not correct to say that a debt can be said to be proved under the Provincial Insolvency Act only if it is accepted or admitted by the Court. 'Provable' and 'proof' are words of technical import in the language of the law of insolvency. A creditor proves his debt when he lodges a proof in the mode prescribed by the statute, *i.e.*, by fulfilling the requirements laid down in S. 49 and when he has done that, he has proved his debt within the meaning of the proviso to S. 78 (2). A.I.R. 1943 P.C. 98 = 47 C.W.N. 715 = 1943-2 M.L.J. 121 = 56 L.W. 444 = 1943 A.L.J. 323 (2) = 10 B.R. 49 = 1943 A.W.R. 11 = 1943 M.W.N. 565 = I.L.R. (1943) Nag. 669 = 1943 N.L.J. 587 = 70 I.A. 83 = 46 Bom. L.R. 306 = I.L.R. (1943) Kar. (P.C.) 109 Sup. = 208 Ind. Cas. 102 (P.C.).

——S. 49—Mode of proof.

Section 49 lays down only one of the modes in which debt may be proved. It does not lay down a mandatory method of proving a debt. A.I.R. 1938 Pat. 65 = 4 B.R. 373 = 19 P.L.T. 364 = 173 Ind. Cas. 988.

——S. 49—Debts provable in insolvency—Limitation.

There is no express period of limitation for a creditor whose debt is provable in insolvency proceedings to prove his debt. A debt is to be proved ordinarily before any dividend is declared. That is necessary in order that the officer of the Court administering the insolvent's estate may have in his possession materials which will enable him to make a **pro rata** and equitable distribution of the assets. If the Receiver has got materials in his hands to show that there are creditors who have not proved their debts because they reside at distant places, and that they have had no time to tender proof of their debts, he can set apart a sum of money sufficient for the purpose of paying them, if and when they prove their debts, after meeting his expenses. A.I.R. 1936 Cal. 434 = I.L.R. (1937) 1 Cal. 127 = 166 Ind. Cas. 886.

——S. 49—Proof of debt, what is.

A person who has lodged a proof and fulfilled the requirements of S. 49 has 'proved' his debt within the meaning of S. 78 (2). 'Provable' means a debt due to a creditor in respect of which he has not put in a claim in the shape of lodging a proof. A.I.R. 1934 Mad. 465 = 67 M.L.J. 45 = 40 L.W. 199 = 1934 M.W.N. 934 = 57 M. 767 = 151 Ind. Cas. 284.

——Ss. 49 and 78—Proof of debt, what is.

During the pendency of the plaintiff's suit for money, the defendant applied to be adjudicated an insolvent. After the passing of the decree, the defendant judgment-debtor was adjudicated an insolvent. The decree in the suit contained a direction that the plaintiff might prove his debt in insolvency. The decree was assigned to a third party who applied in the Insolvency Court to be recognized as the insolvent's creditor and referred to the direction as to proving the debt, in the decree:

Held, that the debt should be deemed to have been proved although the formal mode prescribed by S. 49 was not followed and that S. 78 applied to the case. A.I.R. 1933 Mad. 168 = 145 Ind. Cas. 764.

——S. 50—Appeal.

Generally, where proceedings have taken place under Ss. 38 and 39, there is no appeal as of right. Leave of the District Court or of the High Court must be obtained before any appeal can be admitted against the order generally approving the proposal or the order of annulment. But where, sa part of the proceedings, an enquiry has been held under S. 50, any body prejudiced by the expunging or reducing of a debt can in regard to that matter appeal as of right. 97 Ind. Cas. 556 = 24 A.L.J. 441 = A.I.R. 1926 All. 361.

——S. 50—Application by debtor.

So long as insolvency exists, a debtor cannot apply for expunging or reducing a debt, but when insolvency is annulled, as would be the case when composition or scheme is accepted, he can apply. 97 Ind. Cas. 556 = 24 A.L.J. 441 = A.I.R. 1926 All. 361.

——S. 50—Assessment to income-tax, if can be re-opened in an enquiry under S. 50—Principles to be followed.

In deciding whether an enquiry contemplated by S. 50 should be made, the Court should not act on the principles that have found favour in England. A distinction should be drawn between an assessment to income-tax and a judgment-debt because there is good reason in the case of judgments to allow them to be re-opened, a reason which does not apply in the case

of assessments. The fact that another remedy is allowed by English Law for re-opening an assessment debt is not a reason for holding that different principles should be applied by a Court acting under the provisions of S. 50 from those accepted as applicable to S. 7 of the English Bankruptcy Act.

Where, therefore, a company is assessed to income-tax which has become final, the question of assessment cannot be re-opened under S. 50, except on the ground of fraud. A.I.R. 1941 Oudh 260 = 1941 O.W.N. 118 = 1941 A.W.R. 86 = 16 Luck. 599 = 192 Ind. Cas. 856.

——**S. 50—Creditor obtaining property by defrauding Receiver—Receiver—Remedy of.**

Where the Official Assignee, admitting the proof of claim of a creditor of the insolvent, transfers insolvent's property to him by means of a registered sale-deed, his only remedy is to have the sale-deed set aside by means of a regular suit, although if the matter would have rested on a proof of claim only, and if no sale-deed had been executed, it would have been open to the Official Assignee to come to the Insolvency Court and to have the proof expunged. 114 Ind. Cas. 840 = A.I.R. 1929 Mad. 141.

——**S. 50—Evidence.**

The public examination of insolvent recorded under S. 14 is not relevant evidence, in an enquiry held under S. 26. **In re** Brunner (1887) 19 Q.B.D. 572, Foll. 61 Ind. Cas. 767 = 13 M.L.W. 145 = 1921 M.W.N. 109 = A.I.R. 1921 Mad. 28.

——**S. 50—Irregular proceedings—Order under S. 26—Evidence taken by ordinary Receiver.**

Where an order was passed under S. 26 on the basis of the evidence recorded by the Receiver who was not an Official Receiver and who did not submit his opinion on the evidence along with his report.

Held, that the procedure adopted was irregular and that the order must be set aside. 61 Ind. Cas. 767 = 13 M.L.W. 145 = 1921 M.W.N. 109 = A.I.R. 1921 Mad. 28.

——**Ss. 50, 53 and 80—(1907) Ss. 26, 36 and 52—Schedule of creditors—Preparation of—Power of Official Receiver.**

The power delegated to the Official Receiver under S. 52 of the Act is to frame a Schedule of creditors after an **ex parte** enquiry and he does not decide judicially or finally upon contested claims. The entering of the name of a creditor in the Schedule by the Receiver does not preclude the Court from entering applications for enquiry under Ss. 26 and 36. 41 Mad. 30 = 45 Ind. Cas. 67.

——**S. 50—Refund of dividend.**

A creditor to whom a dividend has been paid cannot be directed to bring back that amount merely by reason of the fact that subsequently the debt is expunged from the list of creditors. A.I.R. 1942 Mad. 644 = 1942 M.W.N. 467 = 55 L.W. 504 = (1942) 2 M.L.J. 202 = I.L.R. (1942) Mad. 879 = 203 Ind. Cas. 246.

——**S. 50—Revision.**

There is nothing in S. 50 which says that any question of title raised between two schedule creditors will be decided by the Insolvency Court and a decision on such question by the Insolvency Court is not open to revision. 92 Ind. Cas. 14 = 24 A.L.J. 334 = A.I.R. 1926 All. 244.

——**S. 50 (2)—Right to apply under—When arises.**

Under S. 50 (2) of the Provincial Insolvency Act a debtor's right to apply depends upon the existence of the composition or the scheme under the provisions of the Act. I.L.R. (1951) Mad. 237 = 63 L.W. 764 = 1950 M.W.N. 485 = A.I.R. 1950 Mad. 800 = (1950) M.L.J. 162.

——**S. 50—Scope—Expunging of debt on annulment.**

Section 50 is one of those sections which govern the procedure of the administration of the debtor's assets in an insolvency, therefore, when the insolvency has come to an end by annulment the procedure provided by the Act in an insolvency can no longer apply, and the Court cannot, under S. 50, expunge or reduce the debt of a creditor. A.I.R. 1938 Pat. 225 = 16 Pat. 754 = 4 B.R. 573 = 715 Ind. Cas. 306.

——**S. 51.**

1. **Applicability.**
2. **Assets realised.**
3. **Attaching creditor.**
4. **Attachment before judgment.**
5. **Auction purchaser.**
6. **Construction.**
7. **Costs.**
8. **Locus standi.**
9. **Receiver.**
10. **Scope.**
11. **Secured creditor.**
12. **Miscellaneous.**

(1) Applicability.

——**S. 51 (3)—Applicability—Sale held after adjudication—Bona fide purchaser at—If protected.**

There is no reason or justification for confining the application of S. 51 (3) of the Provincial Insolvency Act to sales held before the adjudication; the sub-section covers all cases of sale in execution irrespective of the fact whether they have taken place before or after a debtor is adjudged insolvent and a purchaser in good faith acquires a good title in all cases. I.L.R. (1949) A. 508 = 1949 A.L.W. 7 = A.I.R. 1949 A. 660 = 1949 A.W.R. 402 = 1949 A.L.J. 340.

——**S. 51—Applicability.**

Sub-section (3) of S. 51 only applies to sales which have taken place before the order of adjudication. A.I.R. 1942 Mad. 415 = 55 L.W. 119 = 1942 M.W.N. 198 = (1942) 1 M.L.J. 283 = I.L.R. (1942) Mad. 614 = 201 Ind. Cas. 769.

——**S. 51 (3)—Applicability.**

Section 51 (3) does not restrict the sales to those held in execution of a decree but applies to sales in execution in general. Therefore, the sale in execution of an award of the Registrar or the arbitrator under the Mad. Co-operative Societies Act gives a good title to the purchaser who, in good faith, purchsed it as against the Receiver in insolvency. Both Ss. 51 (1) and 51 (3) refer to the same classes of cases. A.I.R. 1940 Mad. 932 = (1942) 2 M.L.J. 388 = 1940 M.W.N. 933 = 52 L.W. 454 = 193 Ind. Cas. 555.

——**S. 51 (3)—Applicability.**

Where a purchase has taken place after the order of adjudication, S. 51 (3) applies. A.I.R. 1940 Nag. 414 = 1940 N.L.J. 505 = I.L.R. (1942) Nag. 377 = 192 Ind. Cas. 183.

——**S. 51 (3)—Applicability—Judgment-debtor adjudged insolvent subsequent to mortgage decree but before property was sold—Property sold in execution without notice to Official Receiver—Sale of same property by Official Receiver to another person—Such person, if can claim possession from previous purchaser.**

The court sale in execution of a decree passes no title unless the person in whom at the time of the sale the title vests is a party to the sale proceedings. Section 51, sub-s. (3) does not apply to a purchase in execution after the adjudication which vests the property in the Official Receiver.

A judgment-debtor under a mortgage decree was adjudged insolvent after orders had been passed for the sale of the hypotheca under the decree, but before the sale was actually held. The sale was held without notice to the Official Receiver and one **X** purchased the property. Subsequently, the Official Receiver sold the property to **Y** subject to the mortgage upon which the decree was passed and **Y** sued **X** for possession:

Held, that **Y** was entitled to recover possession of the property on reimbursing **X** the amount which he had paid to discharge the mortgage decree. A.I.R. 1939 Mad. 433 = 49 L.W. 383 = (1939) 1 M.L.J. 429 = 1939 M.W.N. 445 = 189 Ind. Cas. 386.

——S. 51 (3)—Applicability—Fraudulent purchase—Protection.

Where a decree-holder deliberately kept back from the Court his knowledge of the pending insolvency proceedings by the judgment-debtor and the object of such suppression of fact from the Court was to get on with the sale in execution and purchase the properties himself to the loss of the other creditors who otherwise would have shared equally with him, this amounts to fraudulent conduct on the part of the decree-holder purchaser, and he is not, therefore, protected by S. 51 (3). Such a sale is invalid and can be set aside under S. 4. A.I.R. 1938 Mad. 718 = 47 L.W. 676 = (1938) 1 M.L.J. 781 = 1938 M.W.N. 540 = 181 Ind. Cas. 507.

——S. 51 (3)—Applicability.

Section 51 (3) can only refer to all cases of execution sales held before adjudication. It cannot operate in cases of sales held after adjudication for the two reasons, *viz*, (1) that it comes in the Insol. Act amongst a set of provisions dealing with the effect of insolvency, *i.e.*, adjudication) on antecedent transaction and (2) that after adjudication, the debtor has no property which can be sold in execution. A.I.R. 1938 Mad. 449 = 47 L.W. 705 = 1938 M.W.N. 201 = (1938) 1 M.L.J. 471 = I.L.R. (1938) Mad. 1063 = 178 Ind. Cas. 135.

——Ss. 51 and 4—Applicability—Sale by executing Court and recovery of sale proceeds—Proceeds, if vest in Insolvency Court—Insolvency Court, if can call upon purchaser to deposit purchase money received from executing Court.

Once the executing Court, with or without notice of the insolvency proceedings, orders a sale and recovers the sale proceeds S. 51 comes into operation to vest the sale proceeds in the Insolvency Court. Apart from S. 51, even under S. 4, the Insolvency Court has jurisdiction to decide whether the Official Receiver is entitled to the assets realised by the decree holder in execution of his decree against an insolvent. The Insolvency Court has jurisdiction to call upon the purchaser to deposit the purchase money he had received from the executing Court. A.I.R. 1937 Nag. 193 = I.L.R. (1937) Nag. 249 = 170 Ind. Cas. 383.

——S. 51—Applicability.

Section 51 does not deprive the creditors of the fruits of their decrees in respect of moneys which were brought into Court between the date of the presentation of petition for insolvency and the date of its admission. Section 51 refers to the date of admission and not to that of the presentation of the petition. A.I.R. 1935 Lah. 690 = 160 Ind. Cas. 493.

——S. 51—Applicability—Creditor's application—Assets realised in execution sale— Dismissal of application—Fresh application for adjudication—Whether continuation of prior application—Assets, if can be treated as assets under second application.

A certain creditor applied that his debtor be adjudicated an insolvent. The application was admitted and an **interim** Receiver was appointed. The creditor then applied for stay of a sale in execution of the money decree that had been obtained by another creditor. It was ordered that the sale should take place but that the amount realized should be kept in deposit to the credit of the Insolvency Court until further orders. This order was complied with, but ultimately the creditor's application for adjudication of the debtor as insolvent was dismissed. A fresh application was made by the creditor and it was followed by a petition to the Court for withholding payment of the money lying to the credit of the Court in the previous insolvency case.:

Held, that the second application for adjudication could not be treated to be a continuation of the proceeding which came to an end by the dismissal of the previous application, and that the assets realized in the execution case were assets realised in the course of an execution before the date of the application, and that S. 51 did not apply to the case. A.I.R. 1933 Cal. 651 = 37 C.W.N. 135 = 146 Ind. Cas. 597 (2).

——Ss. 51 and 52—Applicability—Creditor setting the executing Court in motion without giving notice to Receiver—Inference of want of good faith—Sale. if can be set aside—Power of Insolvency Court to set aside sale.

A filed a petition for adjudication as insolvent. Subsequently **B**, a creditor, filed a petition of objection alleging that he had already instituted a suit for money due to him by **A** and that the trial was then pending. **B** obtained a money-decree and applied for execution of the decree but did not apply for attachment of the property in dispute and asked for notice under O. 21, R. 66, Civil P.C. He did not ask for issue of notice to the Receiver. Before the notice was served, **A** was adjudicated insolvent. In execution of the decree, a sale was held, **B** purchasing the property. Then **A** gave notice, under S. 52, Prov. Insol. Act, to the execution Court of the insolvency proceedings and prayed that the sale might not be confirmed, but the request was refused and sale confirmed. Subsequently, on application by the Receiver, the sale was set aside. **B** appealed.

Held, that as **B** set the executing Court in motion without giving any notice to the Receiver under O. 21, R. 22, Civil P.C. notwithstanding that the property of the debtor had vested in the Receiver, **B**'s action was clearly prompted by an intention to obtain preferential treatment and consequently, he could not avail himself of any protection afforded by S. 51 (3), and hence the sale was properly set aside and that the Insolvency Court had power to set aside the sale.

A sale without notice to the Official Assignee is a nullity. A.I.R. 1933 Pat. 619 = 13 Pat. 33 = 146 Ind. Cas. 252.

——S. 51—Applicability—Realization of assets prior to insolvency petition—Rights of attaching creditor and Official Receiver.

Where a judgment-debtor has been adjudicated insolvent but assets were realized before the insolvency petition was filed, S. 51 applies. Consequently, the rights of the Official Receiver do not prevail over the claims of an attaching creditor. A.I.R. 1933 Sind 305 = 146 Ind. Cas 961.

——S. 51—Applicability.

Sub-section (1) of S. 51, does not mean that where execution has issued against the property of a debtor after the admission of a petition for adjudication and his property is sold, the proceeds **ipso facto** belong to the Receiver or the estate of the insolvent. In order to give effect to the section, it is necessary for the Receiver to make an application for the proceeds. A.I.R. 1931 Pat. 70 = 9 Pat. 945 = 130 Ind. Cas. 38.

——S. 51—Applicability—Attachment of money in Court by decree-holder and application for payment—Adjudication before payment—Right of Receiver.

Property belonging to a debtor was attached before judgment and the monies realised were deposited with the **nazir**. Certain decree-holders got their decrees transferred to the very same Court, attached the money and applied for payment. The **nazir** made a report noting the attachment but the Judge issued a notice to the other side as to why the money should not be paid to the decree-holders. Before the hearing of the notice, an application was filed to have the judgment-debtor adjudged insolvent. The **interim** Receiver resisted the decree-holders' application:

Held, that as the decree-holders had presented their application for payment of the money and the **nazir** had noted the attachment in their favour, the facts were tantamount to realization within the meaning of S. 51, and the decree-holders were entitled to the money in preference to the Receiver. A.I.R. 1931 Sind 164 = 26 S.L.R. 41 = 134 Ind. Cas. 1178

——S. 51—Applicability.

The section applies to a case where the decree is against a person against whom insolvency proceedings are pending and who has subsequently been adjudicated an insolvent. So where no insolvency proceedings are pending against the judgment-debtor and it is the decree-holder who is subsequently adjudicated an insolvent and there is a dispute not between the decree-holder and the judgment-debtor but between the original decree-holder and his assignee the section is in applicable. 120 Ind. Cas. 175 = A.I.R. 1929 Lah. 805.

——S. 51 (1)—Applicability.

The exception to S. 51 (1) applies not only to the amount credited in favour of the attaching decree-holder but also to amounts rateably distributed to the other decree-holders, under section 73. From the time of the order of rateable distribution, the money must be treated as belonging not to the judgment-debtor but to the decree-holders in whose favour the order was passed. The Official Receiver therefore could no more recover the money from the Court which passed the order than from the decree-holder, nor can he claim the money for the benefit of the general body of the creditors. 68 Ind. Cas. 512 = 15 M.L.W. 37 = 1922 M.W.N. 51 = 30 M.L.T. 67 = A.I.R. 1922 Mad. 31 = 42 M.L.J. 361.

——Ss. 51 and 52—5 (1907), Ss. 34, 35 and 47—Applicability—Attachment—Injunction to stop sale—Power of court.

Ss. 34 and 35 only apply when there has been an adjudication or the appointment of a Receiver. Even on the assumption that an Insolvency Court had jurisdiction to issue an injunction to prevent one of the creditors executing his decree in another Court against the judgment-debtor pending disposal of the insolvency application, it is not a case in which an injunction ought to or could legally have been issued. 39 All. 547 = 15 A.L.J. 473 = 39 Ind. Cas. 783.

——S. 51 Proviso—(1907), S.34, Proviso—Applicability—Purchaser's knowledge of adjudication.

The protection afforded by proviso to S. 34 of the Act is only to a purchase of the property of a debtor and not to a purchaser or property which has ceased in law to be debtor's property. The protection does not apply where the purchaser had knowledge or means of knowledge of the adjudication of the debtor in insolvency prior to the sale. A sale held in execution of a decree after notice to the Court that the judgment-debtor was adjudged insolvent is irregular and confers no title on the auction purchaser, the property being already vested in the Receiver. 19 M.L.T. 357 = 3 L.W. 504 = 30 M.L.J. 611 = 34 Ind. Cas. 829.

——S. 51—(1907), S. 34—Applicability—Attachment before judgment if creates lien on money deposited to have attachment withdrawn.

Where defendant's properties attached before judgment in plaintiff's suit were released on the defendant's paying Rs. 500 as cash security and thereafter the defendant was adjudged an insolvent but before the plaintiff's suit was decreed.

Held, that the plaintiff acquired no lien or charge upon the money deposited and that the Receiver in insolvency was entitled to have the money paid to him and that the money not having been realised in execution of a decree prior to the adjudication order S. 34 did not apply. 19 C.W.N. 1200 = 31 Ind. Cas. 573.

(2) Assets realised.

——S. 51—Assets realised—What are.

Mere filing of petition by executing decree-holder is not sufficient to convert money lying to the credit of suit into assets realized in execution. Such a conversion or transfer can only he by an order of the Court. Decree-holder cannot claim any preferential right if the debtor is adjudicated an insolvent before such an order. A.I.R. 1944 Mad. 389 = (1944) 1 M.L.J. 333 = 57 L.W. 288 = 1944 M.W.N. 286.

——S. 51—Assets realised—What are.

Where, in an execution sale, one-fourth of the purchase-money is deposited before and the balance of three-fourth is paid into Court after the admission of the insolvency petition, the sale proceeds cannot be deemed to have been realized within S. 51 (1). A.I.R. 1943 Mad. 118 = 55 L.W. 436 = (1942) 2 M.L.J. 178 = 1942 M.W.N. 498 = I.L.R. (1942) Mad. 757 = 208 Ind. Cas. 289.

——S. 51—Assets realised—What are.

Where property is sold in execution and the money is paid into Court, that money represents assets realized in the course of the execution. Where there are several properties sold in execution separately under one proclamation and the moneys are paid into Court separately, the sale of each lot is complete when the whole of the balance of the purchase money is deposited in Court. The money paid into the Court represents assets realized in the course of the execution within S. 51 (1). A.I.R. 1943 Mad. 118 = (1942) 2 M.L.J. 178 = 55 L.W. 436 = 1942 M.W.N. 498 = I.L.R. (1942) Mad. 757 = Ind. 208 Cas. 289.

——S. 51—Assets realised.

Assets are realised only when the full amount of the bid is deposited. Where, however, three lots of properties are sold originating from a single proclamation and the amounts are paid on different dates, the assets are realised on the dates on which deposit for each lot is made and not only the date on which deposit is made for the third lot. A.I.R. 142 Mad. 88 = 1941 M.W.N. 852 = (1941) 2 M.L.J. 918 = 201 Ind. Cas. 238.

——S. 51—Assets realised—Execution sale by creditor between date of admission of insolvenvy petition and adjudication—Official Receiver's right.

Between the date of the admission of the petition of insolvency and the adjudication of the said petition, certain property belonging to the insolvent was sold in execution of a decree by a judgment-creditor and the sale proceeds was handed over to the creditor decree-holder. The Receiver then applied to the Insolvency Court that the said creditor should be asked to refund the sale proceeds to the Receiver under the provisions of S. 51:

Held, that under S. 51, the Official Receiver was entitled to the assets realized and under S. 4 of the said Act, the Insolvency Court was competent and was bound to enquire into the application and order the creditor to pay the sale proceeds to the Official Receiver. A.I.R. 1933 Lah. 477 = 14 L. 724 = 34 P.L.R. 1076 = 144 Ind. Cas. 580.

——S. 51—Assets realised—Meaning of.

The words "assets realized in the course of the execution by sale or otherwise" in S. 51 do not necessarily mean assets which have been ordered to be paid to the judgment-creditor. It is sufficient if they are available for immediate distribution. A.I.R. 1931 Sind 164 = 26 S.L.R. 41 = 134 Ind. Cas. 1178.

——S. 51—'Assets realized.'

In absence of any order by the Court for transfer of money realised by the sale of judgment-debtor's property attached before judgment in another civil suit to the account of the judgment-creditor or for its payment to him, the amount in custody of the Court cannot be treated as assets realized in execution of the decree within the meaning of. S. 51 (1). 113 Ind. Cas. 319 = 22 S.L.R. 345 = A.I.R. 1928 Sind 165.

——S. 51—"Realized", meaning of.

Where the Court holding the assets of the judgment-debtor is the same as the Court attaching the same on behalf of the creditor in another suit, the assets cannot be said to have been "realized" within the meaning of S. 51, unless the money standing to the credit of the judgment-debtor is ordered to be transferred to the credit of the attaching creditor's suit. 101 Ind. Cas. 848 = A.I.R. 1927 Sind 194.

——S. 51—(1907) S. 34—Assets realised—Realised—Date of realisation.

Attachment of money does not mean realisation unless the money reaches the Court. Retention of an officer's pay by a Treasury Officer under attachment is not realisation and the date of realisation is the date on which the money reaches the court. 9 A.L.J. 707 = 16 Ind. Cas. 84.

(3) Attaching creditor.

——S. 51—Attaching creditor—Distinction between attaching and other creditors.

No distinction can be made between an attaching creditor and other decree-holders, so far as S. 51 is concerned. A.I.R. 1939 Mad. 291 = 49 M.L.W. 427 = (1939) 1 M.L.J. 205 = 1939 M.W.N. 168 = I.L.R. (1939) Mad. 343 = 183 Ind. Cas. 441.

——S. 51—Attaching creditor—Position of.

Attachment does not create any title in favour of the attaching creditor. It merely prevents privates alienations.

The position of the attaching creditor does not confer any title upon him in the property in question and he is only entitledto be classed with other creditors all of whom are entitled to rateable distribution of the assets in the hands of the receiver. Such creditor has no higher right than that of any other unsecured creditor and he is not entitled to have his decree satisfied in full out of the sale proceeds of the property attached by him. A.I.R. 1929 Cal. 524.

(4) Attachment before judgment.

——S. 51—Attachment before judgment.

Attachment before judgment by the creditor does not enure for the benefit of all the creditors so as to make a transfer of it void. 1937 M.W.N. 366.

(5) Auction purchaser.

——S. 51—Auction purchaser—Decree-holder purchaser, disability of.

In the practical working of a single section like S. 51, the decree-holder cannot be permitted to decide whether he should pay to the Official Receiver the money which he paid for the property or restore the property itself. The only disability under which the decree-holder purchaser lies is that he will not be entitled to the benefit of the execution, that is, he cannot set off the amount of the decree debt against the purchase price but he is bound to pay the amount of the purchase-money into Court just like any other stranger purchaser. A.I.R. 1942 Mad. 425 = 1942 M.W.N. 176 = 55 M.L.W. 134 = (1942) 1 M.L.J. 306 = I.L.R. (1942) Mad. 635 = 201 Ind. Cas. 686.

——S. 51—Auction purchaser—Decree-holder as purchaser—His disability.

A decree-holder is not precluded from proceeding with the sale with the knowledge of the insolvency, and purchase the property himself. The notice of insolvency to the decree-holder cannot connote to him want of good faith. The only disability under which he lies is that he will not be entitled to the benefit of the execution, that is, he cannot set off the amount of the decree debt against the purchase price but he is bound to pay the amount of the purchase-money into Court just like any other stranger purchaser and share in the sale proceeds ratasbly along with other creditors. A.I.R. 1938 Mad. 906 = 1938 M.W.N. 841 = 48 M.L.W. 279 = (1939) 1 M.L.J. 705 = 182 Ind. Cas. 883.

——S. 51—Auction purchaser—Want of good faith, what is.

Under S. 51, it is unnecessary to enquire whether or not the purchaser had notice of the debtor's insolvency, for granting that he had notice, it cannot be said that there was want of good faith on his part when he purchased the property at a sale sanctioned by the Court. A purchase made on the faith of Court's order would negative any inference of bad faith which knowledge of the debtor's insolvency standing alone, might possibly justify. A.I.R. 1936 Mad. 819 = 71 M.L.J. 170 = 44 M.L.W. 194 = 1936 M.W.N. 753 (2) = 59 Mad. 928 = 170 Ind. Cas. 510.

——S. 51—Auction purchaser—Title of.

A purchaser of an insolvent's property, at a sale in execution of a decree, even with notice of the insolvency, who purchased the property in good faith, acquires a good title to it against the Receiver in whom the insolvent's property had vested under S. 28, sub-s. (2). The provision contained in S. 26, sub-s. (2) is controlled by the later provision contained in S. 51, sub-s. (3) of the Act and effectiveiy secures the title of a purchaser of an insolvent's property at a sale in execution in case of good faith being established on the part of the purchaser. A.I.R. 1935 Cal. 506 = 39 C.W.N. 424 = 62 Cal. 457 = 157 Ind. Cas 862.

——S. 51—Auction purchaser—Bona fide purchaser—Rights of.

Under S. 74 (ii), when the property is vested in the Court, as receiver, it holds it, not as interim receiver, but as a full receiver in the sense in which the term is used in S. 28 (2). Such property cannot be the subject of execution sale but if a sale takes place, the purchaser in good faith is entitled to retain the pro-

perty and the creditors, of the insolvent are entitled only to the sale proceeds of that as assets for distribution among them, i.e., the sale would not be set aside, but would prevail against the Receiver, and the property cannot be returned to the receiver. 106 Ind. Cas. 34 = 39 ML.T. 369 = A.I.R. 1927 Mad. 983.

(6) Construction.

——S. 51—Construction.

Sections 51 and 52 cannot be read together, for the wording of S. 51 precludes this. Under S. 51 a decree-holder, who is required to make a refund is entitled to deduct the costs of execution proceedings. A.I.R. 1943 Mad. 118 = 55 M.L.W. 436 = (1942) 2 M.L.J. 178 = 1942 M.W.N. 498 = I.L.R. (1942) Mad. 757 = 208 Ind. Cas. 289.

(Overruling A.I.R. 1939 Mad. 291 : (1939) 1=M.L.J. 205 = I.L.R. (1939) Mad. 343 : 183 Ind. Cas. 441)

——Ss. 51, 7 and 9—Construction—Date of admission, what is.

In admitting an insolvency petition all that the Court is concerned with is seeing whether the petition itself complies with the requirements of the law. If it does, then it admits it.

The insolvency petition was presented on 3rd July 1933 and on that date, the Judge wrote on the petition these words. "Check and file emergently." The petition was checked and taken on the file on the same day, whereupon the Court orederd that the charges for publishing the notice of the petition should be deposited by the petitioner by 7th July. The costs were deposited on that date and accordingly publication was ordered. It was contended that the petition must be deemed to have been admitted when the costs of the publication were paid on 7th July:

Held, that the fact that the petition was taken on the file on the day on which it was presented meant that this was done after it had been checked and found to be in order. The fact that the Court ordered the costs to be paid by 7th July, in itself showed that the Court had already admitted the petition on earlier date. A.I.R. 1943 Mad. 118 = 55 M.L.W. 436 = (1942) 2 M.L.J. 178 = 1942 M.W.N. 498 = I.L.R (1942) Mad. 757 = 208 Ind. Cas. 289.

——S. 51—Construction—'Person,' meaning of.

The language of S. 51 (3) is very wide. "A person" will include a decree holder purchaser and a stranger purchaser. A.I.R. 1942 Mad. 425 = 1942 M.W.N. 176 = 55 M.L.W. 134 = (1942) 1 M.L.J. 306 = I.L.R. (1942) Mad. 635 = 201 Ind. Cas. 686.

——S. 51—Construction—Benefit of execution, meaning of.

The only logical way of interpreting S. 51 is that the benefit of the execution represents the bids made of a sale or the assets realised otherwise in the course at execution. It refers in other words to money. A.I.R. 1942 Mad. 425 = 1942 M.W.N. 176 = (1942) 1 M.L.J. 306 = 55 M.L.W. 134 = I.L.R. (1942) Mad. 635 = 201 Ind. Cas. 686.

——S. 51—Construction—"Benefit of execution", meaning of.

The expression "benefit of execution" in S. 51, means the sum realized less the costs of execution. A.I.R. 1942 Mad. 88 = 1941 M.W.N. 852 = (1941) 2 M.L.J. 918 = 201 Ind. Cas. 238.

——Ss. 51 and 52—Construction—Policy of Act—Principles to be kept in view.

In construing Ss. 51 and 52, two principles have to be kept in view. (1) It is the policy of law of insolvency that when a debtor commits an act of insolvency, there must be an even distribution of his property among his creditors and no creditor of his should be entitled to receive more than a rateable share of the amount realised from the property of the insolvent and available for distribution equally with other creditors. (2) It is the policy of the law not to frustrate the effort of a diligent execution creditor and deprive him of the fruits of his execution. A.I.R. 1938 Mad. 906 = 1938 M.W.N. 841 = 48 M.L.W. 279 = (1939) 1 M.L.J. 705 = 182 Ind. Cas. 888.

——S. 51—Construction—Distinction between debtor and insolvent.

A debtor and insolvent are, strictly speaking, different persons. An insolvent under the Insol. Act means a person against whom an order of adjudication has been made and that a debtor is a person who has made himself amenable to adjudication but who has not yet been adjudicated. A.I.R. 1938 Mad. 449 = 1938 M.W.N. 201 = (1938) 1 M.L.J. 471 = 47 M.L.W. 705 = I.L.R. (1938) Mad. 1063 = 178 Ind. Cas. 135.

——S. 51—Construction—Date of admission, what is.

In the absence of a provision either in the Prov-Insol. Act or in Civil P.C., it cannot be said that the date of admission of an insolvency must be taken to be the date of the presentation of the petition. A.I.R. 1935 Lah. 690 = 160 Ind. Cas. 493.

——S. 51—Construction—'Benefit', meaning of.

The word 'benefit' in S. 51 can be reasonably construed to mean the net realisation in execution after paying the costs, and a decree holder who has brought the properties of an insolvent to sale may be given a charge over the property sold for the expenses incurred by him in bringing it to sale, as against the Receiver even though S. 52 may not apply to such a case. A.I.R. 1933 Mad. 703 = 38 M.L.W. 389 = 65 M.L.J. 402 = 1933 M.W.N. 996 = 57 M 330 = 145 Ind. Cas. 999.

——S. 51—Construction—Purchase in good faith, meaning of.

A person who purchases with notice of the insolvency is not a purchaser in good faith within the meaning of S. 51 (3). A.I.R. 1933 Nag. 28 = 28 N.L.R. 317 = 140 Ind. Cas. 835.

——S. 51—Construction.

The words "before the date of the admission of the petition" qualify the words "assets realised." They do not qualify the word "sale" and the assets can be said to be "realised in execution" only on the date on which the balance of the purchase-money is deposited. They cannot be said to be realised in execution on the date when the deposit of 25 per cent. of the sale-proceeds is made. Where after the deposit of the 25 per cent of the sale-proceeds is made by the auction purchaser on the date of sale but before the balance of the purchase-money is deposited an application for adjudication of the judgment-debtor as insolvent is entertained the decree-holder is not entitled to sale-proceeds including even the 25 per cent deposited to the exclusion of judgment-

debtor's other creditors as against the Receiver. 85 Ind. Cas. 216 = 48 Mad. 656 = 20 M.L.W. 872 = A.I.R. 1925 Mad. 248 = 47 M.L.J. 759.

(7) Costs.

——S. 51—Costs.

Under S. 51, a decree-holder who is required to make a refund is entitled to deduct the costs of the execution proceedings. A.I.R. 1943 Mad. 118 = 55 M.L.W. 436 = (1942) 2 M.L.J. 178 = 1942 M.W.N. 498 = I.L.R. (1942) Mad. 757 = 208 Ind. Cas. 289.

(Overrules A.I.R. 1939 Mad. 291 = (1939) 1 M.L.J. 205 = I.L.R. (1939) Mad. 343 = 183 Ind. Cas. 441.)

(8) Locus standi.

——S. 51—Locus standi.

Receiver is the guardian of the insolvent's assets. The debtor cannot, therefore ,apply to set aside such **Mustajri** on general principles and in view of S. 51. Only the Receiver can do so. A.I.R. 1937 Lah. 634 = 39 P.L.R. 204 = 172 Ind. Cas. 481.

——S. 51—Locus standi.

Before the admission of insolvency petition, one of the creditors had attached a part of the insolvent's property in execution of a money-decree. The applicant in insolvency applied for stay of execution of the sale. This was rejected. Another creditor then applied to the Insolvency Court to direct the executing Court to sell the property and pay the sale proceeds to the Insolvency Court for distributing amongst the insolvency creditors. This application was also rejected. The executing Court proceeded with the sale and the property was sold and purchased by the decree-holder creditor. Thereafter, the decree-holder purchaser applied to the Insolvency Court for amendment of the petition in insolvency by excluding from the list of assets the property which had been purchased at the execution sale. This amendment was allowed. No Receiver was appointed till after the sale. Another creditor preferred an appeal against the order allowing the amendment.

Held, that the creditor, not being the Receiver, had no **locus standi** to maintain an application under S. 51. A.I.R. 1937 Pat. 643 = 18 P.L.T. 553 = 4 B.R. 110 = 172 Ind. Cas. 159.

(9) Receiver.

——S. 51—Receiver—Interest on money refunded by decree-holder—Receiver's right.

There is no provision in the Insolvency Act conferring upon the Official Receiver the right to recover interest on the money which a decrée-holder is required to refund under S. 51. But under its inherent powers, the Court can direct a refund to be made with interest if it considers that it is just and equitable to do so. A.I.R. 1943 Mad. 118 = 55 M.L.W. 436 = 1942 M.W.N. 498 = (1942) 2 M.L.J. 178 = I.L.R. (1943) Mad. 757 = 208 Ind. Cas. 289.

——S. 51—Receiver.

The Official Receiver can challenge a sale in execution of a decree against the insolvent held after the date of petition in insolvency. The only adverse effects which S. 51 has on the rights of the Receiver—in whom the property vests with effect from the date of the presentation of the petition—are, firstly, that if any assets have been realized in execution of a decree, before the date of the admission of the petitoin, the Receiver will have no right to prevent the decree-holder from getting the benefit of those assets even if such assets are in the hands of the Court and have not been paid over to the decree-holder before the date of the admission by the insolvency Court of the petition : and, secondly, that an auction-purchaser who can establish good faith can acquire a good title to the property against the Receiver. A.I.R. 1942 All. 263 = 1942 A.L.J. 437 = 1942 A.W.R. 162 = I.L.R. (1942) All. 421 = 202 Ind. Cas. 7.

(Overruling A.I.R. 1934 All. 252 = 1934 A.L.J. 857 = 148 Ind. Cas. 891.)

——S. 51—Receiver Interest on assets realised.

Under S. 51, the Official Receiver is entitled to interest on the assets realized as this is a matter analogous to restitution. A.I.R. 1942 Mad. 88 = 1941 M.W.N. 852 = (1941) 2 M.L.J. 918 = 201 Ind. Cas. 238.

——Ss. 51 and 52—Receiver—Decree against Hindu father and son—Attachment of son's share—Subsequent insolvency of father—Right to sell son's share, whether passes to Official Receiver—Effect of attachment.

When once a decree passed against a Hindu father and his son has been followed by an attachment of the son's interest in the joint family property, the normal power of the father to alienate it for his debts ceases from the date of attachment and his right cannot thereafter be transferred on his insolvency to the Official Receiver : and there can be no difference between a case where the son's interest is made liable in an action brought by a person with whom the father has contracted and a case where the son's share is made liable in an action in which the son is sued in respect of his own contractual liability. A.I.R. 1936 Mad. 193 = 69 M.L.J. 898 = 43 M.L.W. 35 = 59 Mad. 296 = 1936 M.W.N. 510 = 161 Ind. Cas. 726.

——S. 51—Receiver.

Only sale proceeds vest in the Official Receiver and not property where the execution Court refuses to stay the execution even on being informed of the insolvency petition. 1935 M.W.N. 1102.

——S. 51—Receiver—Rights of.

Defendant paying money to plaintiff's pleader pending result of suit—Subsequent application to adjudicate defendant as insolvent—**Ad interim** Receiver is not entitled to withdraw money for benefit of general body of creditors. A.I.R. 1933 Cal. 625 = 37 C.W.N. 475 = 58 C.L.J. 222 = 145 Ind. Cas. 826.

——S. 51—Receiver.

If an order is passed in an objection case filed after the date from which the adjudication takes effect, the attaching creditor has no priority over the Official Assignee who is entitled to claim the attached property for the benefit of all creditors of the insolvent including the attaching-creditors. 65 Ind. Cas. 941 = 5 N.L.J. 144 = 19 N.L.R. 126 = A.I.R. 1922 Nag. 108.

——S. 51—(1907) S. 34—Receiver—Execution of decree—Property attached but not sold-before adjudication—Rights of Receiver.

A property of the insolvent attached by the creditor but not sold till the date of adjudication is

still the property of the insolvent and as such it is available to the general body of the creditors. 37. All. 452 = 13 A.L.J. 700 = 29 Ind. Cas. 990.

——S. 51—(1907) S. 34—Receiver—Execution of decree—Realisation of assets before adjudication—Rights of judgment-creditor,.

Where before an order of adjudication of a judgment-debtor as an insolvent, the decree against him has been executed and the assets realised by the Court the judgment creditor is entitled to the money in Court in preference to any interim Receiver that may be appointed. 11 Ind. Cas. 433 (Sind)

——S. 51—(1907), S. 34—Receiver—Execution of decree Saffi before adjudication—Right to proceed.

A sale was held in execution of a decree and the Court ordered that the sale proceeds should be paid to the decree-holder. But before the actual payment was made the judgment-debtor applied to be declared insolvent and the Court appointed an **Interim** Receiver of his property.

Held, that the sale proceeds having been realised before the judgment-debtor was declared insolvent, the Receiver could not claim them. 13 A.L.J. 359 = 28 Ind. Cas. 816.

(10) Scope.

——Ss. 51 (3) and 28 (2)—Scope and effect—Judgment-debtor's property sold in execution of money decree after his adjudication—Notice on Receiver not served under O. 21, R. 22, C. P. Code—Title of bona fide auction-purchaser.

O. 21, R. 22, C.P. Code, does not control S. 51 (3) of the Provincial Insolvency Act which controls S. 28 (2) of that Act, with the result that a purchaser who had **bona fide** purchased the property of a judgment-debtor at a Court sale held in execution of a money decree and without knowledge of the insolvency proceedings acquires a good title, although the judgment-debtor had been adjudicated an insolvent before the said sale, and the Receiver ininsolvency was neither made a party to the execution proceedings nor had been served with a notice under O. 21, R. 22, C.P. Code. Such a purchase will, therefore, prevail over a subsequent purchase of the same property from the Receiver in insolvency. 53 C.W.N. 304.

——S. 51—Scope—Ss. 51 (3) and 52—Sale after notice of insolvency petition—If valid—Position of auction-purchaser.

Section 52 must be read with S. 51, which qualifies it. If the executing Court holds the sale in spite of notices being given under S. 52, the auction-purchaser acquires a valid title under S. 51 (3) if he purchases in good faith. Where the sale is held after the admission of the insolvency petition but before adjudication, the position will be this: if the insolvency application is dismissed the auction-purchaser gets an indefeasible title: but if an order of adjudication is made, he cannot claim any title against the reciever, unless he can show that he purchased the property in good faith. 1946 N.L.J. 597 = 226 Ind. Cas. 290.

——S. 51 Scope.

In view of the provisions of S. 51 (3), the intervention of the judgment-debtor's insolvency in the course of the execution proceedings can never bring about a practical cancellation of the execution proceedings. A.I.R. 1942 Mad. 425 = 1942 M.W.N. 176 = 55 M.L.W. 134 = (1942) .1 M.L.J. 306 = I.L.R. (1942) Mad. 635 = 201 Ind. Cas. 686.

——S. 51—Scope.

Section 51 decides that money which is so realised shall, in certain circumstances, be paid to the decree-holder, and in certain other circumstances, be paid to the Official Receiver. There is no scope under S. 51 for the passing of an order directing a decree-holder to restore to an Official Receiver property which he has purchased at an execution sale. The decree-holder must pay the purchase-money to the Official Receiver. A.I.R. 1942 Mad. 425 = 1942 M.W.N. 176 = 55 M.L.W. 134 = (1942) 1 M.L.J. 306 = I.L.R. (1942) Mad. 635 = 201 Ind. Cas. 686.

(Overruling A.I.R. 1935 Mad. 907 = 159 Ind. Cas. 244.)

——S. 51—Scope.

The Receiver has no right to assets realised in the course of execution against the property before the admission of insolvency petition. A.I.R. 1941 Mad. 575 = 53 M.L.W. 357 = (1941) 1 M.L.J. 405 = 1941 M.W.N. 268 (1).

——S. 51—Scope—Rights of decree-holder.

Under S. 51, the decree-holder will not be entitled to the benefit of his execution against the Receiver only, but where the Receiver has laid no claim to the property sold and purchased by the decree-holder, the judgment-debtor has no right to say that the sale held in favour of the decree-holder should not be confirmed. A.I.R. 1941 Oudh 505 = 1941 A.W.R. 234 = 1941 O.W.N. 833 = 194 Ind. Cas. 605.

——Ss. 51, 52, and 6 (b) (c)—Scope—Insolvency during execution sale—Sale confirmed before receipt of stay order—No proceedings under 51 or S. 52 taken—Decree-holder, held entitled to sale proceeds.

A judgment-debtor was adjudged insolvent during execution sale. Before the order of the High Court staying confirmation of the sale was received by the executing Court, the sale was confirmed but the sale proceeds having been ordered to be sent to the High Court, they were not paid to the decree-holder but were sent to the High Court:

Held, that as no action was taken under S. 51 or S. 52, in time, the decree-holder was entitled to get the sale proceeds after the confirmation of the sale. A.I.R. 1940 Lah. 37 = 41 P.L.R. 706 = 186 Ind. Cas. 588.

——S. 51—Scope.

There is nothing in S. 50 or S. 33 to show that a transferee is not entitled to challenge the genuineness of the debt of the sole creditor in the case in which his transfer is challenged by such a creditor. A.I.R. 1940 Nag. 393 = 1940 N.L.J. 420 = I.L.R. (1940) Nag. 564 = 190 Ind. Cas. 885.

——S. 51—Scope—Mustajri of debtor's land completed before admission of insolvency petition—Finality.

The **Mustajri** of debtor's land must be held good, where it has been completed before the admission of the insolvency petition. A.I.R. 1937 Lah. 634 = 39 P.L.R. 204 = 172 Ind. Cas. 481.

——**S. 51—Scope—Benefit of execution.**

The effect of the insolvency is, that by virtue of S. 51, the decree-holder cannot have the benefit of the execution against the Receiver. But the execution does not become void. It deprives the executing creditor from having the benefit of the execution for his sole benefit. His title does not prevail against the Official Receiver. If the execution is proceeded with the leave of the Insolvency Court and the property is sold, the sale proceeds will have to be delivered over to the Receiver for distribution among all the creditors of the insolvent. A.I.R. 1937 Mad. 727 = 1937 M.W.N. 279 = 170 Ind. Cas. 851.

——**S. 51—Scope.**

Where a property is sold before the insolvency the Official Receiver has no right and cannot claim the sale price. 1937 M.W.N. 366.

——**S. 51 (3)—Scope—Sale contemplated by S. 51 (3)—Bona fide purchaser, if protected.**

The sale contemplated in sub-s. (3) of S. 51 must necessarily be that held after the admission of the petition, for, if it be a sale held previous to that, the execution creditor would become entitled even to the sale proceeds and the property would pass to the purchaser independent of the question of good faith. Sub-section (3), therefore, means that although by reason of the sale being held after the admission of the petition, the decree-holder gets no right to the proceeds, the purchaser in good faith nevertheless acquires a good title to the property. A.I.R. 1936 Mad. 819 = 71 M.L.J. 170 = 44 L.W. 194 = 1936 M.W.N. 753 (2) = 59 M. 928 = 170 Ind. Cas. 510.

——**S. 51—Scope—Good faith—Proof.**

What S. 51 demands is good faith; the existence of it or the want of it may be proved in divers ways. Knowledge on the purchaser's part of the debtor's insolvency does not, in the circumstances, amount to absence of good faith: but it does not necessarily follow that all inquiry into the question whether the purchaser acted in good faith or not is to be excluded. Any collusion or fraud may vitiate the sale. Further another important point must be borne in mind that S. 51 (3) is of wider range than O. 21, R. 90, Civil P.C. It is unnecessary to prove substantial injury under the former section. A.I.R. 1936 Mad. 819 = 71 M.L.J. 170 = 44 L.W. 194 = 1936 M.W.N. 753 (2) = 59 M. 928 = 170 Ind. Cas. 510.

——**Ss. 51 and 37—S. 51, scope of—One creditor realising amount of sale of property—Receiver appointed—Effect—S. 37, if applies.**

What S. 51 means is that if a creditor has proceeded to execute a decree, he will not be entitled as against the Receiver to the benefit of the execution except so far as he may have been able to realise the assets before the admission of the petition for insolvency. If he has derived any benefit from that execution when the application for insolvency was pending, he cannot keep that benefit to himself as against the Receiver.

Where, therefore, during the pendency of the insolvency proceeding, one of the creditors brought the property of the insolvent to sale and realised a certain amount of money from the sale of that property, S. 28 read with S. 51 makes it perfectly clear that when the Receiver appointed calls upon him to make over the benefit he has derived from the execution, he must do so. Section 37 does not apply as it refers to the vesting of the property of the insolvent after an order of annulment has been made. A.I.R. 1936 Pat. 112 = 2 B.R. 168 = 17 P.L.T. 313 = 160 Ind. Cas. 146.

——**S. 51—Scope—Court selling property without knowing of pendency of insolvency proceeding—Sale, effect of—Rights of creditors inter se if affected.**

Where one of the properties had been sold before the order of adjudication, but the sale proceeds thereof were in possession of a creditor who got it during the pendency of the proceeding and the Court sold the property not knowing of the pendency of the insolvency proceeding, the effect of such sale can only be to protect a **bona fide** purchaser, but it will have absolutely no effect upon the rights of the creditors **inter se**, which are governed by S. 51. A.I.R. 1936 Pat. 112 = 2 B.R. 168 = 17 P.L.T. 313 = 160, Ind. Cas. 146.

——**S. 51—Scope.**

The policy of S. 51 is really to put an end as it were to the powers of the executing Court to proceed against or do anything in respect of property against which it has issued execution as soon as it is found that the judgment-debtor whose property it was proceeded against has been adjudicated an insolvent and an application is made by the Receiver under S. 52 of the Act. The subsequent fate of the property is left to the Insolvency Court to decide if it thinks fit or to a separate suit. A.I.R. 1935 Mad. 651 = 1935 M.W.N. 499 = 41 L.W. 698 = 68 M.L.J. 681 = 58 M 1056 = 157 Ind. Cas. 826.

——**S. 51—Scope.**

Section 51 refers to the date of admission and not that of presentation of petition. Therefore, it does not deprive the creditors of the fruits of their decrees in respect of moneys which are brought into Court between the date of the presentation of a petition for insolvency and the date of its admission. A.I.R. 1931 Sind 65 = 130 Ind. Cas. 559.

——**S. 51—Scope—Deposits before adjudication**

Section 34 exempts amounts deposited in Court before the date of the order of adjudication where the deposit is made on account of sale proceeds in execution of decree against the insolvent. 75 Ind Cas. 172 = A.I.R. 1925 Mad. 224.

——**S. 51—(1907) S. 34—Sdcope—Execution of decree—Attachment of decree—Money realised—Order directing decree-holder to 'pay amount realised to Receiver—Legality of.**

In execution of a decree obtained in 1912 against certain persons the decree-holder attached a decree passed in favour of those debtors. In 1914 an application was filed in insolvency against the judgment.

debtors and in 1915 an interim Receiver was appointed. The money due to the debtors under the decree was deposited in Court to the credit of the decree holder who obtained an order for payment and received a certain amount from Court in July 1915. In september 1915, the debtors were adjudicated insolvents, and in November 1917 the decree-holder assigned his rights under the decree. The whole of the decree not having been paid off the assignee applied to the Official Receiver in February 1918 to be allowed to prove his claims to the balance of the decretal amount. His claim was rejected and he was ordered by the District Judge to pay to the Receiver whatever sums he had received under the decree.

Held, that the order directing payment of the amount realised, was illegal. 41 All. 274 = 17 A.L.J. 89 = 57. Ind. Cas. 760.

——S. 51—(1907) S. 34—Scope—Execution of decree, money realised in—Court, if can retain, before adjudication.

When no order of adjudication is made, the Court is not at liberty to retain any money that has come to its hands in execution of a decree but must dispose of it according to law. 14 A.L.J. 236 = 33 Ind. Cas. 723.

——S. 51—(1907) S. 34—Scope—Execution of decree—Assets realised before adjudication—Right of decree-holder.

Where the assets have been realised in the course of execution by sale or otherwise, as mentioned in S. 34 before the date of the order of adjudication, an execution creditor is entitled to them. 23 C.W.N. 461 = 49 Ind. Cas. 480.

——S. 51—(1907) S. 34 (3)—Scope—Execution of decree—Purchaser of insolvent's property from bona fide Court-auction-purchaser thereof.

A purchaser of an insolvent's property, even with notice of insolvency, from a **bona fide** purchaser under a Court sale, has a good title to it under S. 34 (3) against the Receiver and the purchase cannot be set aside. 35 Ind. Cas. 643 (Cal.).

(11) Secured creditor.

——S. 51—Secured creditor—Rights of.

Suit by mortgagee only for portuion of mortgaged property—Decree creating charge on that portion—Fresh suit in respect of the remaining portion is barred under Civil P.C., O. 2, R. 2 but the secutiry is not extinguished. Where such mortgagee has realized the whole security by auction-purchase and is in possession of the same, he can resist Receiver's claim in proceeding under S. 51 on the plea that he was a secured creditor in respect of the whole of the property. A.I.R. 1940 Lah. 166 = 42 P.L.R. 29 = 188 Ind. Cas. 833.

—S. 51—Secured creditor.

A secured creditor can pursue his remedy on his security in the absence of Official Receiver from the array of parties. 42 L.L.J. 113 = A.I.R. 1930 Lah. = A.I.R. 1930 Lah. 855.

——S. 51—Secured creditor.

The mere factum of attachment is not sufficient to bring the attaching creditor within the category of secured creditor. The attachment only creates a species of temporary lien which continues until the insolvency petition has been duly admitted. 110 Ind. Cas. 893 = A.I.R. 1928 Nag. 336.

(12) Miscellaneous.

——S. 51—Appeal against refusal to stay.

Application by Receiver for stay of sale rejected by executing Court—Appeal against the order by judgment-debtor, and not by Receiver, is illegal. 31 P.L.R. 944 = 129 Ind. Cas. 213 = A.I.R. 1930 Lah. 970.

——S. 51—Miscellaneous—Fresh application for adjudication by creditor.

Application of creditor for adjudication of his debtor as insolvent relying on sale in execution of his decree dismissed, sale being subsequent to petition—Second application made after confirmation of sale is not continuation to first. A.I.R. 1930 Rang. 265.

——S. 51—(1907) S. 32 (b)—Miscellaneous—Interest.

The rate of interest for the purpose of dividend cannot exceed 6 per cent per annum under the provisions of S. 32 (*b*) of the Act. 3 P.W.R. 1917 = 19 P.L.R. 1917 = 39 Ind. Cas. 373.

——S. 51—(1907) S. 34—Miscellaneous—Suit against insolvent—Leave of Court.

Insolveney proceedings remain pending till the insolvent obtains his order of discharge. An undischarged bankrupt cannot without the leave of the Court be sued in respect of a debt mentioned in the schedule but which the creditor failed to prove. 20 O.C. 304 = 43 Ind. Cas. 262.

——S. 52.

Synopsis.

1. Applicability and scope.
2. Costs.
3. Executing Court—Duty and powers of.
4. Procedure.
5. Receiver.
6. Secured creditor.
7. Miscellaneous.

1. Applicability and scope.

——S. 52—Applicability—Conditions—Receiver not appointed—S. 52, if applies.

It is necessary that two conditions must be satisfied before the executing Court can make an order for delivery of the attached property to the Receiver in insolvency. The first is that notice is given to the executing Court of the admission of a petition of insolvency by or against the judgment-debtor. In the second place, there should be an application before the executing Court for delivery of such property to the Receiver.

Section 52, however, has no application to a case where no Receiver either **interim** or otherwise has actually been appointed or his appointment has ceased. A.I.R. 1945 Cal. 400=49 C.W.N. 290.

——S. 52—Applicability and scope.

—**Obiter.** Section 52 is not confined to movable property. A.I.R. 1939 Mad. 456=49 L.W. 671=1939 M.W. N. 488=(1939) 11 M.L.J. 802=I.L.R. (1939) Mad. 802 Ind. Cas. 999 (F.B.).

——S. 52—Applicability and scope.

Section 52 has no application to a case where a Receiver is not appointed of the insolvent's property. A.I.R. 1938 Cal. 503=178 Ind. Cas. 262.

——S. 52—Applicability and scope—Applicability to movable property—Immovable property attached by executing Court—Custodia legis.

Under S. 52, it cannot be said that the Receiver is entitled to get possession only of immovable property or that the executing decree-holder should be entitled to a charge for his costs only if the property is movable. Immovable property attached by an executing Court is in **custodia legis** and must therefore be deemed to be in possession of the Court. A.I.R. 1936 Nag. 120=31 N.L R. 212 (Sup.)=161 Ind. Cas. 661.

——S. 52—Applicability and scope.

Section 52 which deals entirely with property which has not been brought to sale, is inapplicable to a case where the property has been brought to sale. A.I.R. 1933 Mad. 703=38 L.W. 389=65 M.L.J. 402=1933 M.W.N. 996=57 M 330=145 Ind. Cas. 999.

——S. 52—Applicability and scope.

Quaere.—Whether S. 52 applies to an **ad interim** Receiver. A.I.R. 1933 Mad 703=38 L.W. 389=65 M.L.J. 402=1933 M.W.N. 996=57 M. 330=145 Ind. Cas. 999.

——S. 52—Applicability and scope—Application by interim Receiver, competency of.

An **interim** Receiver is competent to make an application under S. 52. The section as it at present stands, contemplates an application as soon as the insolvency petition has been admitted. A.I.R. 1932 Lah. 471=14 L, 63=138 Ind. Cas. 821=33 P.L.R. 790.

——S. 52—Applicability and scope—'Receiver' includes ad interim Receiver—Application for stay of sale of insolvent's property in execution of decree—Duty of Court to stay sale—Sale effected—Official Receiver's rights.

Section 52, as now amended, contemplates the presentation of an application not as it used to be after adjudication but at an earlier stage, that is to say, after an insolvency petition has been admitted. At that stage, the only Receiver that can be in existence for the purpose of applying is an **interim** Receiver.

Section 52 applies to all kinds of property under attachment by a Court.

Where an insolvent's property is attached in execution of a decree before he applies for insolvency, and on his insolvency application being admitted, the **ad interim** Receiver applies for stay of sale, the executing Court should stay the sale and direct the delivery of possession to the Receiver. If the sale takes place in spite o Receiver's application for its stay, he is not bound to recognise the title of the auction-purchaser. A.I.R. 1932 Mad. 95=34 L.W. 908=1931 M.W.N. 1251=62 M.L.J. 68=55 M. 316=136 Ind. Cas. 338.

——S. 52—Applicability and scope—Conditions for application.

Before an executing Court can stay sale of judgment-debtor's property, under S. 52, two conditions must be satisfied. They are, firstly, that notice should have been given to the executing Court of the admission of the insolvency petition and secondly that the application should have been made to that Court for delivery of the property to the Receiver. 128 Ind. Cas. 292=A.I.R. 1930 Lah. 851.

——S. 52—Applicability and scope—Movable and immovable property.

Section 52 applies to immovable as well as movable property. A.I.R. 1928 Bom. 177 (1), Foll.; A.I.R. 1925 Sind 69, not Foll. 31 P.L.R. 944=129 Ind. Cas. 213= A.I.R. 1930 Lah. 970.

——S. 52—Applicability and scope.

The object of S. 52 is not to give an advantage to the insolvent but to prevent individual creditors deriving unfair advantage over other creditors and to place the property in the hands of a Receiver for equal distribution to the general body of creditors. The section no doubt gives a right to the insolvent to make such an application but it is obvious that the application must be made for the general body of creditors and not for the insolvent. 125 Ind. Cas. 783=A.I.R. 1930 Pat. 406.

——S. 52—Applicability and scope--Section contemplates both movable and immovable properties attached.

The opening words of S. 52 refer to attachment of any kind of property which is saleable and need not be confined to movable properties alone. Where immovable property is attached in execution of a decree it is commonly stated that the property is in custody of the Court and there is no reason to suppose that the legislature meant that the attaching decree-holder would have a charge for his costs where movable property is attached but he would be entitled to no such relief if immovable property is attached by him although the proceedings relating to the attachment of the property are taken at considerable cost of money and trouble. The true construction is that S. 52 refers to the case of attachment of all kinds of property and is not confined to movable property alone. A.I.R. 1929 Cal. 524.

——S. 52—Applicability and scope.

Section 52 of Act (5 of 1920) refers to property which would include both the moveable and immovable property of the debtor. It however contemplates the delivery of property in the possession of the Court and thereby it restricts its operation to such moveable property which is seized by the Court under the provisions contained in O. 21, C. P. Code or which is attached by the Court in such manner as to give possession of such property to the Court. Immovable property attached under O. 21, R. 54, C. P. Code, is not in possession of the Court. Also the debts due to the debtor which are attached by the issue of a prohibitory order under O. 21, R. 46, Cl. 1 (a), C.P. Code, would not fall within the purview of S. 52 of the Insolvency Act. 19 S.L.R. 35=A. I. R. 1926 Sind 199.

——S. 52—Applicability and scope—Applicability to money decree-holders who have obtained securities in execution.

Section 52 does not apply to decree-holders obtaining security in execution for satisfaction of their money decrees. The exception from the operation of the section which must be understood to have been given to secured creditors must be extended to money decree-holders who have obtained securities in the course of execution. 92 Ind. Cas. 497=1925 M.W.N. 907=A. I. R. 1926 Mad. 194=49 M.L J. 643.

——S. 52—Applicability and scope.

Provincial Insolvency Act, S. 52, contemplates delivery of property in the possession of the Court and thereby restricts its operation to such movable property which is seized by the Court under O. 21 relating to attachment of property by seizure or which is attached by the Court in such manner as to give possession of such property. Therefore debts due to the debtor which are attached by the issue of a prohibitory order under O. 21, R. 46, cl. (1) (a) would not fall within the purview of S. 52 which refers to property both movable and immovable of the debtor. The Receiver referred to in S. 52 is the one appointed under S. 56, para. (1) after adjudication and not the **interim** Receiver under S. 20. An **interim** Receiver for preservation and management of property pending decision of the Court cannot be empowered to apply for an order under S. 52 for transfer of property from the custody of the Court to that of the Receiver or to sell a part of the property to pay off a charge created by S. 52. 76 Ind. Cas. 380= A.I.R. 1924 Sind 69.

2. Costs.

——S. 52—Costs of arbitration.

The costs of arbitration cannot be treated as costs of the suit within the meaning of S. 52 of the Act. 19 S.L.R. 35=A.I.R. 1926 Sind 199.

——S. 52—Costs of execution—If includes costs for suit under O. 21, R. 63, C. P. Code.

Where attachment has been revived under O. 21, R. 63, C.P. Code, the proceedings in suit which led to the order of attachment should be considered as proceedings in furtherance of execution and the expression "costs of the execution" should have a liberal interpretation so as to include the costs of the suit brought under O. 21, R. 63 of the Code in which the creditor succeeded in having the order under R. 60 releasing the property from attachment set aside. A.I R. 1929 Cal. 524.

See also A.I.R. 1935 C. 612=63 C. 176=39 C.W.N. 1289=158 Ind. Cas. 574.

3. Executing Court—Duty and powers of.

——S. 52—Duties of executing Court.

The executing Court is not bound to stay its hands if no Receiver to whom the attached property can be made over is in existence at the time of the sale. A.I.R. 1938 Cal. 503=178 Ind. Cas. 262.

——S. 52—Executing Court—Duty and powers of.

The duty which is enjoined on the executing Court under S. 52 is to deliver the property to the Receiver if an application is made in that behalf. But if no application is made, the executing Court is bound to proceed with the sale of the property. There is nothing in the section to indicate that the executing Court is prohibited from doing what is obliged to do and its power to sell the property remains unaltered and unaffected. A.I.R. 1938 Mad. 906=1938 M.W.N. 841= 48 L.W. 279=(1939) 1 M. L. J. 705=182 Ind. Cas. 888.

——S. 52—Executing Court—Duty and powers of—Property sold before adjudication and without executing Court knowing about proceedings—Effect.

Section 52 provides that when notice is given to the executing Court that an insolvency petition has been admitted, the Court shall, on the application, direct the property, if in the possession of the Court to be delivered to the Receiver. Where, however, the property had been sold before the order of adjudication and before the executing Court learns of the insolvency proceedings, and there is no application to have the property delivered to the Receiver, there is no ground for holding that the Court has no jurisdiction to continue the execution proceedings. A.I.R. 1936 Nag. 117 =I.L.R. (1936) Nag. 41=163 Ind. Cas. 127.

——S. 52—Executing Court—Duty and powers of—Stay by executing Court.

The executing Court is not bound to stay its hand if no Receiver to whom the attached property can be made over is in existence at the time of the sale. A.I R. 1935 Cal. 612=39 C.W.N. 1289=63 C. 176= 158 Ind. Cas. 574.

——S. 52—Executing Court—Duty and powers of—Duty of executing Court—Enquiry—Whether competent to investigate or decide questions of title in dispute between insolvent judgment-debtor and any other co-judgment-debtor or stranger.

Once it is established that there is some property against which execution has issued and which is saleable in execution, and it is found that the property so proceeded is against the property of a person who has been adjudicated insolvent, the Court has nothing more to do than to deliver such property to the Receiver. Section 52 does not contemplate any enquiry at all as regards the extent of the rights of the insolvent in the property proceeded against in execution. Whatever has been proceeded against as the property of the person who was subsequently adjudicated insolvent has to be delivered to the Receiver.

Consequently, in an application under S. 52 of the Act where the conditions prescribed therein have been fulfilled, the executiug Court has no other duty to perform than to direct the delivery of the property in question to the Receiver and is no longer competent to investigate or decide questions of title in dispute between the insolvent judgment-debtor and any other co-judgment-debtor or stanger. A.I.R. 1935 Mad. 651=1935 M.W.N. 499=41 L.W. 698=68 M.L.J. 681=58 M. 1056=157 Ind. Cas. 826.

—.—S. 52—Executing Court—Duty and powers of.

The mere admission of an insolvency petition does not debar a creditor from executing his decree against the debtor. But where execution of a decree has issued against any property of a debtor and before sale thereof, notice is given to the executing Court that on insolvency petition has been admitted, the executing Court is bound under S. 52 on application to direct the property attached to be delivered to the Receiver, and the Receiver can sell the property for satisfying the charge on the property for the costs incurred by the attaching creditor. A.I.R. 1935 Cal. 612=63 C. 176=39 C.W.N. 1289=158 Ind. Cas. 574.

——S. 52—Executing Court—Duty and powers of—Sale of property by executing Court, when to be stayed.

It is only when an application is made to the executing Court for the delivery of the property that the Court is required by S. 52 to direct the property, if in its possession, to be delivered to the Receiver. In the absence of such an application the Court is at liberty to sell the property. The Provincial Insolvency Act contains no provision for the Insolvency Court to allow or direct a sale by the executing Court with or without any conditions. A.I.R. 1935 Rang. 317=13 R. 534=158 Ind. Cas. 859.

——S. 52—Executing Court—Duty and powers of.

Under S. 52, the Court executing the decree is to deliver possession to the Receiver and to no one else. Where there is no Receiver in existence till after the sale in execution, the Court executing the decree should not act under S. 52. A.I.R. 1933 All. 559=1933 A.L.J. 1342=146 Ind. Cas. 832.

——S. 52—Executing Court—Duty and powers of—Sale in execution of judgment-debtor's property—Court's knowledge of insolvency proceedings—Sale, validity of—Stay of execution.

Where an executing Court is apprised of the pendency of insolvency proceedings against a judgment-debtor before the sale of the property, such sale in execution is void as against the Receiver although the Receiver may not have made an application for delivery of the property.

The underlying principle of the Provincial Insolvency Act as can be gathered from the provisions of S. 52 is that when the Court is apprised of the pendency of an application for insolvency in another Court and of the further fact that such application had been admitted, it should stay its hands so far as the execution of the decree by the creditors of the insolvent is concerned. A.I.R. 1933 Cal. 561=37 C.W.N. 392=60 C. 696=57 C.L.J. 381=145 Ind. Cas. 597.

——S. 52—Executing Court—Duty and powers of—Delivery of property to receiver.

The effect of attachment of an immovable property under S. 64, C. P. Code, is that the property attached is kept in **custodia legis** during the period of attachment and, therefore, the Court which attaches the property and purports to sell it is in possession within the meaning of S. 52, and must stop the proposed sale and direct the property to be delivered to the Receiver. 109 Ind. Cas. 152=30 Bom. L.R. 455=A.I.R. 1928 Bom. 177.

——S. 52—Executing Court—Duty and powers of.

There is no provision in the Provincial Insolvency Act (5 of 1920) which prohibits a Court executing a decree from selling the judgement-debtor's property merely by reason of its having been given notice that an insolvency petition by him has been admitted. It is only when an application is made to the executing Court for the delivery of the property that the Court is required by S. 52 to direct the property if in its possession to be delivered to the Receiver. Where no such application is made, the Court is at liberty to sell the property and the sale being legal cannot be impeached by the receiver or the creditors. (1 Q.B. 772, Foll.). 80 Ind. Cas. 509=6 L.L.J. 232=A.I.R. 1925 Lah. 158.

4. Procedure.

——S. 52—Precedure—Attachment of properties of debtor in execution of decree—Subsequent appointment by Insolvency Court of interim Receiver—Order of stay of execution and order under S. 52 by Insolvency Court—Legality—Remedy—Proper procedure.

Where, after the attachment of property of a debtor in execution of a decree against him, the Insolvency Court admits a petition for insolvency by the debtor and appoints an **interim** Receiver, it is only the executing Court that can pass an order under S. 52 on an application made to it and not the Insolvency Court and where, on an application by a petitioning creditor, the execution proceedings are already stayed by the Insolvency Court and also an order passed under S. 52, on an application by the decree-holder directing the Receiver to sell the property for realising the costs of the suit and of the execution, there are two alternatives either of which may be adopted. One of these alternatives is for the Insolvency Court to direct the Receiver to make a proper application to the executing Court in order to obtain the necessary order under S. 52 and the other alternative is for the decree-holders to apply to the executing Court for the sale of the properties under attachment in order that their dues may be realized, in which case the insolvency Court has to vacate the stay order which he had already made. A.I.R. 1935 Cal. 150=38 C.W.N. 1122 =155 Ind. Cas. 77 (2).

——S. 52—Procedure—Property attached in execution—Application under S. 52—Order to be made by executing Court indicated.

Property attached in execution of decree is property in possession of the Court and the only order which the Court can make on an application under S. 52 is that such property be delivered to the Receiver if such Receiver has been already appointed; if no such Receiver has been appointed, the Court should proceed with the execution but hold the sale proceeds subject to such orders as the Insolvency Court may pass in the matter. 125 Ind. Cas. 783=A.I.R. 1930 Pat. 406.

——S. 52—Procedure—Sale of property in execution.

Execution proceedings pending prior to application for insolvency—No notice under S. 52 to Executing Court by Receiver—Attached property sold—Decree-holder obtaining payment—No refund possible—Proper course is application under S. 52 and not under C. P. Code, S. 144. 116 Ind. Cas. 192=A.I.R. 1930 Lah. 39.

5. "Receiver."

——S. 52—Receiver—'Receiver' whether includes ad interim Receiver.

The term 'Receiver' in S. 52 includes an **interim** Receiver appointed by the Court before adjudication. A.I.R. 1936 Mad. 819=71 M.L.J. 170=1936 M.W.N. 753 (2)=44 L.W. 194=59 M. 998=170 Ind. Cas. 579

——S. 52—"Receiver", meaning of—Right of interim Receiver to be placed in possession of property attached in execution.

Section 52 clearly contemplates the presentation of an application under that section before the adjudication of insolvency, and therefore the word "Receiver" must, in such a case, include an **interim** Receiver who would be the only Receiver in existence before adjudication. He is, therefore, entitled to ask to be placed in possession of the property attached in execution of the decree-holder's decree and he is entitled to sell that property. A.I.R. 1936 Nag. 120=31 N.L.R. 212 (Sup.)=161 Ind. Cas. 661.

——S. 52—"Receiver," meaning of.

The word 'Receiver' in S. 52 includes an **interim** Receiver. A.I.R. 1934 All. 444=148 Ind. Cas. 417.

——S. 52—"Receiver", whether includes interim Receiver.

According to S. 52 as now amended, there is no difference between a Receiver appointed after adjudication and an **interim** Receiver so far as the right of a decree-holder in a simple money decree to execute his decree by attachment and sale of the insolvent's property is concerned. A.I.R. 1933 Lah. 192=34 P.L.R. 41=141 Ind. Cas. 47.

——S. 52—"Receiver."

Section 52 contemplates a Receiver with power to sell. Such power is possessed only by a Receiver appointed after adjudication and not by a Receiver appointed **ad interim**. 128 Ind. Cas. 292=A.I.R. 1930 Lah. 851.

——S. 52—"Receiver."

The "Receiver" referred to in S. 52, is the Receiver appointed under para. 1 of S. 56 of the Act after the passing of the order of adjudication and not the interim Receiver appointed under S. 20 of the Act. The powers under S. 52 cannot be exercised by an interim Receiver. 19 S.L.R. 35=A.I.R. 1926 Sind 199.

6. Secured creditor.

——S. 52—Secured creditor—Stay of execution on condition of execution of mortgage in favour of decree-holder—Adjudication of judgment-debtor as insolvent—Validity of mortgage against other creditors.

The High Court in appeal ardered that the decree-holder should stay his execution proceedings against the property of the judgment-debtor on condition that the judgment-debtor executed a registered mortgage deed of the land attached in favour of the decree-holder for his benefit. The mortgage deed was accordingly executed. The decree-holder succeeded in the appellate proceedings. In the meantime, the judgment-debtor was adjudicated an insolvent on the application of the other creditors of the judgment-debtor.

Held, that as the decree holder was the person for whose benefit the mortgage security of the judgment-debtor's attached property had been created; he had become a secured creditor and was, therefore, entitled to a preferential right to the security over the other creditors as well as the Official Receiver who had subsequently come in. A.I.R. 1931 Lah. 298=32 P.L.R. 180=133 Ind Cas. 282.

7. Miscellaneous.

——S. 52—Appeal—Proceedings for sale of property in execution of decree creating charge—Insolvency of judgment-debtor—Application by Receiver for possession—Maintainability—'Property in the possession of the Court,' meaning of.

Property which a judgment—creditor is seeking to bring to sale on the ground that the decree creates a charge upon it is not property in the possession of the Court within the meaning of S. 52 and the executing Court has, therefore, no power to direct such property to be delivered to the Receiver.

Where an **interim** Receiver makes an application in execution for enforcing the right conferred on him hy S. 52, and an order is made on such application, no appeal lies therefrom. Such an order comes neither under S. 4, Civil P.C., nor falls within the definition of "decree" in the Code. A.I.R. 1933 Mad. 152=37 L.W. 114=1933 M.W.N. 43=64 M.L.J. 119=56 M. 453=141 Ind. Cas. 817.

——S. 52—Miscellaneous—Cessation of attachment.

Sale stopped and execution struck off as a result o an application by Receiver under S. 52—The attachment of property before judgment does not cease. A.I.R. 1940 Mad. 733=1940 M W.N. 519=193 Ind. Cas. 138.

——S. 52—Miscellaneous—Order as to validity.

An application under S. 52 to the executing Court to deliver property to the Receiver can only be a valid application if the receiver has been clothed by the insolvency Court with powers to take possession of the insolvent's property. 94 Ind. Cas. 126=23 M.L.W. 513=A.I.R. 1926 Mad. 606.

——Ss. 52 and 2 (d)—Miscellaneous—"Property."—Power of Hindu father.

The power of a Hindu father to dispose of the family property to satisfy his ligitimate debts is included in the term 'property'. On the insolvency of the father, the power vests in the Official Receiver who can therefore sell the sons' shares for the benefit of the father's creditors. 32 Bom. L. R. 1362=A. I. R. 1931 Bom. 50.

——S. 53. Synopsis.

1. Amendment. See also PROVINCIAL INSOLVENCY ACT, S. 53—LIMITATION.
2. Appeal.
3. Applicability.
4. Application under.
5. Bad faith.
6. Burden of proof.
7. Construction.
8. Defence.
9. Duty of Court.
10. Effect of order.
10. (a) Ex parte Order.
11. Fraudulent preference.
12. Fraudulent transfer.
13. Good faith.
14. Jurisdiction.
15. Leave of Court.
16. Limitation.
17. Pending proceedings.
18. Power of Court.
19. Procedure.

20. Refund of consideration.
21. Res judicata.
22. Revision.
23. Right to apply.
24. Scope.
25. Second appeal.
25-a. Transfer.
26. Transfer from transferee.
27. Valuable consideration.
28. Miscellaneous.

1. Amendment.

See also PROVINCIAL INSOLVENCY ACT, —LIMITATION

——S. 53—Amendment—Retrospective effect.

The amendment made by Act (10 of 1930) in S.53 has retrospective effect and applies to transfers made before the date of the amendment and to proceedings pending at the time when the amendment came into force. It does not introduce a new period of limitation but has only clarified the meaning of the old section. A.I.R. 1932 Oudh 267=9 O.W.N. 529=7 Luck. 713=138 Ind. Cas. 711.

——S. 53—Amendment—Retrospective effect.

The amendment of S. 53 made by Act (10 of 1930) is retrospective in effect and applies to transfers made before the date of the amendment.

The amendment does not impair any vested rights but merely clarifies the meaning of the section. A.I.R. 1932 Oudh 77 (1)=8 O.W.N. 1371=7 Luck. 403=135 Ind. Cas. 383.

2. Appeal

——S. 53—Appeal—Jurisdiction of Appellate Court on annulment of adjudication.

A creditor applied and obtained sanction to institute proceedings under Ss. 53, 54 against an alienation by the insolvent. The application under Ss. 53, 54 was heard and dismissed on the ground that the transaction in question was not in fraud of creditors and was supported by consideration. The aggrieved creditor appealed against the decision. During the pendency of appeal, the adjudication was annulled, but, the Court ordered the property to continue to vest in the Receiver. The question arose whether, on the annulment of adjudication, the jurisdiction of the Appellate Court still subsisted :

Held, that the annulment did not put an end to the jurisdiction of the Appellate Court to hear appeal. A I.R 1944 Mad. 49=56 L.W. 654=(1943) 2 M.L.J. 492=1943 M.W.N. 701=216 Ind. Cas. 75.

——Ss. 53, 54—Appeal—Application by Official Receiver under Ss. 53 and 54, dismissed—Appeal—Order of adjudication, if can be Annulled.

It is not open to the District Judge in an appeal by the Official Receiver against the dismissal of his application under Ss. 53 and 54 to annul the order of adjudication passed against the insolvent. The Judge having seisin of the insolvency proceedings is the trial Judge and he alone can deal with such a matter unless it comes before the District Judge on appeal. A.I.R. 1942 Mad. 483=(1942) 1 M.L.J. 588=1942 M.W.N. 430=I.L.R. (1942) Mad. 862=55 L.W. 301=202 Ind. Cas. 490.

——S. 53—Appellate Court finding wrong allocation of onus—Remand.

Where the District Judge and the opposite party were under a misapprehension as to the onus of proof and it is probable that the opposite party were induced not to offer any evidence when they saw that the party on whom the onus was believed to lie, did not offer any evidence, the proper course is to send the case back to the District Judge to determine the matter after giving an opportunity to the opposite party to adduce evidence and to the appellants to adduce rebutting evidence. (1936) 164 Ind. Cas. 808=2 B.R. 748=17 P.L.T. 626.

——S. 53—Appeal—Receiver's or creditors' right to appeal after annulment of adjudication.

Where, soon after the dismissal of an application by the Receiver to set aside a transfer, the adjudication is annulled, there is no existing insolvency upon which an order in favour of the Receiver or the scheduled creditors as such can be based. The Receiver has ceased to exist and consequently, no appeal is competent by the Receiver or a creditor from the order of dismissal. A.I.R. 1935 Rang. 498=160 Ind. Cas. 861.

——S. 53—Appeal—Necessary parties.

In an appeal from an order dismissing an application by a creditor for setting aside sale by the Receiver, the Official Receiver is a proper party. A.I.R. 1935 Mad. 433=41 L.W. 461=1935 M.W.N. 494=156 Ind. Cas. 284 (2).

——S. 53—Appeal.

A creditor is a person aggrieved by an order in favour of another creditor in a proceeding under Ss. 53 and 54. 61 Ind. Cas. 924 and 39 All. 152, Not Foll. 62 Ind. Cas. 761; 52 Ind. Cas. 188; 36 Ind. Cas. 761 and 51 Ind.Cas. 461, Foll. 79 Ind.Cas. 395=47 Mad. 673=18 M.L.W. 857=33 M.L.T. 196=A.I.R. 1924 Mad. 345.

——Ss. 53, 75—(1907), Ss. 36 and 46—Appeal—"Persons aggrieved by order", meaning of—Right of appeal against adverse order.

Per **Krishnan, J**:—A creditor-respondent impeaching a sale by the insolvent as sham, can appeal against an adverse order of Court under S. 36. A person is agrieved by an order under S. 36 when :—1. He is a party to an order, or if he is not when he is bound by the order and it affects his person or property, injuriously ; 2. He is a party to an order and has suffered a "legal grievance" thereby as something was wrongfully refused which he could demand or something was wrongly granted to some one which he had a right to object to, though he was not beneficially interested in the result.—A person not a party to an order and bound by it at all and whom the order does not touch though it may directly affect him or disappoint him of a benefit which he might have received if the order had been otherwise and a person who, though a party, has suffered no grievance by the order, legal or beneficial is not a person aggrieved by the order. 36 Ind. Cas. 771 (Mad.).

3. Applicability.

——S. 53—Applicability--Purchase from transferee in good faith and for valuable consideration—If can be avoided.

A transfer by the transferee cannot be avoided by the Official assignee unless it was found that such transfer was not in good faith and for valuable consideration. Where there is good faith the Official Assignee cannot avail himself of S. 53 of the Provincial Insolvency Act. 1950 A.W.R. 267.

——S. 53—Applicability—Conditions for avoiding transfer.

The transfer can be avoided even if only one of the two conditions are not fulfilled. It can be upheld only

if both the conditions are complied with. The Protection given to the transferee under the section is limited to cases where the transfer is found to be both in good faith and for valuable consideration. A.I.R. 1941 All. 316=1941 A.L.J. 387=1941 A.W.R. 229=I.L.R. (1941) All. 603=196 Ind. Cas. 132.

——S. 53—Applicability—Voluntary transfer, what is—Waqf in pursuance of contract.

A transfer which the debtor is bound to make in pursuance of a contract entered into prior to his insolvency petition is voluntary within the meaning of S. 53 if it is not in terms of the contract. Consequently, where **a waqf,** which the debtor was found to create under a contract, is found to be invalid, the transfer is voluntary and is liable to be annulled if it falls within the mischief of S. 53. A.I.R. 1940 Cal. 417=I.L.R. (1940) 2 Cal. 189=71 C.L.J. 432=44 C.W.N. 718=193 Ind. Cas. 540.

——S. 53—Applicability.

Section 53 besides voluntary transfers, applies to transfers **in invitum.** A.I.R. 1940 Mad. 749=1940 M.W.N. 259.

——S. 53—Applicability.

When the mortgage has been executed two years before the insolvency of the mortgagor, S. 53 does not apply. A.I.R. 1940 Mad. 564=51 L.W. 429=1940 M.W.N. 365=(1940) 1 M.L.J. 647=192 Ind. Cas. 810.

——S. 53—Applicability.

In proceedings under S. 53, the two points that have got to be determined by the Court are good faith on the part of the transferee and valuable consideration for the transfer. A.I.R. 1940 Nag. 393=1940 N.L.J. 420=I.L.R. (1940) Nag. 564=190 Ind. Cas. 885.

——S. 53—Applicability.

Transfer of property to a third person made in good faith and for valuable consideration is not void under S. 53 even if it has the effect of preferring some creditors over others. A.I.R. 1940 Oudh 205=1940 O.W.N. 146=1940 A.W.R. 67=185 Ind. Cas. 771.

——S. 53—Applicability.

The fact that there are certain circumstances appearing in the evidence on the side of the alienees which, in the absence of an explanation, would offer ground for suspicion, is not sufficient for coming to the conclusion that alienations fall under S. 53. A.I.R. 1938 Mad. 285=181 Ind. Cas. 225.

——S. 53—Applicability.

Even where an order of adjudication is based on the basis of fraudulent preference, the Receiver is entitled to show if he can, that there was no consideration and to have the transaction avoided under S. 53 and not under S. 54. The rule of English Law on the point cannot be applied to a case under the Prov. Insol. Act. A.I.R. 1937 Rang. 27=14 Rang. 748=167 Ind. Cas. 73.

——S. 53—Applicability—Transaction ab initio a nullity—Whether can be formally annulled—Annulment, when can take place.

Where a transaction is **ab initio** a nullity, it cannot be formally "annulled". It can only be declared invalid. Annulment applies to voidable transactions such as those lying under S. 53, which are good until avoided and annulled. A.I.R. 1936 Rang. 54=161 Ind. Cas. 687.

——S. 53—Applicability—Court's power to set aside benami acquisition of property.

Where a person, a few days before applying to be adjudicated as an insolvent, purchased a property in another person's name and it was proved that the real purchaser was the insolvent and another's name was merely inserted in the sale-deed in order to defeat creditors:

Held, that the case was not one within the purview of S. 53, because the allegation here was not that the insolvent had transferred property but that the insolvent acquired certain property before his insolvency, but acquired it in the name of somebody else, but the Court could, on being satisfied as to the fraudulent nature of the transaction, set it aside. A.I.R. 1935 All. 982=1935 A.L.J 1158=1935 A.W.R. 1118=159 Ind. Cas. 616.

——Ss. 53, 54—Applicability—Mortgage by father and sons—Father alone adjudicated—Mortgage can be avoided under Ss. 53 and 54 only in respect of father's share.

Where a father executed a mortgage of properties belonging to him and his two minor sons to one of their creditors acting on his own behalf and as guardian of his minor sons, and the father alone was subsequently adjudged an insolvent:

Held, that the transfer by the insolvent father alone to the extent of his own share therein would come within S. 54 of the Prov. Insol. Act. The transfer of the sons' shares cannot be dealt with either under S. 53 or S. 54 of the Insol. Act though it may be sought to be avoided under S. 53 of the T. P. Act. A.I.R. 1935 Mad. 246=1934 M.W.N. 801=155 Ind. Cas. 611.

——S. 53—Applicability.

A transfer to a creditor may be dealt with under S. 53. Prov. Insol. Act. A.I.R. 1933 Lah. 43=33 P.L.R. 1058=140 Ind. Cas. 598.

——Ss. 53, 54—Applicability.

When a debtor against whom a petition in insolvency has been presented dies before adjudication and the proceedings are continued under S. 17, the Official Receiver or creditors can invoke the power of the Court to set aside settlements and alienations voidable under Ss. 53, 54. A.I.R. 1933 Mad. 25=1932 M.W.N. 1102=63 M.L.J. 727=37 L.W. 75=141 Ind. Cas. 822.

——S. 53—Applicability.

Obiter.—Section 53 is not inapplicable to a case of a transfer – in favour of a creditor. A.I.R. 1933 Mad. 185=37 L.W. 130=64 M.L.J. 382=1933 M.W.N. 312=141 Ind. Cas. 101.

——S. 53—Applicability.

Section 53 has no application to a case when a transaction is wholly fictitious. A.I.R. 1932 Nag. 109=28 N.L.R. 89=139 Ind. Cas. 288.

——S. 53—Applicability.

A transfer by a Court sale in execution is not entirely outside the scope of S. 53. A.I.R. 1931 Mad. 597=34 L.W. 547=1931 M.W.N. 287=135 Ind. Cas. 544.

——S. 53—Applicability.

Section 53 applies where the existence of transfer is admitted; on the other hand S. 4. applies if the transfer or the existence of right claimed by the objector is denied by Receiver. 123 Ind. Cas. 539=A.I.R. 1930 Lah. 180.

——S. 53—Applicability.

Where a person makes a gift in favour of his wife and subsequently applies for insolvency two years after

the gift, the transfer is one not coming within S. 53. The creditors must file a regular suit to set aside the same. 114 Ind. Cas. 126=5 O.W.N. 964.

——S. 53—Applicability.

Deed by insolvent. constituting a person, in fact a selling agent, comes within the mischief of S. 53. 30 M.L.J. 415, Diss. from. 105 Ind. Cas 138=50 Mad. 815=26 M.L.W. 248=1928 M.W.N. 9=A.I.R. 1927 Mad. 869=53 M.L.J. 742.

——S. 53—Applicability.

Official Assignee praying for action under S. 53 or in the alternative under S. 54—Alience not proving that he was creditor—Action under S. 53 is justified. 99 Ind. Cas. 683=A.I.R. 1927 Mad. 412.

——S. 53—Applicability.

An insolvent nominally transferred certain property of his to one **P**. The deed directed **P** to pay certain amounts to one **A** a mortgagee but no payments were made by **P**. Pending the appeal from order annulling adjudication, **P** sold the land to the nephew and son-in-law of the insolvent who paid off out of the consideration the mortgagee **A**. The order annulling the adjudication being reversed:

Held, that the conveyance by the insolvent in favour of **P** was voidable under S. 53 as not being in good faith and for valuable consideration:

Held, also that the payment by the second vendee to the mortgagee would not make the sale in his favour a **bona fide** one for consideration as he was aware of the insolvency proceedings and as his transfer was obtained pending the appeal against the annulment of the adjudication.

Held, further that the covenant to pay **A** in the sale-deed to **P** was not binding personally on the second transferee. 76 Ind. Cas. 1006=18 M.L.W. 610=1923 M.W.N. 780=A.I.R. 1924 Mad. 358.

——S. 53—Applicability.

An application for an adjudication that certain property is still the property of the insolvent and that no valid transfer thereof took place does not fall within section 36. 4 L.L.J. 444=A.I.R. 1921 Lah. 288.

——S. 53—Applicability.

The section applicable to the annulment of the transfer by an insolvent to a person other than a creditor is S. 53, and the proper person to move in the matter of getting the transfer annulled is the Receiver. 15 C.W.N. 253, Foll. 62 Ind. Cas. 924=A.I.R. 1921 Lah. 81.

4. Application under.

——S. 53—Application by creditor for annulment of transfer—If abates on his death—C.P. Code, O. 22, Rr. 3 and 4.

If a creditor applying for the annulment of a transfer made by the insolvent dies, no question of abatement of his application can arise. The property having vested in the Court for the benefit of the creditors of the insolvent, it is the Court and not a creditor which really has the "right to sue". What creditor does or can do is merely to move the Court to take a particular action for the benefit of the general body of creditors. The right of a creditor to move the Court is not "a right to sue" the transferee of the insolvent's property. It therefore does not fall within the purview of O. 22, Rr. 3 and 4, C.P. Code. I.L.R. (1950) Nag. 331=1950 N.L.J. 105=A.I.R. 1951 Nag. 268.

——S. 53—Application under—Application by creditor for annulment of transfer dismissed for default—Fresh application by his legal representative—Maintainability.

The dismissal for default of an application by a creditor for annulment of a transfer made by an insolvent, does not bar a subsequent fresh application by the legal representatives of the creditor. Indeed, such an application by the creditor himself, if alive, would be maintainable. 49 Ind.Cas. 229, rel. on. I.L.R. (1950) Nag. 331=1950 N.L.J. 105=A.I.R. 1951 Nag. 268.

——S. 53—Application under—Joint trial with consent—Each alienation should be dealt with separately and evidence considered separately.

Where the trial of four separate applications under S. 53, together was with the consent of the parties, it is not open to the applicants to take objection to the joint trial. This, however, does not mean either that the evidence otherwise irrelevant becomes relevant because the applications were heard together, or that because some alienations are found to be fraudulent as being not in good faith the others must necessarily, on that account, partake of the same character. In other words, in spite of the joint trial of the applications, the case as regards each alienation must be dealt with separately, and the evidence relating to it considered separately. A.I.R. 1938 Mad. 285=181 Ind. Cas. 225.

——S. 53—Application under.

Where a receiver reports to the effect that a transfer is fraudulent and prays that the transfer might be annulled under S. 53, the Court should treat the report as an application under S. 53 and go into the matter for itself after taking evidence. A.I.R. 1932 Cal. 151=58 Cal. 1352=136 Ind. Cas. 143.

5. Bad faith.

——S. 53—Bad faith—What is.

For a man practically in a state of insolvency, to alienate his last remaining property and that only an expectancy, to a relative, for a sum only part of which was paid would indicate that there was bad faith and the transaction must be set aside. A.I.R. 1939 Lah. 322=41 P.L.R. 190=184 Ind. Cas. 463.

——S. 53—Bad faith—What is.

It is not **mala fide** for a creditor (except where his transfer occurs in three months before the petition and may become fraudulent under S. 54) to accept security for his debt merely because he may 'not be wholly ignorant' that the debtor is so embarassed that there may not be enough left for all the creditors and that some of them may receive less than he has got in case the debtor becomes insolvent on a petition presented within two years after the transaction. A doctrine contrary to this would almost automatically enlarge the period of fraudulent preference from three months to two years. A.I.R. 1934 Mad. 294=1933 M.W.N. 1049=39 L.W. 449=150 Ind. Cas. 339.

——S. 53—Bad faith—Inference of.

In the vicissitudes of business, firms do sometimes part with their property to get cash or satisfy old creditors and thus keep their credit in the market. But this does not necessarily imply that they are acting **mala fide** nor does it lead to the conclusion that the transferees had become aware of their difficulties. A.I.R. 1934 Pesh. 126=158 Ind. Cas. 90.

6. Burden of proof.

——S. 53—**Burden of proof.**

The onus is on the party seeking to set aside the transfers to prove his case. A.I.R. 1945 P.C. 38=1945 Pesh. L.J. 38=1945 A.L.J. 34=221 Ind. Cas. 603 (PC).

——S. 53—**Burden of proof.**

In an application for annulment under S. 53, it is for the Official Receiver to prove that the transfer is not "in good faith and for valuable consideration." A.I.R. 1941 All. 316=1941 A.W.R. 229=1941 A.L.J. 387=I.L.R. (1941) All. 603=196 Ind. Cas. 132.

——S. 53—**Burden of proof.**

Where, in a suit, by the Receiver of the insolvents' estate under S. 53 to set aside the alienation, alienee is found to have been in a dominant position on the date of the alleged fraudulent transfer, and it is also found that the alienee is in possession of the properties, the onus lies on the alienees to prove how they had come by them, as against the Receiver who is trying to secure them as belonging to the insolvent's estate. The alienee's possession of the said properties does not necessarily indicate that he held them under a valid title, which has, in the circumstances to be made out by affirmative evidence. A.I.R. 1940 P.C. 211=45 C.W.N. 317=7 B.R. 149=52 L.W. 757=22 P.L.T. 399=43 Bom. L.R. 459=73 C.L.J. 179=1941 A.W.R. 6=1941 Rang. L.R. 355=190 Ind. Cas. 643 (P.C.).

——S. 53—**Burden of proof.**

The onus to prove want of good faith on the part of the transferee is on the Receiver. A.I.R. 1939 Cal. 503=60 C.L.J. 329=43 C.W.N. 575=183 Ind. Cas. 635.

——S. 53—**Burden of proof.**

In a proceeding under S. 53, the onus of proof is on the Receiver in the first instance. A.I.R. 1938 All. 555=1938 A.L.J. 878=1938 A.W.R. 566=I.L.R. (1938) All. 800=178 Ind. Cas. 75.

——S. 53—**Burden of proof.**

In an application preferred by the Official Receiver under S. 53, Prov. Insol. Act, 1920, or S. 55, Presi. Towns Insol. Act, to annul a transfer of property by the insolvent, the **onus probandi** is not on the transferee but upon the Official Receiver to establish that the transaction was not **bona fide** and for value and was, in consequence, voidable as against him. A.I.R. 1938 Bom. 449=40 Bom. L.R. 884=I.L.R. (1939) Bom. 1=178 Ind. Cas. 373.

——S. 53—**Burden of proof—How discharged.**

The burden of proving want of good faith on the part of alienee is not discharged by mere vague allegations of fraud by one witness going into the witness-box and saying that all the alienations are fraudulent. The burden can be discharged only if circumstances are established from which it can be reasonably inferred that the alienee acted in bad faith and that there was no valuable consideration for the alienation. A.I.R. 1938 Mad. 285=181 Ind. Cas. 225.

——S. 53—**Burden of proof—Discharge—Duty of Court.**

In an action under S.53 to set aside a transaction, it is essential for the Court to consider all the facts in relation to each other and weigh them as a whole and then come to a conclusion whether the creditor has discharged the burden. A.I.R. 1938 Mad. 370.

——S. 53—**Burden of proof—Onus, when on transferee—Onus, when discharged.**

When the genuineness of a transaction is challenged even by the insolvent, the duty is cast upon the transferee then to defend his transfer on both grounds that are mentioned in S. 53, and the burden, therefore, shifts on to him to establish not only good faith but valuable consideration. This he can only establish if he leads unimpeachable evidence to prove that prior to the transaction impugned, any debts were due to him from the insolvent and that he was not merely sheltering the property for the insolvent's benefit as against his **bona fide** creditors. Mere production of books of account, unattended by any disinterested statement to the effect that the accounts were genuine or that the sums covered by the accounts were actually advanced to the insolvent, would not be enough to discharge the onus. A.I.R. 1937 Lah. 801=39 P.L.R. 1025=175 Ind. Cas. 538.

——S. 53—**Burden of proof—Good faith.**

Where the sale by the insolvent has taken place only eleven months before the application for adjudication and the circumstances raise a strong presumption that the vendee was not acting in good faith, it is for the vendee and the insolvent to rebut that presumption and prove that the insolvent's financial position was sound at the time of the sale, and both of them acted in good faith. A.I.R. 1937 Lah. 441=173 Ind. Cas. 531.

——S. 53—**Burden of proof.**

Under S. 53, the onus of proof of absence of good faith and consideration lies on the Official Receiver. (1937) 169 Ind. Cas. 975.

——S. 53—**Burden of proof.**

The burden of proving that the transfer was made in bad faith aud for no valuable consideration lies on the Official Receiver. A.I.R. 1937 Rang. 276=14 R. 704=170 Ind. Cas. 471.

——S. 53—**Burden of proof.**

Where a transaction is impeached under S. 53, the burden of proof is on the person alleging want of consideration. (1936) 38 P.L.R. 965.

——S. 53—**Burden of proof—Evidence.**

Onus on Receiver to prove want of good faith—Suspicious circumstances do not amount to fraudulent nature. (1936) 38 P.L.R. 212.

——S. 53—**Burden of proof.**

In the matter of annulment of transfers under S. 53, the onus lies on the person challenging the **bona fides** of the transfer and not on the transferee. 164 Ind. Cas. 808=2 B.R. 748=17 P.L.T. 626.

——S. 53—**Burden of proof—Discharge of burden of proof—Shifting of.**

The burden of proof in a suit to set aside a fraudulent transfer under S. 53 is on the Official Receiver and can only be discharged by showing circumstances from which the strong inference can be drawn that the transfer impugned was made either **mala fide** or in the absence of valuable consideration. Where he discharges the **prima facie** burden, it is for the transferee to explain the case which gave grounds for suspicion and to show that there was, in fact, an explanation which the Court could deem to be satisfactory. A.I.R. 1936 Rang. 506=166 Ind. Cas. 90.

——S. 53—**Burden of proof—Circumstances amounting to fraudulent nature of transfer—Necessity of explanation.**

When a transfer is shown to have taken place directly after the insolvent had been served with a summons and is one of two transfers by which he got rid of all his immovable properties, and when it is known that the other has been admitted by the transferee to be a fraudulent one, and that this transfer was to a mere child, the circumstances certainly require a very full explanation. A.I.R. 1936 Rang. 506=166 Ind. Cas. 90.

——S. 53—**Burden of proof.**

In a proceeding under S. 53, the onus lies upon the applicant to prove that the transfer was not made in favour of a purchaser or an encumbrancer in good faith and for valuable consideration. A.I.R. 1935 Rang. 53=12 Rang. 625=153 Ind. Cas. 395.

——S. 53—**Burden of proof.**

The creditors of an insolvent have **locus standi** to maintain an appeal against an order refusing to annul a mortgage by the insolvent on an application by the Receiver. The burden of proof is on the creditors to prove that the transaction in question was not made in good faith or for valuable consideration. A.I.R. 1934 Lah. 968=154 Ind. Cas. 708.

——S. 53—**Burden of proof.**

Under S. 53, it is for the Official Receiver to prove **mala fides**. A.I.R. 1934 Mad. 294=1933 M.W.N. 1049 =39 L.W. 449=150 Ind. Cas. 339.

——S. 53—**Burden of proof.**

In an application by creditors under S. 53 for annulment of transfers by the insolvent, the burden of proving that the transfers were not made in good faith and for consideration lies on the creditors. A.I.R. 1934 Oudh 368=11 O.W.N. 601=150 Ind. Cas. 835.

——S. 53—**Burden of proof.**

The onus of proving the absence of good faith and payment of consideration in a proceeding under S. 53, lies on the official Receiver. A.I.R. 1934 Pesh. 126=153 Ind. Cas. 90.

——S. 53—**Burden of proof.**

Where the Receiver in seeking to set aside a transfer under the provisions of S. 53, the onus is upon him to prove that it was not made in good faith and for valuable consideration. A.I.R. 1933 Cal. 689=37 C.W. N. 675=147 Ind. Cas. 449.

——S. 53—**Burden of proof.**

The onus of proving that a transfer had not been made in good faith and was not for valuable consideration is on the Official Receiver even in the case of a transfer which has been made within the two years prescribed by S. 53. A.I.R. 1933 Lah. 43=34 P.L.R. 1058= 140 Ind. Cas. 598.

——S. 53—**Burden of proof.**

In proceedings under S. 53, the burden of proof is upon the Official Receiver or on the party who questions the **bona fides** of the sale-deed. A.I.R. 1933 Mad. 271=1932 M.W.N. 821=143 Ind. Cas. 372.

——S. 53—**Burden of proof—Fraudulent transfer—Onus—Evidence**

Fraud can be proved only by proof of circumstances which indicate fraud.

If a creditor comes to Court and merely alleges that a transfer within two years of insolvency has not been made in good faith and for valuable consideration the burden of proof rests initially on him. But where detailed allegations are made and some of these allegations are admitted, this is not necessarily the case. A.I.R. 1933 Nag. 188=29 N.L.R. 164=144 Ind. Cas. 844.

——S. 53—**Burden of proof.**

Under S. 53, the onus lies on the person challenging the **bona fides** of the transfer and not on the transferee. A.I.R. 1933 Pat. 564=14 P.L.T. 739=145 Ind. Cas. 524 (1).

——S. 53—**Burden of proof.**

In a proceeding to set aside a transfer under S. 53, the burden of proof is upon the Receiver to show that the transfer sought to be impugned had not been made in good faith and for full consideration. A.I.R. 1932 All. 243=1932 A.L.J. 53=137 Ind. Cas. 235.

——S. 53—**Burden of proof.**

In an application to set aside alienation made by the insolvent the onus of proof to show that transfer was made in good faith and for valuable consideration is on the Official Receiver and not on the transferee. 1932 M.W.N. 59.

——S. 53—Burden of proof—The onus of proving that a transfer is void under S. 53, is on the Official Receiver and not on the transferee. A.I.R. 1931 P.C. 75=35 C. W. N. 577=1931 A.L.J. 444=53 C. L. J. 373=60 M. L. J. 652=1931 M.W.N. 615= 9 Rang. 170=33 Bom. L.R. 867=58 I.A. 115=34 L.W. 36= 131 Ind. Cas. 767 (P.C.).

——S. 53—**Burden of proof—Transfer within two years—Presumption.**

Every transaction into which an insolvent enters within two years previous to his insolvency is treated by the Prov. Insol. Act as **prima facie** invalid, and the burden is on the insolvent or the alienee to show that the transaction impeached was a valid and **bona fide** transaction. Good faith and valuable consideration must be proved by the alienee, or by the person who supports the transfer. A.I.R. 1931 Pat. 14=9 Pat. 839 =129 Ind. Cas. 129.

——S. 53—**Burden of proof—Relief under S. 53—Statute barred—Special provisions of the onus of proof are inapplicable.**

Section 53 casts a heavy burden on the transferee to prove his **bona fides**. If the relief of the Official Receiver under S. 53 is statute barred, it is not open to the Court to rely upon the special provisions of that section for the purpose of throwing the onus on the transferee to prove the **bona fides** of his transaction. While entertaining such an application under S. 4 of the Act, the Court will deal with the question of onus in the same manner as in an ordinary suit. 115 Ind. Cas. 330=A.I.R. 1929 Sind 94.

——S. 53—**Burden of proof—Transfer of Property Act, S. 53—Provincial Insolvency Act, S. 53—Difference indicated.**

Transfers in good faith and for valuable consideration are protected under the Transfer of Property Act and also under the Insolvency Act but there is this difference that under the latter Act it is the trans-

feree who must show that the transaction was in good faith and for valuable consideration. 104 Ind. Cas. 822=46 C.L.J. 168=A.I.R. 1927 Cal. 766.

——S. 53—Burden of proof—Consideration and good faith.

In the case of application under S. 53 the burden is on the transferee to prove that the transaction under which he claims was for valuable consideration and made in good faith. 101 Ind. Cas. 588=28 P.L.R. 275=A.I.R. 1927 Lah. 415.

——S. 53—Burden of proof.

The burden lies on the person who tries to bring himself within the exception by asserting that he was a purchaser or incumbrancer in good faith and for valuable consideration. 89 Ind. Cas. 357=47 All. 864=23 A.L.J. 792=6 L.R.A. Civ. 397=A. I. R. 1926 All. 29.

——S. 53—Burden of proof.

Suit to establish a claim on mortgage deed by secured creditor—Plaintiff must prove good faith and consideration of the mortgage. 91 Ind. Cas. 4=26 P.L.R. 812=A.I.R. 1926 Lah. 307.

——S. 53—Burden of proof—Good faith and consideration.

Where an incumbrance made within two years of adjudication is challenged in the Insolvency Court, the onus lies on the incumbrancer to prove both good faith and valuable consideration : 14 M.L.T. 150; 31 M.L.J. 133; 43 Mad. 739; 19 C. W. N. 865 and 39 All. 95, Rel. on. 92 Ind. Cas. 5=20 S.L.R. 231=A. I. R. 1926 Sind 140.

——S. 53—Burden of proof.

Transfer by insolvent within 2 years before insolvency —Court can set aside at instance of creditor—Onus of proving good faith is on transferee. 71 Ind. Cas. 418 =6 N.L.J. 47=19 N.L.R. 32=A.I.R. 1923 Nag. 97.

——S. 53—Burden of proof—Mortgage within two years of insolvency.

Where a mortgagee seeks to enforce a mortgage executed within two years of the adjudication, the burden of proving good faith and consideration rests heavily on the mortgagee although the Official Assignee has moved to expunge proof of the mortgage which he had admitted under S. 36 of Provincial Towns Insolvency Act, Sch. II, as such admission is not an adjudication. 60 Ind. Cas. 205=43 Mad. 739=28 M. L. T. 258=39 M.L.J. 345.

——S. 53—Burden of proof—Good faith.

The transferee should show that the transfer to him was both for valuable consideration as well as in good faith. 43 Mad. 739, Foll.

The mere fact that valuable consideration has been paid for the transfer does not necessarily lead to an inference of good faith. 62 Ind. Cas. 289=17 N.L.R. 69=A.I.R. 1921 Nag. 103.

——S. 53—(1907), S. 36—Burden of proof—Good faith—Presumption—Good faith may be presumed if a transfer is supported by consideration. 50 Ind. Cas. 117 (All.)

——S. 53—(1907), S. 36—Burden of proof—Transfer —Benami—Onus—Antecedent debts—Claim for dower.

The onus of proving that a transaction impugned under S. 36 of the Provincial Insolvance Act was carried out in good faith and for valuable consideration is on the transferee. Antecedent debts might constitute a good consideration. So also claims for dower due to the wife from the husband. Where an insolvent transferred property to his wife in lieu of dower within two years before adjudication and continued in possession of the property along with his wife and it was found that the dower debt was genuine and the value of the property not incommensurately large, the transfer is valid and cannot be impugned. 22 C.W.N. 709=44 Ind. Cas. 915.

——Ss. 53, 41—(1907), Ss. 36 and 44—Burden of proof—Enquiry under—Statements recorded by Official Receiver.

Omission to object to evidence going on record. The Official Receiver's report is evidence only for S. 44. Statements recorded in an enquiry by the Official Receiver cannot be treated as evidence by a Court in proceedings before it under S. 36. 36 All. 549, Appr. The burden of proving that a document is in fraud of creditors is on the party pleading fraud. 19 All. 76 P.C., foll. Such statements cannot be affidavits of the persons making them. 36 Ind. Cas. 906 (Mad.).

——S. 53—(1907), S. 36—Transfer by Insolvent—Burden of proof.

S. 36 lays the onus upon the transferee to prove that the transfer made by an insolvent was made in good faith and for valuable consideration. 19 C.W.N. 865=29 Ind. Cas. 814.

——Ss. 53, 54—(1907), Ss. 36 and 37—Burden of proof—Mortgage by insolvent—Bona fide transfer for value.

S. 37 has no application where the mortgagee of the insolvent is not a previous creditor. The mortgagee is entitled to show under S. 36 that he was a **bona fide** transferee for value. 138 P.W.R. 1918=46 Ind. Cas. 667.

——S. 53—(1907), S. 36 A.—Burden of proof—T. P. Act, Ss. 59 and 100—Invalid mortgage—Charge.

Under S. 36, Provincial Insolvency Act, the mortgagee must prove that a mortgage was executed by an insolvent within two years of his being adjudged as such, in good faith and for valuable consideration and therefore it binds on the Receiver. 31 M.L.J. 133=(1916) 2 M.W.N. 236=36 Ind. Cas. 903.

——S. 53—(1907), S. 36—Burden of proof—Transfer of Insolvent.

The only proof that is necessary when a transfer by an insolvent is impeached under S. 36, is that it was effected within two years prior to the act of insolvency or the declaration of insolvency. If this is done the onus is shifted upon the transferee to establish the **bona fides** and good faith of the transaction. The Receiver is the only person who can set the Court in motion under S. 36 and if he refuses creditors may apply on their own behalf. (1917) P.H.C.C. 303=2 Pat. L.J. 101 =1 Pat. L.W. 752=38 Ind. Cas. 369.

7. Construction.

——S. 53—Construction.

The words "voidable against the Receiver" in S. 53 must, in view of S. 58 of the Act, be read as "voidable against the receiver or the Court as the case may be." A.I.R. 1933 Nag. 365=30 N.L.R. 35=147 Ind. Cas. 1253.

——S. 53—Construction.

As the important words in S. 55, Presidency Towns Insolvency Act, are exactly the same as those in S. 53. Provincial Insolvency Act, if a hypothecation bond would have come within the meaning of S. 55, Presidency Towns Insolvency Act, had that Act been applicable, it would certainly be void under S. 53, Provincial Insolvency Act. A.I.R. 1933 Rang. 424=147 Ind. Cas. 796 (D.B.).

——S. 53—Construction—Voluntary act, what is—Insolvent electing to sell having election—Whether 'voluntary act'.

Where it was open to the insolvent to make the sale or not as he preferred and he elected to make the sale-deed, it must be held that it was a voluntary act. A.I.R. 1937 Nag. 117=I.L.R. (1937) Nag. 78=167 Ind. Cas. 833.

——S. 53—Construction—"Voluntary".

The word "voluntary" in S. 53 means gratuitous or without consideration. 113 Ind. Cas. 148=30 Bom. L.R. 893=A.I.R. 1928 Bom. 341.

——S. 53—Construction—"Voluntary transfer."

Section 53 does not limit the expression "voluntary transfer" to any particular form of alienation of the property by the insolvent. The expression covers all sorts of devices to deprive creditors of the benefit of the property of the insolvent. 110 Ind. Cas. 742=A.I.R. 1928 Lah. 750.

——S. 53—Construction—English Law.

Section 53 is based upon the corresponding provision in the English Act and in interpreting S. 53 Court must take into consideration what the law of Bankruptcy is under the English Act. 99 Ind. Cas. 241=50 Mad. 300=1926 M.W.N. 972=26 M.L.W. 865=A.I.R. 1927 Mad. 163=51 M.L.J. 719.

——S. 53—Construction—"Purchaser" includes a trustee.

The word "purchaser" in S. 53 is used in the wider sense commonly given to the term in English Law and not in the mercantile sense of a person, who has bought something by contract of purchase and sale. It therefore includes a trustee. 36 W.R. 629 and 30 M.L.J. 415, Foll. 79 Ind. Cas. 888=11 O.L.J. 599=27 O.C. 392=A.I.R. 1925 Oudh 28.

——S. 53—Construction.

Transfer of property falling under Section 36 of the Provincial Insolvency Act remains valid unless and until set aside at the instance of the Official Receiver and the only Court having jurisdiction to annul a transfer so voidable is the Court of insolvency. The reasons are that a special statutory provision, whereby District Courts and certain other Courts are invested under Section 3 (1) of the Insolvency Act with power of invalidating certain defined transactions of insolvents, should not be extended to all Courts of original jurisdiction whether notified under the Act or not. Otherwise conflicts might arise between the decision of a Court sitting in insolvency and the judgment of another Court exercising ordinary jurisdiction. The expression "be void agaist the Receiver and may be annulled by the Court" must be read together and interpreted to mean "may be annulled by the Court at the instance of the Receiver, as void against him". 42 Mad. 322, Foll. 70 Ind. Cas. 253=25 O.C. 291=10 O.L.J. 491=A.I.R. 1923 Oudh 80.

——S. 53—(1907), S. 36—Construction—T. P. Act, S. 53.

The scope of S. 36 of the Insolvency Act is wider than that of section 53 of the T. P. Act the former section does not require the intent to defeat or delay creditors required by the latter but requires only proof of the transfer being made within two years of the adjudication of the debtor as an insolvent. 39 All. 95=14 A.L.J. 1183=37 Ind. Cas. 684.

——S. 53—(1907), S. 36—Construction—Purchaser—Meaning—Void.

The word 'Purchaser' means person who has given valuable consideration and is used in the general sense. The word 'void' means voidable. 30 M.L.J. 416=34 Ind. Cas. 602.

8. Defence.

——Ss. 53, 54—Defence—Alienee's defence that applying creditor is bogus.

In a proceeding commenced on an application under Ss. 53 and 54, against the transferee of the insolvent, by the sole creditor at whose instance the insolvent was adjudged as such, the transferee can be allowed to raise the contention that this creditor was a bogus one and was not justified in getting his transfer adjudged, insolvent. Had there been several genuine creditors of this insolvent, the fact that only one of them is a bogus one is not very significant and it may not be then necessary to go into the question as to whether that person out of several others is genuine or not in proceedings under Ss. 53 and 54. A transferee whose transfer under S. 53 is challenged by a Receiver or a creditor is entitled to raise defence pertinent to the enquiry and it could not be said that the plea that the sole creditor of the insolvent is a bogus one and that the insolvency proceedings are a nulity is not a pertinent defence by a transferee when his transfer is challenged. A. I. R. 1940 Nag. 393=1940 N.L.J. 420=I.L R. (1940) Nag. 564=190 Ind. Cas. 885.

9. Duty of Court.

——S. 53—Duty of Court—Fraudulent transaction—Evidence—Duty of Court.

It has to be borne in mind that the fraudulent nature of the transaction in insolvency cases can scarcely ever be proved by direct evidence. The petitioning creditor or the Receiver has to rely on circumstantial evidence in most cases, and usually that is to be found only in the conduct of the parties. It is, therefore, more than ever the duty of the Court carefully to examine all the sourrounding circumstances; and any case, if a Judge considers that the burden of proof lies on a particular party, it is incumbent on him at least to examine the facts on which that party's case is based. A.I.R. 1938 Nag. 216=I.L.R. (1940) Nag. 526=175 Ind. Cas. 430.

——S. 53—Duty of Court.

On an application to avoid transfer under S. 53, the Court is not bound to annul all transactions made by the insolvent which come within the purview of S. 53, A.I.R. 1935 Rang. 433=160 Ind. Cas. 480.

——S. 53—Duty of Court.

The language of S. 53 makes it incumbent on the Court to annul every transfer of property by an insolvent if the transferor is adjudged an insolvent within two years after the date of the transfer, provided the Court comes to a finding that such transfer was not made in good faith or for valuable consideration. The section is not restricted in its scope. A.I.R. 1933 Nag. 965=30 N.L. R. 35 =147 Ind. Cas. 1253.

——S. 53—Duty of Court.

Debt due from insolvent—Validity challenged by another creditor—Matter should not be referred to regular suit, but should be tried by Insolvency Court.

Mere voluntariness of transfer will not justify its being set aside. 72 Ind. Cas. 805=18 M.L.W. 426=1923 M.W.N. 306=A.I.R. 1923 Mad. 641=45 M.L.J. 105.

——S. 53—(1907), S. 36—Duty of Court—Creditor challenging another's debt.

In a list of debts filed by an insolvent, a certain person was shown as mortgagee of certain property and one of the other creditors challenged the mortgage.

Held, that the Judge was bouud to enquire in to the validity of the mortgage in insolvency proceedings without driving the parties to a separate suit. 37 All. 252=13 A.L.J. 270=28 Ind. Cas. 573.

10. Effect of order.

——S. 53—Effect of order.

In setting aside a transaction on the application of the Official Receiver, the Court is placing the property at the disposal of the Official Receiver for the benefit of the creditors A.I.R. 1942 Mad. 294=54 L.W. 173=(1941) 2 M.L.J. 212=1941 M.W.N. 818=200 Ind. Cas. 808.

10. a Ex parte order.

——S. 53—Ex parte order—Setting aside of.

Where a sale has been set aside **ex parte** against the transferee in an insolvency proceedings, he can be given opportunity to prove his case if sufficient cause for his non-appearance is shown. 103. Ind. Cas. 381=A.I.R. 1927 Mad. 897.

11. Fraudulent preference.

——S. 53—Fraudulent preference—Ss. 54, 28—Mortgage by insolvent and non-insolvent members of family—Insolvent fathers representing non-insolvents as guardians—Transaction with respect to non-insolvents could not be set aside.

A mortgage deed was executed by three insolvents who were a father and two sons, and by three grandsons who were not insolvents. Two of the grandsons were minors and the deed was executed on their behalf by their fathers as guardians. The Official Receiver sought to set aside the transaction by the non-insolvents under S. 54:

Held, that the insolvent fathers could not be said to have executed the mortgage merely as undivided fathers because, in such a case, there was no necessity to make minors parties to the transaction. The transaction, so far as the non-insolvents were concerned, could not, therefore, be set aside. A.I.R. 1945 Mad. 253=1945 M.W.N. 276=58 L.W. 260=(1945) 1 M.L.J. 469.

——Ss. 53, 54—Fraudulent preference.

Consideration being grossly inadequate leads to an inference of fraudulent preference and attempt to defeat and delay creditors. A.I.R. 1934 Lah. 271=35 P.L.R. 74=150 Ind. Cas. 240.

——Ss. 53, 54—(1907), Ss. 36 and 37—Fraudulent preference—Right to avoid—Official Receiver—Exclusive jurisdiction of insolvency Court.

The expression "the Court" in S. 36 or S. 37 of the Provincial Insolvency Act signifies the Court exercising jurisdiction under that Act. The special statutory provision investing Courts under S. 3 (1) of the Provincial Insolvency Act with the power, among other powers, of invalidating certain defined transactions of inselvents should not be extended to all Courts of original jurisdiction, whether notified under the Act or not. The word "void" in S. 36 or S. 37 means voidable. 30 M.L.J. 415; 25 M.L.J. 308; 35 M.L.J. 296, Foll. No Court has the jurisdiction to annual, as such, a transfer amounting to a fraudulent preference or a voluntary transfer made within two years of an adjudiation, except a Court exercising insolvency jurisdiction in proceedings which have been instituted to declare the debtor, who made the transfer, insolvent by a petition duly presented under the Act. It is only the Official Receiver who can set the Court in motion to annual a transfer under Ss. 36 and 37 of the Provinciai Insolvency Act. 2 Pat. L.J. 101, Foll. 42 Mad. 322=10 L.W. 59=52 Ind. Cas. 519.

——Ss. 53, 54—(1907), Ss. 36 and 37——Frudulent preference—Sale of debtor's whole propert.—Presumption.

Where a near relation of a debtor purchases the whole, or substantially the whole of the property of a person in insolvent circumstances he cannot be said to be acting in good faith. The repayment of a debt not yet due to a near relative by a person in insolvent circustances amounts to undue preference. Where the effect of a conveyance of the whole of the debtor's property is to defeat and delay the creditors it can be presumed that the debtor acted with intent to defeat and delay the creditors. 55 Ind. Cas. 57 (Nag.).

——Ss. 53, 54—(1907), Ss. 36 and 37—Fraudulent preference—Pressure of creditors—Effect.

The pressure of a creditor excludes preference which is voluntary Act on the part of the debtor. 9 S.L.R. 65=31 Ind. Cas 50.

12. Fraudulent transfer.

——Ss. 53 and 54—Fraudulent transfer—Sale by debtor to creditor for past debts and for cash advance—Insolvency petition by debtor within one week and adjudication—Sale set aside under S. 54 at instance of Receiver—Right of creditor to rank as creditor—Extent of—Contract Act, S. 65.

Where an alienation by way of sale is made by a debtor is favour of his creditor in consideration of antecedent debts and of cash received at the time of the sale, and the sale is set aside at the instance of the Receiver in Insolvency on the ground of fraudulent preference under S. 54 of the Provincial Insolvency Act, the debtor being adjudicated an insolvent on a petition presented by him within a week of the sale, it is open to the alienee to the creditor to prove as an unsecured creditor his just antecedent debts which existed before the fraudulent transfer was thought of but were fraudulently included in the consideration for the sale. The creditor cannot, however, prove the amount of cash alleged to have been paid at the time of the transfer. The transfer being void **ab initio**, S. 65, Contract Act, will not apply. I.L.R (1947) Bom. 156 =49 Bom. L.R. 87=A.I.R. 1947 Bom. 392.

——S. 53—Fraudulent transfer—Transfer is voidable and so valid until annulled—Transferee not liable for mesne profits up to date of annulment.

In a case under S. 53, a transfer is not void **ab initio** but is merely voidable and is valid until annualled by the Court. The possession of the transferee, therefore, is lawful and not wrongful till the date of annulment, and the transferee is not responsible for mesne profits

up to that date. A.I.R. 1946 Nag. 163=I.L.R. (1946) Nag. 273=1946 N.L.J. 22.

——S. 53—Fraudulent transfer—Law of Cypres (VII of 1886), Ss. 2 and 3 (as amended by S. 2 of law) (X of 1927), Fraudulent transfers—Criterion—Law as to, enunciated.

The law of Cypres makes the intent of the transferor the crucial test for deciding whether the transfer or disposal is to be deemed to be "fraudulent". The fraud contemplated is not what has been called "moral" fraud; but consists in the intention of the transferor to "hinder" or "delay" (that is something less than "prevent") his creditors. Whether or not that intention exists must be decided as an inference of fact from considering all the circumstances of the case. The embarrassed position of the transferor over a period of years, actions againt him ending in decrees which remain unsatisfied and a sequence of substantial conveyance within short period of time would constitute a very substantial evidence of such an intention. A.I.R. 1945 P.C. 38=1945 A.L.J. 34=1945 Pesh. L.J. 38=221 Ind. Cas. 603 (P.C.).

——S. 53—Fraudulent transfer—Assignment of insurance policy in favour of sons.

An assignment of an insurance policy by a person who is adjudged insolvent within two years from the assignment in favour of sons, it not being made before or in consideration of marriage or made in favour of a purchaser incumbrancer in good faith and for valuable consideration, is liable to be set aside under S. 53. A.I.R. 1944 Nag. 185=1944 N.L.J. 162=I. L.R. (1944) Nag. 871=219 Ind. Cas. 190.

——S. 53—Fraudulent transfer.

A donor who was subsequently adjudicated insolvent had made a gift of his property to his minor son and a nephew. The mutation of names was effected infavour of the donees in respect of the property gifted. No **khewat** stood in the name of donor after the date of the gift and donor no longer retained possession over the gifted property. The amount of indebtedness admitted by the insolvent did not show that the insolvent was under any pressure from his creditors which led him to make the gift in question. It had not been shown that any of the debts was a decretal debt or that there was any execution of decree pending against the insolvent :

Held, that in the circumstances of the case, there was no evidence whatsoever to show that the deed of gift was a fictitious or colourable transaction which was not intended to take effect. Therefore, the insolvent had no interest in the property gifted and the gift could not be annulled under S. 4. A. I. R. 1941 Oudh 403=1941 O.W.N. 752=1941 A.W.R. 186=194 Ind. Cas. 600.

——S. 53—Fraudulent transfer.

In the normal course, there is nothing in law to prevent a debtor from **bona fide** paying or securing an individual creditor. Such a transaction is not open to be challenged by any other creditor merely because the firstly mentioned creditor receives his payment before the other creditor begins to enforce his remedy. A.I.R. 1940 Bom. 289=I.L.R. (1940) Bom. 526=42 Bom. L.R. 486=190 Ind. Cas. 606.

——S. 53—Fraudulent transfer—What is.

The deed of transfer purported to be a **waqfnama** executed by the debtor just one day before he applied for insolvency. Although he could retain considerable benefits out of the properties, he divested himself of all the rights therein and conferred them almost wholly on his wife and children:

Held, that the transaction was **mala fide** and without consideration and was liable to be annualled under S. 53: A.I.R. 1940 Cal. 417 I.L.R. (1940) 2 Cal. 189 =71 C.L.J. 432=44 C.W.N. 718=193 Ind. Cas. 540.

——S. 53—Fraudulent transfer—Pressure, what is.

A threat of legal proceedings to a person in embarrassed conditions cannot be said to be a genuine pressure so as to make a transfer **bona fide** which otherwise appears to be fraudulent. A.I.R. 1940 Lah. 6.

——Ss. 53, 54—Fraudulent transfer—Evidence.

A decree for maintenance in favour of wife against the husband creating a charge on the property is not necessarily tainted because of the relationship between the parties or of the fact that the suit was filed shortly before the husband's insolvency indicative of such nature. A.I.R. 1940 Mad. 749=1943 M.W.N. 259.

——S. 53—Fraudulent transfer—Preferential transfer to one creditor in satisfaction of existing debt due to him.

Where the transfers are sought to be avoided, not under S. 54, but under S. 53, a preferential transfer of property to one creditor in satisfaction of an existing debt due to him is not fraudulent as to other creditors, although the debtor, in making the transfer intended to defeat the claims, and the transferee had knowledge of such intention, if the only purpose of the latter is to secure his own debt and the property is not worth materially more than the amount of his debt. A.I.R. 1939 Cal. 503=69 C.L.J. 329=43 C.W.N. 575=183 Ind. Cas. 635.

——S. 53—Fraudulent transfer—Fraud of guardian, whether fraud of minor.

(**Obiter**).—Where the transaction was between the insolvent and the guardian of the minors who were transferees, the guardian's fraud could not be deemed to be the fraud of the minors under S. 53. A.I.R. 1938 Bom. 449=40 Bom. L.R. 884=I.L.R. (1939) Bom. 1=178 Ind. Cas. 373.

——S. 53—Fraudulent transfer—What is.

An insolvent executed a mortgage deed in favour of one of the creditors. The object of raising money was to carry on business of the debtor or at any rate to pay off some of the business creditors. The consideration for the mortgage was not the satisfaction of the past debt of the mortgagee merely but a substantial advance in addition to that:

Held, that no dishonestly could be imputed to the mortgagee even if it so happened that the mortgage money was not distributed rateably amongst all the creditors or that some creditors were paid to the exclusion of others. Apart from the cases which come within the purview of S. 54, there was no duty cast on a creditor to product the interests of other creditors and it could not be said that one was defrauded by payment to another. A.I.R. 1938 Cal. 417=I.L.R. (1938) 2 Cal. 275=42 C.W.N. 554=178 Ind. Cas. 727.

——S. 53—Fraudulent transfer.

A person who was in debts sold his house to his wife in lieu of her deferred dower. Some days before sale, he had received a notice from his creditors for payment of their debts. Within one year from such sale, the person applied for being adjudged insolvent. There was a great probability that the husband had retained an advantage to himself by such sale:

Held, that under the circumstances, the transfer was tainted with fraud and must be set aside. A.I.R. 1937 Lah. 859=I.L.R. (1938) Lah. 502=40 P.L.R. 1048=175 Ind. Cas. 76.

——S. 53—Fraudulent transfer—Pressure, what is.

A threat of legal proceedings to a man who is hopelessly insolvent clearly cannot be described as "pressure".

The insolvents who were in a desperate financial position, were endeavouring to benefit certain of their creditors at the expense of the rest. They did not even wait to realise the property. In each case, a value was put on the property of the insolvents, and for the transaction that value arbitrarily fixed was taken to be the value of the property:

Held, that there was a conspiracy to defraud between the insolvents and the creditors who received this property. A.I.R. 1937 Lah. 53=39 P.L.R. 181=169 Ind. Cas. 845.

——S. 53—Fraudulent transfer—Transfer by insolvent to defraud creditors—Rights of Receiver.

In the case of fraudulent transfers by insolvent where the contemplated fraud has been effected, the transferor is not entitled to claim the aid of the law to recover the property he has parted with and the Receiver cannot claim any better rights than the insolvent and cannot recover the money realised by sale by the transferee of the insolvent. A.I.R. 1937 Oudh 129 =1936 O.W.N. 1234=166 Ind. Cas. 210.

——S. 53—Fraudulent transfer.

Where the insolvent transferred substantially all his property in favour of his relative who was also a creditor at a time when he was heavily indebted and was being pressed by his creditors and caused a letter to be written to his creditors stating that owing to depression in paddy price, he was not in a position to pay anything to them apart from interest.

Held, that the transfer was fraudulent and should be set aside. A.I.R. 1937 Rang. 27=14 R. 748=167 Ind. Cas. 73.

——S. 53—Fraudulent transfer—What is.

In a case where debts were actually due to the creditor who challenged the gift at the time of the transfer, the intent to defeat or delay creditors will be presumed, whereas if there were no debts due at the time of the transfer and the transfererer ran into indebtedness subsequently, the presumption will be regulated by the circumstances of each particular case. Further, a voluntary settlement by a person who owes no debts at the time in favour of his children for natural love and affection cannot be set aside merely because some years afterwards it is proved to have the effect of defeating or delaying subsequent creditors

Where the circumstances establish that at the time of making a gift, the donor's object was merely to make a provision for the future maintenance of his wife who realising that her husband was a spend thrift, in order to safeguard herself against the future improvidence of her husband, secured a gift in her favour.

Held, that the transaction could not be held to be a transfer made with intent to defeat or delay the creditors of the transferor. A.I.R. 1936 Lah. 222=162 Ind. Cas. 922.

——S. 53—Fraudulent transfer—What is not.

Where, in satisfaction of pre-existing debts, a debtor transfers to his creditor some immovable property by way of mortgage, the value of such property not being greater than the value of liquidated debts and the creditor being unaware that there were other creditors of the transferor, and the debtor is subsequently adjudicated insolvent, the transaction is **bona fide** and for value and cannot be impeached. A.I.R. 1935 Rang. 53 =12 R. 625=153 Ind. Cas. 395.

——S. 53—Fradulent transfer—Fraud defined.

An intention to delay creditors is not necessarily fraudulent or unlawful. Fraud in respect of creditors involves an element of loss or injury of a substantial character and not merely inconvenience caused by delay in the realisation of what is due.

In order to constitute fraud, there must be an intention to deceive. There must also be damage to the party deceived and fraud without damage gives no cause of action. A.I.R. 1934 Mad. 252=39 L.W. 357=150 Ind. Cas. 381.

——Ss. 53, 4—Fraudulent transfer—Consideration passing before Sub-Registrar—Presumption—Transaction, if can be set aside under S. 4.

Where the consideration passed before the Sub-Registrar, the presumption is that the transaction was intended to be operative. Until and unless that presumption is displaced by cogent evidence, it will prevail. The facts that the insolvent was a relation of the vendees or that the transaction took place when vendor was on the eve of insolvency are not sufficient to rebut this presumption. In such a case, the transaction is neither sham nor bogus and cannot even be set aside under S. 4. A.I.R. 1934 Pesh. 30=150 Ind. Cas. 308.

——S. 53—Fraudulent transfer—Essentials.

If the transaction is a real and not a fictitious one, it is not brought within S. 53 unless the Receiver proves that the transferee knew that the transferor was insolvent when the transfer was made, even where the transfer is of the whole of the available assets. A.I.R. 1934 Rang. 208=153 Ind. Cas. 19 (2).

——S. 53—Fraudulent transfer.

Where an insolvent transferred property worth not less than Rs. 18,000 to a relative of his for Rs. 12,000 when he was in embarrased circumstances and though the alienee claimed to be the purchaser of the property, he had not got the title deeds with respect to the property and the property itself was occupied by a relation of the insolvent's wife:

Held, that although a large part of the alleged price was paid before the Sub-Registrar, the circumstances, when taken together, pointed to the conclusion that the sale was a mere device resorted to by the debtor to withdraw the whole of the immovable property from the claims of his creditors and to reserve it for himself and his family and was therefore, void.

Dictum.—The fact that the vendor and the purchaser are connected with each other would not **per se** sustain an inference of collusion but it does give rise to suspicion. A.I.R. 1933 Lah. 631=34 P.L.R. 647=143 Ind. Cas. 286.

——S. 53—Fraudulent transfer.

A deed is void against creditors when the debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his presents debts. A.I.R. 1933 Rang. 424=147 Ind. Cas. 796.

——S. 53—Fraudulent transfer—What is.

In the case of a mortgage by an insolvent to a person who is not a creditor, if the bulk of the consideration is found to be fictitious the whole mortgage should be declared void. A.I.R. 1933 Lah. 455 (2)=33 P.L.R. 905=137 Ind. Cas. 800 (1).

——S. 53—Fraudulent transfer—Presumption of fraud from circumstances—Partial validity, effect of.

Where a debtor effected a mortgage in favour of his own son-in-law at a time when he was involved heavily in debt and within three months of the application for his being declared insolvent:

Held, that the presumption was that the mortgage was effected to defraud his creditors.

A transfer effected with a view to defraud creditors is wholly void even when there has been part payment of the consideration. A.I.R. 1931 Lah. 667=32 P.L.R. 637 (2)=134 Ind. Cas. 1108.

——S. 53—Fraudulent transfer—Annulment of.

Where the vendees are not shown to be connected in any way with the insolvent and **prima facie** from the evidence the transaction does not seem to be a colourable one, nor does any question of "fraudulent preference" arise, the sale not having taken place within three months before adjudication, the case comes under S. 53 and the sale should not be annulled. A.I.R. 1930 Lah. 135.

——S. 53—Fraudulent transfer.

If a person tricks the would be insolvent into giving him a mortgage by a representation that he would settle with his other creditors the transfer can be annulled under S. 53. 128 Ind. Cas. 589=A.I R. 1930 Rang. 315.

——S. 53—Fraudulent transfer—Question of fraudulent transfer—Time for consideration of.

Questions relating to the alleged fraudulent transfers by the applicant do not arise at the time of his being declared an insolvent but they are more appropriate for determination when the question arises of realising his assets. 99 Ind. Cas. 524=A.I.R. 1927 Lah. 108.

——S. 53—Fraudulent transfer.

Mortgage executed in favour of relations shortly before application for adjudication—Mortgage presumed to be fictitious. 99 Ind. Cas. 708=27 P.L.R. 513=A.I.R. 1926 Lah. 621.

——S. 53—Fraudulent transfer.

Sale by insolvent—Vendee paying off mortgage is entitled to redemption amount though sale may be fraudulent. 82 Ind. Cas. 489=21 N.L.R. 21=A.I.R. 1929 Nag. 73.

——S. 53—Fraudulent transfer.

Transfer for inadequate price—Mortgage to transferee, not mentioned—Transfer is void. 68 Ind. Cas. 460=A.I.R. 1922 Nag. 235.

——S. 53—(1907), S. 36—Fraudulent transfer—Transfer to wife within two years.

A transfer by an insolvent of a portion of his property within two years of his insolvency, to his wife, not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, is **diso facto** void as against the official Receiver and the property comprised in that transfer is liable to be distributed amongst the general body of creditors. 28 C.L.J. 536=49 Ind. Cas. 87.

——Ss. 53, 54—(1907), Ss. 36 and 37—Fraudulent transfer—Annulment—Rights of transferee.

Aliences, the transfers in whose favour have been annulled under Ss. 36 and 37 of the Provincial Insolvency Act., may prove as unsecured creditors in the insolvency of the alienor to the extent of just antecedent debts. 65 P.R. 1919=51 Ind. Cas. 720.

——S. 53—(1907), S. 36—Fraudulent transfer—Intention—Onus.

Where an insolvent sells property to near relatives to defraud creditors and retains possession of some part thereof an intent to defraud should be imputed to the vendees also. A sale with intent to defraud creditors is wholly void even if there has been a part consideration. 30 Mad. 6, Folus. 25 Ind.Cas. 948 (Mad.).

——Ss. 53, 55—(1907), Ss. 36 and 38—Fraudulent transfer—Transfer in lieu of dower in favour of his wife—Indebtenss of husband.

Where a Mahomedan wife obtained in lieu of dower debt from her husband who was heavily indebted a transfer of his house the transaction could not be declared fraudulent solely because shortly after the transfer, the husband put in an application for being adjudicated insolvent. 20 O.C. 295=43 Ind. Cas. 280.

——S. 53—(1907), S. 36—Fraudulent transfer.

S. 36 does not prevent an Official Receiver from recovering any immoveable property supposed to have been transferred by the insolvent for protecting it against his creditors. 5 S.L.R. 80=12 Ind. Cas. 622.

13. Good faith

——S. 53—Good faith—Want of good faith, effect of.

Under S. 53, there must be both good faith and valuable consideration. If there is want of good faith, the fact that valuable consideration has passed will not save the transaction. Where the lack of good faith has been proved—and this is sufficient to enable the Court to pass an order annulling the transaction—the fact that the insolvent and his fellow conspirators may not have had in mind that the transaction would operate to defeat his creditors and acted merely with the object of putting the property beyond the reach of the son for the benefit of his father's mistress does not make the transaction anytheless fraud on the creditors. What the Court has to consider is whether the transaction comes within the four corners of S. 53, and if it does, the Court has power to set it aside. A.I.R. 1942 Mad. 294=54 L.W. 173=(1941) 2 M.L.J. 212=1941 M.W.N. 818=200 Ind. Cas. 808.

——S. 53—Good faith—Want of good faith—Evidence.

An inadequate consideration may be evidence of want of good faith which may, by itself, be sufficient for setting aside the transfer.

Where the debtor divests himself of the entire property which is worth at least Rs. 10,000, for a consideration of Rs. 5,000 in favour of his wife while he has several decrees against him, the inadequacy of consideration by itself is sufficient to prove want of good faith and the transfer must be set aside. A.I.R. 1941 All. 316=1941 A.L.J. 387=I.L.R. (1941) All. 603=1941 A.W.R. (C. C.) 229=196 Ind. Cas. 132.

——S. 53—Good faith—Transfer in favour of wife —Burden of proof.

The transfer by an insolvent to his wife of property which is under attachment in execution of a decree against him raises an inference against the **bona fide** nature of the transaction. The onus is on the wife to rebut the inference. A.I.R. 1941 Rang. 250=1941 Rang. L.R. 268=197 Ind. Cas. 513.

——S. 53—Good faith required.

Under S. 53, good faith is necessary only on the part of the transferee. It is not required that the transferor should act in good faith also. A.I.R. 1938 Cal. 417=I.L.R. (1938) 2 Cal. 275=42 C.W.N. 554= 178 Ind. Cas. 727.

——S. 53—Good faith—Absence of good faith required.

So far as S. 53 is concerned, it is the absence of good faith on the part of the transferee that has to be proved and not the absence of good faith on the part of the transferor, the insolvent. A.I.R. 1938 Mad. 285=181 Ind. Cas. 225.

——S. 53—Good faith—Absence of good faith—Onus.

Where a transfer by the debtor is challenged by the Receiver, under S. 53, the onus is upon him to prove the want of good faith. A.I.R. 1935 Cal. 650=158 Ind. Cas. 1017.

——S. 53—Good faith—How to decide question of good faith.

In determining the question of good faith with respect to an alienation by an insolvent, it is necessary that the facts should be considered in relation to each other and weighed as a whole; it is a mistake to take each fact, which militates against the **bona fides** of the transfer separated from the rest of the facts and to proceed to demonstrate that it was consistent with good faith A.I.R. 1933 Lah. 631=34 P.L.R. 647= 143 Ind. Cas. 286.

——S. 53—Good faith.

If a creditor takes the whole or substantially the whole of the property of his debtor in payment of a past debt and knowing that there are other creditors, he cannot be said to be acting in good faith. A.I.R. 1933 Lah. 43=33 P.L R. 1058=140 Ind. Cas. 598.

——S. 53—Good faith—Evidence of absence of good faith.

An inadequate consideration may be evidence of want of good faith which may itself be sufficient for the setting aside of a transfer. A.I.R. 1932 All. 243=1932 A.L J. 53=137 Ind. Cas. 235.

——S. 53—"Good faith".

Transferee ignorant of transferor's impending insolvency and having no intention to cheat other creditors —Transferee acts in good faith. 113 Ind. Cas. 148=30 Bom. L.R. 893=A.I.R. 1928 Bom. 341.

——S. 53—Good faith—Facts dealing with bona fides.

Each fact dealing with the **bona fides** of the transactions is not to be separated from the rest of the facts, but the facts should be considered in relation to each other and weighed as a whole. 15 N.L.R. 68, Foll. 103 Ind. Cas. 486=10 N.L.J. 12=A.I.R. 1927 Nag. 166.

——S. 53—Good faith—Proof of.

The mere fact that valuable consideration has been paid for the transfer does not necessarily lead to an inferenee of good faith also. A.I.R. 1921 Nag. 103, Foll. In order to prove good faith it is necessary for the purchaser to show that there was real intention of the debtor to pass ownership, and of himself to acquire it. Mere transference of possession is insufficient to give rise to any inference which would support an intention to acquire ownership. 103 Ind. Cas. 486=10 N.L.J. 12= A.I.R. 1927 Nag. 166.

——S. 53—Good faith—Want of good faith.

To attract the operation of S. 53 it is not in terms necessary that the document should be to defeat or delay creditors. It is sufficient if it was a transfer not in good faith or not for valuable consideration. It is open therefore to the alienee to escape the operation of the section by showing good faith and payment of valuable consideration, but a document cannot be partly in good faith and partly not. The dominant intention underlying the document is what has to be looked at. 94 Ind. Cas. 535=23 M.L.W. 734=1926 M.W.N. 419= A.I.R. 1926 Mad. 672=50 M.L.J. 448.

——Ss. 53, 54—(1907), Ss. 36 and 37—Good faith—Test—Lender's intention.

The test of the 'good faith' referred to in S. 36 is whether the lender intended that the advance should enable his debtor to carry on his business and whether he had reasonable grounds for believing that it would enable him to do so. 9 S.L.R. 65=31 Ind. Cas. 50.

14. Jurisdiction.

——S. 53—Transfer alleged to be nominal or fictitious —Declaration of void character—Jurisdiction of insolvency Court. See Provincial Insolvency Act, S. 4. 51 Bombay L.R. 82 A.I.R. 1949 Bom. 129 (F.B.).

——S. 53—Jurisdiction—Mortgage by father on his own behalf and on behalf of sons—Adjudication of father—Alienation of son's share is unimpeachable.

Where a mortgage is executed by a Hindu father, the insolvent and his sons represented by the father as guardian, the Insolvency Court has no jurisdiction to set aside under S. 53, the document as far as it is excuted by the sons or on behalf of the sons by the father as guardian. A.I.R. 1944 Mad. 235=(1944) 1 M.L.J. 19=1944 M.W.N. 114=220 Ind. Cas. 60.

——S. 53—Jurisdiction to go behind decree, nature of.

The power of an Insolvency Court to go behind a judgment is a power to inquire into the consideration. The judgment is conclusive unless the consideration can be challenged. A.I.R. 1940 Mad. 749=1940 M. W.N. 259.

——Ss. 53, 54—Jurisdiction of Court to go behind decree.

Where a suit has not been fought on merits, it is competent to the Insolvency Court to go behind the judgment and to look into what has been called "the consideration for the judgment-debt." The case is otherwise where there has been a real contest or where the decree-holders claim to be mortgagees or charge-holders. In such a case, however, it is open to the Receiver to challenge the mortgage or charge in appropriate proceedings and he would have to show grounds which would entitle him to have it annulled under S. 53 and S. 54. A.I.R. 1940 Mad. 749=1940 M.W.N. 259.

——S. 53—Jurisdiction of Insolvency Court—Direction for separate suit.

Under the Provincial Insolvency Act, the Insolvency Court is the only Court which has jurisdiction to go into the questions raised under S. 53 and decide the same and the parties should not be referred to the Civil Court for determination of such questions. A.I.R. 1932 Cal. 151=58 C. 1352=136 Ind. Cas. 143.

— —S. 53—Jurisdiction.

Where a Court holds that a creditor has no *locus standi* to present a petition for annulling a transaction under S. 53 because it violates the provisions of S. 54-A the Court has no jurisdiction to give a decision on the application on merits and the decision of it given is *ultra vires*. A.I.R. 1930 Rang. 332.

——S. 53—Jurisdiction.

Insolvent holding a decree but transferring it before adjudication—Adjudication cadnot he annulled upon this ground. 110 Ind. Cas. 113=3 Luck. 323=5 O.W.N. 89=A.I.R. 1928 Oudh 404.

——S. 53—Jurisdiction.

Notice given to transferee on application of Receiver —Transferee failing to appear—Case decided *ex parte*. Plaintiff failing—Separate civil suit for declaring ownership is barred by S. 4. A.I R. 1924 All. 40, Foll. 98 Ind. Cas. 1001=49 All. 71=24 A.L.J. 897=A.I.R. 1927 All. 66.

——S. 53—Jurisdiction—Court cannot pass an order under S. 53 or S. 54 unless transferor is adjudged insolvent.

Unless a person is adjudged insolvent, the insolvency Court has no jurisdiction to decide whether a transfer of property made by him should be annulled or was fraudulent and void. In other words, no order under S. 53 or S. 54 of the Insolvency Act can be made unless the transferor has been adjudged insolvent. 95 Ind. Cas. 1055=A.I.R. 1927 Lah. 95.

——S. 53—Jurisdiction of Courts other than insolvency Courts is barred.

Insolvency Court has exclusive jurisoiction to determine questions as to annulment of transfers not made in good faith and for valuable consideration and to decide questions of title for determinatton of the dispute under Ss. 53 and 4, and therefore the jurisdiction of other Court is impliedly barred. 105 Ind. Cas. 50=4 O.W.N. 751=A.I.R. 192J Oudh 357.

— —S. 53—Jurisdiction—Court can declare transfer by debtor to be void even if it took place beyond two years of adjudication. (Mukerji, J., contra.)

The Insolvency Court has full power to declare even though it be at the instance of the receiver that certain property belongs to the insolvent and that any other person, who is putting forward a claim to it, is not really entitled to it. This by no means implies an annulment of a voidable transfer within the meaning of S. 53 of the Provincial Insolvency Act. The limitation of two years, prescribed undee S. 53, is applicable to all cases where the transfer, when originally made was a good transfer, of property though it was subject to an option of avoiding it to be exercised by the receiver. But such a transfer is only voidable and not void and remains good so long as it is not annulled by the Court. On the other hand, a transfer which is wholly ffctitious from the very begining, is of no effect and does not require to be annulled, All that the Court has to do in such a case is to decide that it is void, which decision will bind the claimant to the property as if it were by an ordinary civil Court.

Per *Mukerji, J.*—An insolvency Court has no jurisdiction to entertain an application of the receiver to declare an ostensible transier vnid within the meaning of S. 53 of the Insolvency Act if the transaction took place more than two years before the adjudication. He must seek his remedy by an ordinary civil suit instituted under S. 53 of the Transfer of Property Act. 94 Ind. Cas. 429=48 All. 414=24 A.L.J. 495=A.I.R. 1926 All. 470.

——S. 53—Jurisdiction—Receiver has no power to decide as to voidness of a transaction.

An application by the petitioning creditor for an adjudication that a mortgage deed by the insolvent was not a binding transaction, is substantially an application to declare the instrument void as against the Receiver under S. 53, and such application are to be decided by the Court and not by the Receiver as against whom the instrument is sought to be declared void, as this would in effect make the Official Receiver the Judge in his own case. A.I.R. 1922 Mad. 246, Appl.

Where the Receiver exercises his power of framing a schedule, that it is to say, altering and amending the schodule filed by the debtor, S. 50 is applicable which lays down that where the Receiver thinks that a debt has been improparly entered in the schedule the Court may, on an application of the Receiver, expunge such entry. Cl. (2) gives power to the Court to do so in certain cases on the application of the creditor or of the debtor, but nowhere is the power given to the Receiver to expunge a debt entered in the schedule of the insolvent. 97 Ind. Cas. 407=1926 M.W.N. 935=A.I.R. 1926 Mad. 1019=51 M.L.J. 287.

——S. 53—Jurisdiction—Mortgage suit—Simultaneous application under S. 53—Proper procedure.

The proper course, is cases where a civil suit is pending on a mortgage and where the Official Receiver applies to the Insolvency Court for a dectaration that the mortgage is bad under S. 53, would be to have the proceedings in the suit stayed till the disposal of the application by the Insolvency Court. It would save time and trouble if the proceedings in the civil suit are stayed pending the disposal of the application under S. 53. The order of the Insolvency Court under S. 53 would be binding upon the parties and the ordinary Civil Court would therefore not be able to execute the mortgage decree passed by it. The application must be made either to the Court in which the civil suit is pending or to a Court which has power to stay the proceedings in that suit. But there is no warrant either in law or in practice for the contention that the presentation of an application to the Insolvency Court for an order under S. 53 takes away the jurisdiction of the Civil Court to proceed with the suit of a secured creditor. It does not follow that because a transaction is void under S. 53, therefore, the mortgagee has no remedy against the mortgagor. The transaction under S. 53 is only voidable and not void. The jurisdiction to set aside a transaction which is good against the mortgagor, but not good against the general body of creditors, is an exclusive jurisdiction of the Insolvency Court. But that does not take away the jurisdiction of the Civil Court to proceed with the mortgagee's suit to decree. A mortgage which is voidable under S. 53, is only voidable to the extent to which the property transferred is necessary to satisfy the creditors of the insolvent. 88 Ind. Cas. 934=1925 M.W.N. 672=48 Mad. 750=A.I.R. 1925 Mad. 1051=49 M.L.J. 203.

——S. 53—Jurisdiction—Adjudication annulled—Right of receiver to proceed under.

It cannot be said that in all cases where an adjudination order is annulled the Receiver is ipso facto relieved of all future duties, but where the estate is allowed to revert to the insolvent unconditionally, it cannot have been the intention of the Act that the Receiver should continue to act as if the still represented the estate and to prosecute for the insolvent's benefit applications which the insolvent himself could not prosecute and which are based on an adjudication which has ceased to exist. 41 All. 200 doubt. and expl; 17 W.R. 85, Foll.

Receiver has no power to prosecute an application under S. 53 after the adjudication had heen annulled. 86 Ind. Cas. 324=3 Rang. 301=A.I.R. 1925 Rang. 301.

——S. 53—Jurisdiction.

Transfer of property in foreign territory—Court has no power to annual. 65 Ind. Cas. 334=18 N.L.R. 93 =A.I.R. 1922 Nag, 221.

——S. 53—(1907), S. 36—Jurisdiction—Transfer made more than two years before insolvency.

Under this Act an Official Receiver has no jurisdiction to finally decide claims to the insolvents properties based on transfers made more than two years before the adjudication. 45 Ind. Cas. 180 (Cal.).

——S. 53—(1907), S. 36 — Jurisdiction — Official Receiver.

S. 36 does not empower an Official Receiver to set aside a mortgage executed by a person within 2 years of the presenting an insolvency petition to a Court which had no power to entertain it, but more than 2 years before its presentation to the proper Court. 5 L.W. 123=(1917) M.W.N. 103=36 Ind. Cas. 828.

——S. 53—(1907), S. 36—Jurisdiction—Enquiry under—Transfer to Munsif.

Where there has been a report by the receiver that certain transfers by the insolvent are void under S. 36 the District Judge has no jurisdiction to send the case for enquiry to a Munsif. 33 Ind. Cas. 188 (Cal.).

——S. 53—(1907), S. 36—Jurisdiction—'Two years.'

Under S. 36 of the Act a Judge has jurizdiction only in regard to transfers made within two years of the order of adjudication and not even those made within two years preceding the date of presentiug the Insolvency petition. 23 Ind. Cas. 224 (Oudh).

——S. 53—(1907), S. 36—Jurisdiction—Enquiry under —Property situate beyond jurisdiction.

A proceeding under this section is not a suit and therefore the question as to the validity of a transfer of property situate beyond the jurisdiction of the Court can be dealt with by the Court. 12 C.L.J. 452= 15 C.W.N. 253=7 Ind. Cas. 765.

15. Leave of Court.

——S. 53—Leave of Court—Creditor, suit to set aside alienation by debtor—Leave of Court not needed.

A suit under S. 53 is not a suit in respect of the property of the insolvent but is a suit in respect of the property which had been the property of the insolvent and which he had transferred in fraud of his creditors. Such a suit does not fall with the prohibition of the Insolvency Act, moreover, the very definite right given by S. 53 to creditor cannot be taken away without an express provision by the Legislature to this effect and there is nothing in the Presidency Towns Insolvency Act or in the Provincial Insolveucy Act which can be read as taking away his right. Once a declaration has been obtained, the property does become the property of the insolvent and automatically vests in the Official Assignee or Official Receiver as the case may be. Therefore, leave of Insolvency Court is not necessary for the institution of such a suit. A.I.R. 1941 Mad. 903= 1941 M.W.N. 942=54 L.W. 495=(1941) 2 M.L.J. 684= I.L.R. (1942) Mad. 1=197 Ind. Cas. 599 (F.B.).

(Overrules A.I.R. 1919 Mad. 167=52 Ind. Cas. 442).

——S. 53—Leave of Court—Appeal from order refusing to annul transfer.

An appeal from an order refusing to annul a transfer under S. 53 can only be allowed either by leave of the District Court or of the High Court under S. 75 (3). A.I.R. 1931 Lah. 651=132 Ind. Cas. 589=33 P.L.R. 65.

16. Limitation.

——S. 53—Limitation — Staring point — Amendment, if retrospective.

In N.W.F. Province, the law before the amendment of the Provincial Insolvency Act (V of 1920) by Act X of 1930, was that the limitation period was to be considered from the date of adjudication. Only the transactions coming into existence after it can be affected by the amendment and transactions before the date of amendment and over two years old at the date of the adjudication order are not within time. A.I.R. 1934 Pesh. 30=150 Ind. Cas. 308.

——S. 53—Limitation.

The amendment made by S. 6, (Act 10 of 1930), has a retrospective effect and a transfer of property of the description given in S. 53 made by an insolvent more than two years before the date of the actual order of adjudication but within two years of the date of the presentation of the petition for adjudication, can be annulled by the Court under S. 53 at the instance of the Official Receiver. A.I.R. 1930 Mad. 834=1930 M.W.N. 882=32 M.L.W. 454=54 Mad. 12=128 Ind. Cas. 154=59 M.L.J. 686 (F.B.).

——S. 53—Limitation.

The adjudication dates back to the date of petition which means the date of presentation of petition in the proper Court and not in the wrong Court: (1917) M.W.N. 103, Appr. A.I.R. 1923 Lah. 425, not Appl. 1939 M W.N. 470=126 Ind. Cas. 483=A.I.R. 1930 Mad. 782.

——S. 53—Limitation.

The actual date of the order of adjudication is the terminating point for the purpose of limitation; A.I.R. 1925 Bom. 480; A.I.R. 1928 Lah. 361 (F.B.); A.I.R. 1928 Rang. 148 and A.I.R. 1927 Sind 66, Foll. 113 Ind. Cas. 330=A.I.R. 1929 Sind 94.

——S. 53—Limitation—Period of two years should be counted from order of adjudication.

A transfer of property of the description given in S. 53 cannot be annuled if made by the insolvent more than two years before the date of the order of adjudication though within two years of the date of the presentation of the petition for insolvency. 111 Ind. Cas. 8=10 Lah. 106=29 P.L.R. 446=A.I.R. 1928 Lah. 361 (F.B.).

——S. 53—Limitation—Doctrine of "relation back."

The doctrine of "relation back" cannot be imported into S. 53, Provincial Insolvency Act, so as to make it

appear that the point of time from which the two years are to be calculated is the date of the presentation of the petition, and not the date when the transferor is adjudged insolvent, and thus interpretiug the language according to its plain meaning without reference to the doctrine of relation back provided in Cl. 7, S. 28, it can be held that in S. 53 the date of adjudication and not the date of presentation should be the starting point: 49 Bom. 730, Foll.; 46 Cal. 991; 42 All. 443, not Foll. 110 Ind. Cas. 361 = 6 Rang. 193 = A.I.R. 1928 Rang. 148.

———S. 53—Limitation—Two years, calculation of.

An application to set aside a voluntary transfer lies under S. 53 where the transfer is more than two years from the date of the order of adjudication but within two years from the date of the presentation of the petition on which the adjudication is made. A.I.R. 1925 Bom. 480 and A.I.R. 1924 Lah. 374, Diss. 35 M.L.J. 296=99 Ind. Cas. 241=50 Mad. 300=1926 M.W.N. 972=26 M.L.W. 865=A.I.R. 1927 Mad. 163= 51 M.L.J. 719.

———S. 53 — Limitation—Doctrine of "relation back."

The doctrine of "relation back" cannot be imported into S. 53 so as to make it appear that the point of time form which the two years are to be calculated is the date of the presentation of the petition and not the date when the transferror is adjudged insolvent; and therefore a transfer effected more than two years before the order of adjudication but within two years of the date of the presentation of the petition cannot be annulled under the section: A.I.R. 1924 Lah. 374 and A.I.R. 1925 Bom. 480, Foll.; 35 M.L.J. 296 and 46 Cal. 991, not Foll. 97 Ind. Cas. 321=A.I.R. 1927 Sind 66.

———S. 53—Limitation.

A person is adjudged insolvent on the date on which the order is made, though effect of such order relates back to earlier date—Voluntary transfer by a person is voidable only if made within two years from the date of the adjudication order. 88 Ind. Cas. 941=49 Bom. 730=27 Bom. L.R. 967=A.I.R. 1925 Bom. 480.

———S. 53—Limitation.

Article 181 does not govern an application under S. 36 of the Provincial Insolvency Act by the Official Receiver to set aside an alienation by the Insolvent. 79 Ind. Cas. 443=A.I.R. 1925 Mad. 172.

———S. 53—Limitation—No time-limit for application under S. 53.

The Court can take action under S. 53 at any time during the pendency of the proceedings when a transfer open to objection under the said section is brought to its notice, by an application made to it by a creditor of the Insolvent, Art. 181 has no application to this case. 75 Ind. Cas. 995=A.I.R. 1924 Lah. 553.

———S. 53—Limitation.

S. 16 (6) of the Act does not govern S. 36 and therefore transfers taking place within two years of the presentation of the petition but beyond two years of the order of adjudication cannot be annulled. 23 I. C. 924, foll. 35 M.L J. 296, not foll. 72 Ind. Cas. 433=A.I.R. 1924 Lah. 374.

———S. 53 — Limitation — Limitation Act does not apply.

The limitation under Art. 181, Limitation Act, is confined to application under C. P. Code and does not extend to applications under S. 36, Provincial Insolvency Act and so such applications may be made at anv time during the pendency of insolvency proceedings. 60 Ind. Cas. 123=12 M.L.W. 535.

———Ss. 53, 28—(1907), Ss. 36 and 16 (6)—Limitation—Order of adjudication—Date of operation of—Transfer more than two years before adjudication but within two years of application—Void.

S. 36 of the Provincial Insolvency Act should be read along with the S. 16 (6) of the Act and an order of adjudication relates back to and takes effect from the date of the presentation of the petition of insolvency.

A transfer made by an insolvent more than two years before the date of the adjudication order but within two years of the date of the presentation of the petition for insolvency may be void against the Receiver and may be annulled by Court. 46 Cal. 991=24 C. W. N. 172= 52 Ind. Cas. 747.

———Ss. 53, 28—(1907), Ss. 36, 16—Limitation—Order of adjudication—Date of operation of.

A voluntary transfer by a person adjudged insolvent more than two years after the date of the transfer but on a petition of a creditor within two years is voidable under S. 36 of the Provincial Insolvency Act. The adjudication as insolvent referred to in S. 36 has to be treated as made on the date of the presentation of the petition in which the insolvency proceedings originated. 23 I. C. 924, Not Foll.; 42 Cal. 289; 38 I. C. 369, Doubted. 35 M. L. J 296=24 M. L. T. 149 = (1918) M.W.N. 487=8 L.W. 281=49 Ind. Cas. 283.

———S. 53, 28—Ss. 36 and 16 (6)—Limitation—Order of adjudication—Date of operation of.

Whether for purposes of S. 36 the date of adjudication can, with reference to S. 16 (6) be that on which the insolvency petition was presented. 5 L. W. 128 (1917) M.W.N. 103=36 Ind. Cas. 828.

17. Pending proceedings.

———Ss. 53 and 67—Pending proceedings—Order setting aside alienation by debtor—Appeal—Compromise—Alienee depositing enough money to pay of creditors and expenses—Balance left after payment to creditors—Preferential right of alienee to such balance.

Where pending an appeal against an order under S. 53 of the Provincial Insolvency Act setting aside an alienation by the debtor, the alienee enters into a compromise agreeing to deposit enough money to pay off all the debts and makes the deposit, then the alienee, rather than the debtor, has a more equitable right to the balance remaining out of such deposit after payment of all the debts. The balance left after such payment cannot be considered as surplus remaining after the adminitration and the payment of all the creditors in full to which the insolvent is entitled under S. 67 of the Act. 1949 M.W.N. 475=A.I.R. 1949 Mad. 709= (1949) 1 M.L.J. 591.

———Ss. 53, 54—Pending proceedings—Absolute order of discharge—Proceedings under Ss. 53, 54, pending in appeal whether can be continued.

The granting of an absolute order of discharge has no mediate effect upon any proceedings which may be pending under either S. 53 or S. 54, whether in the Insolvency Court itself or in the Court of appeal, After an absolute order of discharge has been granted, proceedings which were pending under S. 53 or S. 54 could be continued by the Official Receiver, unless, of course

there were definite orders of the Insolvency Court to the contrary. A. I. R. 1943 Mad. 644 = 56 L. W. 408=(1943) 2 M.L.J. 134=1943 M.W.N. 438=210 Ind. Cas. 93.

———Ss. 53, 54—Pending proceedings.

The annulment of an adjudication under S. 43 does not operate so as to cause the abatement of the proceedings already instituted under Ss. 53 and 54. A.I.R. 1941 Lah. 316=43 P. L. R. 369=I. L. R. (1942) Lah. 330=197 Ind. Cas. 564.

———S. 53—Pending proceedings—Joint petition for discharge — One of two petitioners discharged — Application by Official Receiver to annul transfer by discharged insolvent—Whether once during insolvency proceedings.

Where, on a joint application for discharge by two insolvents, only one is discharged and the Official Receiver applies under S. 53 to annul a transfer made by the discharged insolvent, the application must be deemed to have been made during the insolvency proceedings.

A legal proceeding is said to be pending as soon as it has begun and until it has concluded, that is to say, so long as the Court having original cognizance of it can make an order on the matters in issue or to be dealt with therein. The pendency of the insolvency proceedings subsists, therefore, so long as there is jurisdiction for the Court to make orders therein appart altogether from the date of discharge. A.I.R. 1937 Rang. 276= 14 R. 704=170 Ind. Cas. 471.

18. Power of Court.

———Ss. 53, 54 and 4—Power of Court—Joint Hindu family—Adjudication of father—Annulment of sale of property executed by insolvent and his sons—Sons not made parties to proceeding.

A father of a joint Hindu family was adjudged insolvent on an application by a creditor who applied under Ss. 53, and 54 of the Provincial Insolvency Act for annulment of a sale of certain joint family property effected by the father and his sons. The father and the major sons signed sale-deed on their behalf and the minor sons were represented by their father who acted as their guardian, and the recitals in the deed stated that the debt was a family debt and was borrowed for a family purpose. The sons were not made parties to the proceeding. The Court found that the sale was bogus.

Held, that the Insolvency Court could set aside the sale only to the extend of the father's interest in the property sold and that the interests of the sons, including the minor sons could not be touched by the Court, at any rate, in their absence. As the son's share in the property had been sold there was no disposing power left to the father and consequently there was nothing which could vest in the receiver or the Court. I L.R. (1949) Nag. 155=A.I.R. 1949 Nag. 223=1948 N.L.J. 573.

———S. 53—Power of Court.

The powers under S. 53 are not to be exercised with reference to the principle of expediency. A.I.R. 1933 Nag. 365=30 N.L.R. 35=147 Ind. Cas. 1253.

———S. 53—Power of Court—Court's power to act suo motu.

In case where on the adjudication of the debtor as insolvent no Receiver is appointed, the Insolvency Court can itself move under S. 53 to set aside transfer made by the insolvent on the fact of the transfer being brought to its notice by any of the creditors. A.I.R. 1933 Nag. 365=30 N.L.R. 35=147 Ind. Cas. 1253.

———Ss. 53, 41 (4)—(1907), S. 36 and 44 (4)—Power of Court to delegate to Receiver.

The Act does not empower the Court to leave the duty of judicial enquiry under S. 36 to be done by the Official Receiver who, in fact, should be made a party to such proceedings. (1916) 2 M. W.N. 182=35 Ind. Cas. 875.

———S. 53—(1907), S. 36—Power of Court—Enquiry under power to delegate.

The District Judge must himself decide whether or not action should be taken to annul transfer under the section and cannot delegate an enquiry under S. 36 to a subordinate Court. 36 All. 549 = 12 A. L. J. 889= 26 Ind. Cas. 32.

———S. 53—(1907), S. 36—Power of Court under.

The words used in S. 36 are "may be annulled" and not "must be annulled" but the power given to the Court, is one that should be used if the circumstances call for it. 6 N.L.R. 146=8 Ind. Cas. 1115.

19. Procedure.

———Ss. 53 and 4—Procedure—Real transfer in fraud of creditors made beyond two years of insolvency petition —Annulment—Power of Court—Proper course—T. P. Act, S. 53.

Where an insolvent has made a real transfer in fraud of his creditors he has no present right to remove the transferee, unless the Insolvency Court has first annulled the transfer, and it can only annul the transfer subject to the provisions of S. 53 of the Provincial Insolvency Act (*i.e.*), where the transfer is made within two years of the petition for insolvency. There is no power conferrred by the Act to annul a transfer made outside the two-years, period. S. 4 of the Act no doubt confers wide powers to decide questions of title but it confers nothing further than the right to decide. To put it differently, it gives power to make a declaration, but no power to give consequential relief. A Civil Court can no doubt in proper circumstances in a suit under S. 53 of the T.P. Act annul a transfer made more than two years before the petition for insolvency. But the Provincial Insolvency Act does not confer upon the Insolvency Court all the powers of a Civil Court. The proper course for the Insolvency Court in such circumstances is first to satisfy itself whether the transfer is really one liable to be annulled under S. 53 of the T. P. Act, and if it decides that it is so, then to instruct the Receiver to file a suit for the purpose in the Civil Court. 26 Pat. 253=A.I.R. 1947 Pat. 471.

———Ss. 53, 54-A—Procedure—Exercise of right conferred by S. 54-A by creditor under S. 53 — Transfer established as wholly fictitious—Creditor, if can be deprived of his rigbt on ground that declaration as to fictitiousness could not be given except on Receiver's application—Aforesaid objection not taken in the trial Court—Appellate Court should treat proceedings as defective in form.

Where the creditor exercising his rights conferred by S. 54-A moves the Court to annul transfer under S. 53 he should not be deprived of the right, because he happens to succeed in proving a stronger case, by establishing that the transfer was wholly fictitious, on the ground that a declaration could not be given to the latter effect on the application of the Receiver.

If the objection were taken in the trial Court, clearly the Court could direct the Receiver formally to file the necessary application. Consequently, where the objection is not taken, the Appellate Court should treat the proceedings as merely defective in form for the absence of such application. A.I.R. 1941 Cal. 298=73 C.L.J. 225=199 Ind. Cas. 412.

——S. 53—Procedure—Issue to be framed.

Issues in cases under S. 53 ought to be framed in the terms of the section. A.I.R. 1937 Nag. 117=I.L.R. (1937) Nag. 78=167 Ind. Cas. 838.

——Ss. 53, 54—(1907), Ss. 36 and 37—Procedure—Transfer by transferee—Right to avoid vests with Official Receiver — Transferee necessary party — Enquiry — Procedure.

It is not competent to a Court to institute an enquiry under S. 36 or 17 of the Provincial Insolvency Act, on a report by the Official Receiver but where such proceedings are taken without objection they are not invalid **in toto**, and may be validated by the Official Receiver converting his report into a properly stamped petition.

The Court has jurisdiction under S. 36 of the Provincial Insolvency Act to enquire into a petition by the Official Receiver for the avoidance of a transfer by the debtor's transferee, where the second transfer is only a colourable transaction and debtor's transferee is only a benamidar for his subsequent transferee. In such an enquiry the second transferee is a necessary party.

Quaere:—Whether Ss. 36 and 37 of the Act contemplate action being taken against the transferees from the first transferee. 52 Ind. Cas. 761 (Mad.).

——S. 53 — (1907), S. 36 — Procedure—Annulment of transfer — Notice to transferee, essential — Notice to prove debt.

When a question arises whether a transfer should or should not be annulled under S. 36 it is requisite that the transferee should have proper notice that proceedings are contemplated under that section and a proper opportunity was given to put his case before the Court. The question of a proof of debt under the Provincial Insolvency Act is different from the question of annulling a mortgage under S. 36. 44 Ind. Cas. 168 (Cal.).

——S. 53—(1907), S. 36—Procedure—Annulment of transfer—Notice to transferee.

Before setting aside a sale-deed executed by an insolvent under S. 36 the transferee must be given full notice not only that the transfer in his favour is being challenged; but also upon the grounds upon which it is challenged proceeding ought to be taken in the name of the receiver and no such proceeding should be commenced until after the appointment of the Receiver. 42 Ind. Cas. 845. (All.)

——S. 53—(1907), S. 36—Procedure.

An application by a Receiver under S. 36 should be like an ordinary written statement and the transferee should put in a reply and the Court should try it much like a suit and not disdose of it summarily. 39 All. 391=15 A.L.J. 279=42 Ind. Cas. 841.

——S. 53—(1907), S. 36—Enquiry under—Duty of Court—Evidence should be allowed—Procedure.

When a transfer is impeached as being fraudulent transfer the Court ought not to decide that the document is invalid on a mere perusal of the same without giving the parties an opportunity to adduce evidence. 41 Ind. Cas. 411 (Cal.).

20. Refund of consideration.

——S. 53—Refund of consideration — Setting aside transfer—Refund of consideration, when necesssary.

Where a day after the Insolvency of a firm certain entries were made in the amount books showing satisfaction in cash of certain creditors who alleged that they had merely taken **havalas** from some of the firm's debtor's and it appeared that when these entries were made, there was the concurrence or at least the connivance of the debtors and the creditors of the firm and the satisfaction thereby shown was found to be an undue preference:

Held, that whether the transaction might turn out to be void or voidable, the claims of the creditors were fully satisfied according to the new arrangements to which they were parties, and that if the transactions be set aside, the payments must be refunded, A.I.R. 1933 Sind 85=143 Ind. Cas. 628.

21. Res judicata.

——S. 53—Res judicata — Decision under S. 53, if operates as res judicata.

The decision in tne insolvency case under S. 53 operates as **res judicata** in a subsequent suit for declaration of right to possession based on the conveyance: A.I.R. 1940 Cal. 578=44 C.W.N. 586=71 C.L.J. 594=191 Ind. Cas. 783.

——S. 53 — Res judicata — Order setting aside transfer.

An order of an Insolvency Court setting aside a transfer as being without consideration operates as **res judicata**. A.I.R. 1939 Lah. 145=41 P.L.R. 575.

——S. 53—Res judicata.

When an application uader S. 53 is dismissed, subsequent application under S. 54 is not barred. A.I.R. 1937 Lah. 668=39 P.L.R. 914=173 Ind. Cas. 514.

——S. 53—Res Judicata First application under S. 53, second under S. 54.

According to S. 5, the provisions of the Civil P.C are applicable subject to the provisions of the Provincia Insolvency Act. But the Insolvency Act provides for setting aside alienations under Ss. 53 and 54 on different grounds. So where an application under S. 53 is dismissed subsequent application under S. 54 is not barred by virtue of S. 11, Expl. IV, Civil P.C. Particularly when the Official Assignee is not proved to be aware of the grounds of his subsequent application at the time when the first application was made. A.I.R. 1937 Lah. 668=39 P.L.R. 914=173 Ind. Cas. 514.

——S. 53—Res judicata.

Where a transaction, being several years old could not be questioned by the Insolvency Court under S. 36 the question which the Insolvency Court expressly declined to adjudicate upon, is not **res judicata in a** subsequent suit under S. 53 of the Transfer of Property Act. 64 Ind. Cas. 523=A.I.R. 1922 All 443.

22. Revision.

——S. 53—Revision.

The question whether a particular transaction is **bona fide** or genuine one or it is a transaction which is not made in good faith and is fictitious is a mere question of fact. It cannot be treated as question of law: Consequently, a decision on such question under S. 53 is not open to revision. A.I.R. 1935 Lah. 708=37 P.L.R. 224=159 Ind. Cas. 866.

23. Right to apply.

——S. 53—Right to apply—Ss. 53, 54, 54-A— Transfer of property belonging to company—Transfer fraudulent —Right of unsecured creditor to challange.

The official Liquidator represents all the unsecured creditors and it is their right to challange through him a transfer of property belonging to the Company if the transfer is believed to be fraudulent, and either voidable under S. 53 or void under S. 54. If the official Linquidator refuses to do this, they may do it themselves with the leave of the Court under S. 54-A. A I.R 1942 Oudh 417=1942 O.W.N. 319=18 Luck. 110=200 Ind. Cas. 485.

——S. 54—Rights to apply—Creditor's right to apply.

In the absence of a Receiver appointed in the case, the scheduled creditor can apply for setting aside a transfer under Ss. 53 and 54 and it must be deemed that the Insolvency Court has granted him the necessary leave when is entertains his application in that behalf. A.I.R. 1940 Nag. 393=1940 N.L.J. 420=I.L.R. (1940) Nag. 564=190 Ind. Cas. 885.

——S. 53—Right to apply.

Pending Insolvency of mortgagor, mortgagee impleading Official Receiver in mortgage suit and obtaining ex parte decree—Application of Official Receiver to set aside mortgage-decree is maintainable—Official Receiver's right to have mortgage annulled is one foreign to mortgagee's suit. 1936 M.W.N. 699.

——S. 53—Right to apply—Receiver's right.

However strictly S. 53 may be construed, the subsequent transfer made by the transferee from an insolvent cannot debar the Official Receiver from exercising his rights under S. 53 so far as the original transfer is concerned. A.I.R. 1935 Lah 368=16 L. 1013=38 P.L.R. 24=156 Ind. Cas. 1018.

——S. 53—Right to apply—Persons competent to apply.

The mortgagors of a property were declared insolvents on a creditor's petition alleging an act of insolvency the fraudulent execution of a mortgage in favour of B.B. remained ex parte. and the Insolvency Court declared the mortgage void and adjudicated the mortgagors insolvents. A the assignee of the mortgagee B, sued for a declaration that the mortgage-deed was valid. It was urged on behalf of the Official Receiver that the order on the creditor's petition operated as **res judicata:**

Held, that the Insolvency Court ought not to avoid such alienations until moved by the Official Receiver under S. 53, or by an aggrieved party. A.I.R. 1932 Mad 233=35 L.W. 66=62 M L J. 177=138 Ind. Cas. 31.

——S. 53—Rights to apply.

There is no reason why a creditor or the Official Receiver acting for his benefit should not institute a suit under that section subsequent to the date of the order of adjudication. 115 Ind. Cas. 330=A.I.R. 1929 Sind 94.

——S. 53—Right to apply—Enquiry under—Who can question the transfer.

When neither the Receiver nor the Insolvency Court challenges the validity of a transfer by the insolvent, it is not open to a previous gratuitous transferee to challenge the validity of the transfer. A.I.R. 1921 All. 232, Foll. 102 Ind. Cas. 92=A I.R. 1927 All. 731.

——S. 53—Right to apply—Person entitled to complain.

It is the Official Receiver at whose instance an enquiry into the fictitious nature of the transaction should be made and it is the Official Receiver who should be the principal party representing the whole body of the creditors. 39 All. 152; A.I.R. 1924 Cal. 827; A.I.R. 1922 Mad. 246; 2 Pat.L.J. 101, Foll. 89 Ind. Cas. 357=47 All. 864=23 A.L.J. 792=6 L.R.A. (Civ.) 397=A.I.R. 1926 All. 29.

——S. 53—Right to apply—Creditor can move Insolvency Court where no Receiver is appointed. 83 Ind. Cas. 246=A.I.R. 1925 Nag. 225.

——S. 53—Right to apply.

It is the Receiver and only the Receiver who should conduct proceedings for cancellation of fraudulent deeds by insolvent; the provisions of S. 4 cannot be taken to authorize a creditor to prosecute an enquiry of this kind. 79 Ind. Cas. 326=51 Cal. 663=A.I.R. 1924 Cal. 827.

S. 53—Right to apply.

Obiter:—When the receiver refuses or neglects to apply, creditor can apply and set the proceedings under this section in motion. 1924 Lah. 331, Rel. on. 75 Ind. Cas. 985=A.I.R. 1924 Lah. 553.

——S. 53—Right to apply—Creditor can apply under S. 53 or S. 54.

A creditor can move the Court under S. 53 or S. 54 of the Act to set aside a voluntary transfer, or to void a fraudulent preference whatever the circumstances might be. 33 Ind. Cas. 395=47 Mad. 673=18 M.L.W. 857=33 M.L.T. 196=A.I.R. 1924 Mad. 345.

——S. 53—Right to apply—Application by creditor is tenable.

An application under S. 53 can only be made by the Receiver but if no Receiver is appointed, the Insolvency Court can itself move on the matter being brought to its notice by any other creditor. 78 Ind. Cas. 140=A.I.R. 1924 Nag. 361.

——S. 53—Right to apply.

Fraudulent alienation—Applicaon to annual cannot be made by creditor unless Receiver refuses to make it himself. 2 P.L.J. 101, Foll. 66 Ind. Cas. 271=45 Mad. 189=14 M.L.W. 639=1921 M.W.N. 816=A.I.R. 1922 Mad. 246=41 M.L.J. 606.

24. Scope.

——S. 53—Scope.

Section 53, 'Provincial Insolvency Act, empower the Court to annual certain transfers which take places within two years of the insolvency, and S. 54 to annual others which occur within three month before, but either section does not take away the general and wide jurisdiction and powers conferred by S. 4: A.I.R. 1944 Nag. 44=1944 N.L.J. 1=I.L.R. (1944) Nag. 342=213 Ind. Cas. 241 (F.B.).

[Overruling: A.I.R. 1938 Nag. 546=I.L.R. (1940) Nag. 203=181 Ind. Cas. 297.]

——S. 53—Scope—Colony land

Section 53 contemplates only such property as is available to the creditors or the official Receiver for the purposes of Insolvency and as the colony land is excluded from this category, its transfer cannot be challenged by the Official Receiver. (1940) 42 P.L.R. 144.

——S. 53—Scope.

Remission of contract by person on verge of insolvency, without consideration, is not operative against Official Receiver under S. 53. A.I.R 1940 Mad. 737=1940 M.W.N. 495=192 Ind. Cas 79.

——S. 53—Scope.

Sections 53 and 54 deal with transfer which is voidable at the option of the creditors. The transfer made after the presentation of the creditors, petition on which an order of adjudication was passed, is void ab initio and is not covered by S. 53 or S. 54. A.I.R. 1939 Nag. 207=1939 N.L.J. 267=I.L.R. (1939) Nag. 540=183 Ind. Cas. 172.

——S. 53—Scope.

The Receiver or the Official Assignee, under S. 53, Provincial Insolvency Act or S. 55, Presidency Towns Insolvency Act, has to prove, not that the insolvent was acting fraudulently or in bad faith but he has to prove that either the transferee or the purchaser gave no value or consideration for transfer and if there is consideration for the transfer, then the Receiver has to prove that there was no good faith on the part of the transferee. It is not necessary that both parties to the transaction should act in good faith; mere fraud on the part of insolvent is not enough. What is required under the section is the fraud or want of good faith on the part of the transferee. A.I.R. 1938 Bom. 449=40 Bom. L.R. 884=I.L.R. (1939) Bom. 1=178 Ind.Cas. 373.

——S. 53—Scope.

Under S. 53, it is not sufficient for the Receiver to prove that the result of the transfer was the preference of some creditors over others. A.I.R. 1937 Nag. 117=I.L.R. (1937) Nag. 78=167 Ind.Cas. 833.

——S. 53—Scope—Transfer by decree—Nominal transferor, being transferee from insolvent—Applicability of S. 53.

Section 53 refers to "any" transfer, and these words include a transfer made by a decree. The section does not provide for transfers by a transferee. But the words of S. 53 are wide enough to include the real transferor as distinct from the nominal transferor. Consequently, a transfer by a nominal transferee from an insolvent can be set aside, if it is proved that the real transferor behind the transfer was the insolvent himself and the both the transactions from part of the same transaction. A.I.R. 1936 Bom. 176=38 Bom. L.R. 255=162 Ind. Cas. 659.

——S. 53—Scope—Good faith considerations—Case of bad faith, whether comes within ambit of S. 53.

The fact that the transfer is in favour of a creditor, necessary takes it out of the reach of S. 53. In addition to valuable consideration, that section insists upon good faith and where the creditor transferee is shown not to have acted bona fide, the transfer can be annulled. But in considering the question of good faith under S. 53, that element which relates to fraudulent preference must be eliminated, that is to say, the knowledge, for instance, on the part of the transferee creditor that the other creditors are being defrauded, does not by itself constitute bad faith.

Cases may be conceived where the transaction is not a real one as where though the sale is ostensibly in favour of a creditor, there is some benefit reserved to the debtor, or again, where a third party, i e., [some person other than the transferee is really intended to take the benefit. Such cases of bad faith tainting the transfer, while being unconnected with the fraudulent preference which comes within the mischief of S. 54, are nevertheless within the ambit of S. 53. A.I.R. 1935 Mad. 253=68 M.L.J. 57=1935 M.W.N. 114=41 L.W. 723=157 Ind. Cas. 559.

——Ss. 53, 54—Scope—Any order setting aside a transfer under either of Ss. 53 or 54 pre-supposes an existing insolvency. A.I.R. 1935 Rang. 498=160 Ind. Cas. 861.

——S. 53—Scope—Sections 53 and 54, only lay down rules of evidence and are not exhaustive. A.I.R. 1933 Mad. 527=37 L.W. 508=63 M.L.J. 397=1933 M.W.N. 206=146 Ind. Cas. 530 (2).

——S. 53—Scope—An order under S. 53 does not entail a decision under S. 4. A.I.R. 1931 Nag. 153=27 N.L.R. 179=134 Ind. Cas. 687 (F.B.).

——S 53—Scope.

Section 53 applies only to transfers by the insolvent and not to transfers by transferees of the insolvent. Thus though a mortgage by the vendee of the person adjudged insolvent cannot be impeached in insolvency proceedings, it cannot be said that it cannot be impeached at all. 121 Ind. Cas. 663=A.I.R. 1930 Nag. 34.

——S. 53—Scope—Operation of S. 53.

Legislature by enacting S. 53 did not impliedly intend to deprive the debtor or the creditor of their right to have transfers set aside by instituting a suit before a ordinary tribunal within the longer period of limitation. 115 Ind. Cas. 330=A. I. R. 1929 Sind 94.

——S. 53—Scope.

Section 53 is not controlled by S. 28 (7). 111 Ind. Cas. 8=10 Lah. 106=29 P.L.R. 446=A.I.R. 1928 Lah. 361 (F.B.).

——S. 53—Scope.

The provisions of S. 28 (7), Provincial Insolvency Act apply to S. 53: 46 Cal. 991; 42 All. 433; 1927 Mad. 163; 35 M.L.J. 296, Foll.A.I.R. 1925 Bom. 480; A.I.R. 1924 Lah, 374; and 23 Ind. Cas. 924, not Foll.

The two years provided by S. 53 should be reckoned from date of the alienation upto the date of adjudication. 104 Ind. Cas. 177=26 M.L.W. 61=1927 M.W.N. 429=1927 M.W.N. 702=A.I.R. 1927 Mad. 826=53 M.L.J. 136.

——S. 53—Scope—Clause 7, S. 28 governs S. 53. 99 Ind. Cas. 241=1926 M.W.N. 972=50 Mad. 300=26 M.L.W. 865=A.I.R. 1927 Mad. 163=51 M.L.J. 719.

——S. 53—Scope—Section 4 of the Provincial Insolvency Act is subject to the provisions of S. 53 of the Act. 94 Ind. Cas. 429=48 All. 414=24 A.L.J. 495 =A.I.R. 1926 All. 470.

——S. 53—Scope—Receiver's report is not legal evidence.

The report of the Official Receiver in connection with an enquiry under S. 53 or S. 54 is not by itself legal evidence. Wherever it was intended by the Legislature that the report of an Official Receiver should be treated as evidence in the case, an express provision is made in the section dealing with th t matter e.g., in Ss. 38 and 42, on which a finding could be based. 89 Ind. Cas. 357=47 All. 864=23 A.L.J. 792=6 L.R.A. (Civ.) 397=A.I.R. 1926 All. 29.

——S. 53—Right to proposed under S. 53, Transfer of Property Act.

There is nothing in the Provincial Insolvency Act to prevent the creditors and, therefore, the Official Receiver from proceeding under S. 53 of the Transfer of Property Act, if they wish though they have another remedy under S. 53 of the Provincial Insolvency Act: 42 Mad. 322, Expl. 95 Ind. Cas. 300=23 M.L.W. 643 =A. I. R. 1926 Mad. 826.

——S. 53—Scope.

The District Judge cannot decline to go into the matter of the nominal or fraudulent nature of the alie-

nation in an application under S. 53.96 Ind. Cas. 944= 49 Mad. 794=A.I.R. 1926 Mad. 801=53 M.L.J. 602.

——S. 53—Scope—Rights of transferce.

The general principle applicable to cases under S. 53 is that when the transfer is found to be partly not in good faith and for valuable consideration, the assignment, as an assignment, is void but, for money genuinely paid in discharge of genuine debts, the alienee will stand in the shoes of those whom he has paid. In the case of a mortgage debt paid off, the transfer will not operate as a mortgage at all, not even to the extent of the amount paid, but the alienee will be entitled to rank in the schedule of secured creditors to the extent of his payment. 94 Ind. Cas. 535=23 M.L.W. 734=1926 M.W.N. 419=A.I.R. 1926 Mad. 672=50 M.L.J. 448.

——S. 53—Scope.

S. 54 deals with a fraudulent preference by the debtor himself and the question for consideration of the Court is as to his dominant motive only. Under S. 53 the law requires that whatever be the dominant motive of the transferor if the transferee himself had acted in good faith he is protected. The general words in S. 53 declaring all transfers void subject to certain exceptions cannot, therefore, be controlled by the specific mention of certain transfers which are declared void by S. 54. 93 Ind. Cas. 331=20 S.L.R. 197=A.I.R. 1926 Sind 133.

——S. 53—Scope—What has to be proved.

A man can commit what may be termed commendiously "anticipatory fraud" and effect a transfer of his properties with a view to get debt and prevent his creditors getting at his property. (26 E.R. 688; 33 Mad. 205 and 5 Bom.L.R. 255, Rel. on.

Under S. 53 of the Act what has to be proved is that the transfer was in good faith and for valuable consideration if the transfer is within two years of the insolvency, the burden being on the person asserting it, to prove it. Every transaction which an insolvent enters into within two years previous to his insolvency is treated by the Act as **prima facie** invalid and it lays the burden on the insolvent or the alienee to show that the transaction is a valid and **bona fide**, one. Both good faith and valuable consideration have to be proved by the alienee or by the person who supports the transfer.

The circumstances under which the deed came to be executed, the covenants made in the deed and the conduct of the parties both at the time and subsequently have all to be taken into consideration; and if it can be held that the transfer at the time was really intended to be carried out and was made **bona fide** for saving the insolvent from incurring debts and ruining himself, it may be that the transfer would not be inrerfered with. But if, on the other hand, there are circumstances to show that the transferor was actually screening his properties from the reach of his future creditors, there will be good ground for holding that the transfer is a fraudulent one. 82 Ind. Cas. 450=20 M.L.W. 683=1924 M.W.N. 506=A.I.R. 1924 Mad. 865=47 M.L.J. 431.

——S. 53—(1907), S. 36— Scope — Enquiry under—Matters for consideration.

In an enquiry under S. 36 of the Act, when a dower debt is alleged to be fraudulent, the important relevant matters for consideration are:—

(a) the exact amount of the dower due.
(b) the nature of the dower debt.
(c) the reality and good faith of the transfer.
(d) the value of the property transferred.
(e) the delay in the discharge of the dower debt.

As regards good faith the transferee must prove his good faith. 39 All. 95=14 A.L.J. 1183=37 Ind. Cas. 684.

25. Second Appeal.

——S. 53—Second appeal.

No second appeal lies from an order made by a Subordinate Judge under Ss. 53 and 54. A.I.R. 1940 Bom. 51=I.L.R. (1940) Bom. 1=41 Bom.L.R. 1258= 187 Ind. Cas. 508.

——Ss. 53 and 54—Second appeal.

A decision under S. 53, cannot be treated as one under S. 4 and therefore, no second appeal is maintainable against it. A.I.R. 1935 Lah. 708=37 P.L.R. 224 =159 Ind. Cas. 866.

——S. 53—Second appeal.

No second appeal lies against an appeilate order declaring an alienation by a debtor void as against the Official Receiver under Ss. 53 and 54. A.I.R. 1933 Mad. 653=38 L.W. 494=65 M.L.J. 298=145 Ind. Cas. 876.

——S.53—Second appeal.

No second appeal lies from an order passed under S. 53. A.I.R. 1931 Mad. 745=34 L.W. 105=61 M.L.J. 820=54 M. 989=132 Ind. Cas. 641.

——S. 53—Second [appeal.

Where an Insolvency Court, acting under the power conferred by S. 53 annuls a transfer of proerty and the District Court confirms this order, no second appeal lies to the High Court. A.I.R. 1931 Nag. 153=27 N.L.R. 179=134 Ind. Cas. 687 (F.B.).

——S. 53—Second appeal.

There is no right of second appeal from an order under S. 53 of Act V of 1920 annulling a transfer. 67 Ind. Cas. 887 (Lah.).

25. A Transfer.

——S. 53—Transfer—Partition of Joint family property.

Having regard to the definition of the expression "Transfer of property" contained in S. 2 (f) there can be no real doubt that a partition of joint family property amounts to "transfer of property" which falls within the mischief contemplated by S. 53 of the Act. 123 Ind. Cas. 286=31 P.L.R. 245=A.I.R. 1930 Lah. 645.

——S. 53—Transfer—A deed of release accompanied by mutuation and transfer of possession is a transfer. 123 Ind. Cas. 217=7 O.W.N. 377=A.I.R. 1930 Oudh 314.

——S. 53—Transfer—Meaning of.

The transfer contemplated by S. 53 is a transfer to some third party by which the debtor either receives consideration which is not available to his creditors or renders a portion of his property incapable of being taken possession of by the Receiver. 113 Ind. Cas. 148 =30 Bom. L.R. 893=A.I.R. 1928 Bom. 341.

——S. 53—Transfer—Transaction evidenced by decree passed on confession of judgment by insolvent is voluntary. 110 Ind. Cas. 742=A.I.R. 1928 Lah. 750.

——S. 53—Transfer—Any transfer of property must means a transfer recognised by the general law. 105 Ind. Cas. 138=50 Mad. 815=26 M L.W. 248=1928 M.W.N. 9=A.I.R. 1927 Mad. 869=53 M.L.J. 742.

26. Transfer from transferee.

———S. 53 — Transfer from transferee — Remedy open.

Where the insolvent, prior to his insolvency petition, transfers his property to another who transfers the same to a third person after the date of adjudication, the remedy in respect of the first transfer might be asked for in the alternative either under S. 53, if the fact were so found or under S. 4, if the transaction were proved to be fictitious but the remedy in respect of the second transfer (tranfer from the transferee from the insolvent to a third person) can only be obtained from the Insolvency Court in exercise of the jurisdiction under S. 4. A.I.R. 1941 Cal. 298=I. L. R. (1941) Cal. 298=73 C.L.J. 225=199 Ind. Cas. 412.

———S. 53—Transfer from transferee.

If the former transfer by the Insolvent is found to be void, the subsequent transfers also fall along with it. A.I.R. 1940 Lah. 124=190 Ind. Cas. 327.

———S. 53—Transfer from transferee.

Where the original tranfer by the insolvent is tained, the subsequent transfer by the transferee must also fail. A.I.R. 1938 Mad 370.

———S. 53—Transfer from transferee—Defence open to transferee.

Quaere—Whether a second transferee who bona fide takes a transfer for value from one whose transfer offends S. 53 can invoke the protection of the equitable rule in favour of transferees for value without notice. A.I.R. 1937 Mad. 872=(1937) 2 M.L.J. 378=46 L. W. 439=1937 M.W.N. 1090=175 Ind. Cas. 749.

———S. 53—Transfer from transferee.

A transferee from an insolvent cannot avoid the operation of S. 53, by merely passing on the property to some other person. The original transfer made by the insolvents voidable under S. 53 and if once it is declared void as against the Official Receiver, the subsequent transfer by the transferee cannot stand and can be annulled under S. 4, if not technically under S. 53. A.I.R. 1935 Lah. 368=16 Lah. 1013=38 P. L. R. 24=156 Ind. Cas. 1018.

———S. 53—Transfer from transferee.

Official Receiver sought for recovery of property as transfer was fraudulent—But transferee transferring to another bona fide transferee for value—Court's direction that 1st transferee must pay unpaid purchase money held valid. 1934 M.W.N. 681.

———S. 53—Transfer from transferee—Validity of transfers by transferees from insolvents—Whether can be considered by Insolvency Court.

Although generally it is incompetent for the Court in proceedings under S. 53, to inquire into the validity of transfers by transferees from an insolvent, yet in proceedings properly framed under Ss. 53 to 55, it may be convenient and sometimes necessary to have such transferees before the Court. The power of the Court under S. 4 to decide all questions arising in insolvency is undoubted and it is only a matter of discretion whether the procedure under the Act should be adopted or a suit be directed. A.I.R. 1932 Mad. 513=36 L. W. 219=140 Ind. Cas. 674.

———S. 53—Transfer from transferee of insolvents.

Under S. 53 the Official Receiver is not at liberty to attack a transfer from a transferee of the insolvent. A.I.R. 1925 Lah. 295 and 52 Ind. Cas. 761, Rel. on. 97 Ind. Cas. 918=A.I.R. 1927 Mad. 58=51 M.L.J. 228.

——S. 53—Transfer from transferee.

Section does not apply to transfers by insolvent subsequent to adjudication nor to transfers by insolvent transferee. 90 Ind. Cas. 1037=26 P. L. R. 397=A.I.R. 1926 Lah. 146.

——S. 53—Transfer by transferee insolvent cannot be annulled.

S. 36 of the Provincial Insolvency Act (1907) gives no power to the Court to cancel a transfer made by a transferee of the insolvent. The fact that the transferee of the insolvent comes into Court and make a statement that the transfer may be vacated does not alter the situation. 88 Ind. Cas. 89=7 L.L.J. 160=26 P.L.R. 224=A.I.R. 1925 Lah. 295.

27. Valuable consideration.

——S. 53—Valuable consideration—Meaning of.

Section 53 does not demand that the transfer should be for full and adequate consideration. That being so, it cannot be held that the transfer is without valuable consideration unless it is found that the consideration was so small as to be negligible in relation to the value of the property. A.I.R. 1941 All. 316 = 1941 A. L. J. 387=I.L.R. (1941) All. 603=1941 A. W. R. 229=196 Ind. Cas. 132.

——S. 53—Valuable consideration—What is.

A consideration will be 'valuable' within the meaning of S. 53, if it is not so small as to be negligible when the value of the property is to be taken into account even though it is not fully adequate. A.I.R. 1932 All. 243=1932 A.L.J. 53=137 Ind. Cas. 235.

——S. 53—Valuable consideration.

Surrender by insolvent — Landlord aware of a previous contract to sell—Transfer is not for valuable consideration. 104 Ind. Cas. 822=46 C.L.J. 168=A.I.R. 1927 Cal. 766.

——S. 53—Valuable consideration.

A responsibility taken by a person to whom properties are transferred in consideration of his taking up a trust thereof falls within the expression "valuable consideration" in Ss. 53 and 55 of the Provincial Insolvency Act 30 M. L. J. 415, Foll. 79 Ind. Cas. 888=11 O. L. J. 599=27 O.C. 392=A.I.R. 1925 Oudh 28.

——Ss. 53, 54—(1907), Ss. 36 and 37—Valuable consideration.

When a transfer is sought to be annulled in insolvency proceedings the transferee must be given a chance of defending his legal position. Prima facie old debts are good consideration into the adequacy of which the court will not enter. 50 Ind. Cas. 117 (All.).

——S. 53—(1907), S. 36—Valuable consideration—Dower debt.

A dower debt stands on the same footing as an ordinary debt and a transfer to the wife to satisfy the claim for dower is a transfer for valuable consideration. A transfer made before and in consideration of marriage under S. 36 of the Provincial Insolvency Act does not include an insolvent's transfer of property to his wife long after marriage in view of dower settled at marriage. 39 All. 95=14 A.L.J. 1183=87 Ind. Cas. 684.

——Ss. 53, 33—(1907), Ss. 36 and 24—Valuable consideration—Transfer by Mahomedan to wife for dower debt—Setting aside—Proof of debt.

When the Receiver of a Mohomedan insolvent got set aside a transfer by the latter to his wife in lieu of her dower debt of Rs. 25,000 the wife could not subsequently prove that her dower was Rs. 25,000 but she could prove the true amount due to her. 11 A. L. J. 614 =20 Ind. Cas. 641.

——Ss. 53, 55 (c)—1907), Ss. 36 and 38 (c)—Valuable consideration.

A transfer by a debtor of most of his properties to a few of his creditors for distribution among all the creditors pro rata made more than three months before the presentation of his petition in insolvency, is a transfer for valuable consideration within Ss. 36 and 38 (c) of the Provincial Insolvency Act (1907) the consideration for the conveyance being the, undertaking by trustees to distribute the assets. 30 M.L.J. 415=34 Ind. Cas. 602.

28. Miscellaneous.

———Ss. 53 and 54—Miscellaneous--Order of adjudication based on transfer as being act of insolvency—Transferee not party to adjudication proceeding—Whether can contend in subsequent proceeding for annulment that transfer was good—Evidence Act, S. 41.

Held, (by majority of F. B.):—A transferee who was not a party to the adjudication proceeding can contend in subsequent proceedings for annulment that his transfer was good notwithstanding that the order of adjudication was based on the alleged transfer as being an act of insolvency. Under S. 41 of the Evidence Act the order of adjudication in an insolvency case is admissible to prove the legal character of the debtor as an insolvent, but is inadmissible as against third parties to prove that the act on which the order was passed was an act of insolvency.

Per Bose J., (contra):—The transferee cannot question the order of adjudication in the annulment proceedings either as regards the fact of insolvency or as regards the act on which the order is founded. The remedy of the transferee is to appeal under S. 75 of the Provincial Insolvency Act, under S. 41 of the Evidence Act the order of adjudication operates as a judgment in rem and as such binds the transferee just as it binds all other men, and because this is insolvency it binds not only as regards the fact of insolvency but also as regards the action which the order is based. I.L.R. (1947) Nag. 85=230 Ind. Cas. 195=1947 N.L.J. 172= A.I.R. 1947 Nag. 161 (F.B.).

——Ss. 53, 54—Miscellaneous—Distinction between void and voidable transactions.

In case of a voidable transfer, the property continues in the alienee unless the transfer has been set aside. But where the transaction is a void one, the property continues to belong to the insolvent even though it stands in the name of the allienee. A.I.R. 1944 Mad. 49=56 L.W. 654=(1943) 2 M.L.J. 492=1943 M. W. N. 701= 216 Ind. Cas. 75.

——S. 33—Miscellaneous.

Annulment of an alienation under S. 53, Insolvency Act, is invariably "in pursuance" of the order of adjudication. If, therefore, the order of adjudication was made before the notification, the application for annulment of a transfer made by the insolvent would be subject to the Kamaun rules and not to the arrangement introduced by the notification. 1930 A.L.J. 1095=A.I.R. 1930 All. 511=128 Ind. Cas. 3.

——S. 53—Miscellaneous.

Decree attached—Assignment thereof —Assignor becoming insolvent after assignment — Official Receiver can proceed against the decretal amount when realized. 106 Ind. Cas. 666=1927 M. W. N. 680=A.I.R. 1927 Mad. 1025.

——Ss. 53, 55 (c)—(1907) Ss. 36, 38 (c)—Miscellaneous —Time of vesting.

Properties of an insolvent convey by him for consideration under Ss. 36 and 38 (c) to a few of his creditors, as trustees for its distribution pro rata among the general body of creditors do not vest in the Official Receiver on the adjudication. 30 M. L. J. 415=34 Ind. Cas. 602.

———S. 54.

Synopsis.

1. Appeal, second appeal and revision.
2. Applicability and scope.
3. Bar of suit.
4. Burden of proof.
5. Effect of order.
6. Fraudulent preference.
7. Interpretation.
8. Limitation.
9. Mesne profits.
10. Procedure.
11. Right to impeach transfer.
12. Transfer beyond three months.
13. "Within three months".
14. Miscellaneous.

1. Appeal second appeal and revision.

———S. 54—Appeal—Creditor right of

A creditor has a right of appeal from an order passed on an application by the Official Receiver under S. 54. A.I.R. 1933 Lah. 856 = 35 P. L. R. 171 = 147 Ind. Cas. 262.

——S. 54—Order dismissing application—Appeal.

Under the First Schedule to the Provincial Insolvency Act only an order annulling a transfer under S. 54 is made appelable as of right. An order refusing to annul a transfer for any reason whatsoever, would be covered by S. 75 (3) of the Act and can be appealed from only with the leave of the Court.

An order dismissing an applieation by the Official Receiver under S. 54 and directing him to have recourse to an ordinary civil suit is not appealable as of right but only with the leave of the Court under S. 75 (3). A.I.R. 1933 Lah. 242=33 P.L.R. 971=141 Ind. Cas. 36.

——S. 54 — Appeal from order refusing to annul transfer.

An appeal from an order refusing to annul a transfer under S. 54 can only be filed either by the leave of the District Judge or of the High Court under S. 75 (3). A.I.R. 1931 Lah. 651 = 33 P. L. R. 65 = 132 Ind Cas. 389.

——S. 54—Appeal—No second appeal lies.

Annulment of a transfer or refusal to annul a transfer is not a decision of a question falllng under S. 4, and as the distinction between decisions under S. 4 and orders under Ss. 53 and 54 is clearly recognised in Sch. I, no second appeal lies against an order passed under S. 54. A.I.R. 1924 Nag. 361, not Foll. 125 Ind. Cas. 686=A.I.R. 1930 Nag. 272.

——Ss. 54 and 53—New case in appeal.

Where in challenging a transfer by the debtor, the Receiver does not press his case under S. 53 before the Judge and does not allow the transferee to adduce any evidence as to the fairness of the price but confines his case to one of fraudulent preference under S. 54, he should not, in appeal, be allowed to adduce fresh evidence as to inadequacy of price. A.I.R. 1925 Cal. 650=158 Ind. Cas. 1017.

——S. 54—No second appeal lies from the decision of an Insolvency Court under S. 54 but the appeal can be treated as revision under S. 75. A.I.R. 1940 Lah. 6.

——S. 54—No second appeal lies against an appellate order declaring an alienation by a debtor void as against the Official Receiver under S. 54. A.I.R. 1933 Mad. 653 =38 L.W. 494=65 M.L.J. 298=145 Ind. Cas. 876.

——S. 54—No second appeal lies from an order setting aside a transfer under S. 54 and a revision lies only under first proviso to S. 75. A.I.R. 1932 Lah. 321=33 P.L.R. 255=137 Ind. Cas. 55.

——S. 54—Second appeal—Fraudulent preference — Burden of proof—Question of law or fact.

The finding of the lower Appellate Court on the question of fraudulent preference would ordinarily be one of fact and outside the province of the High Court sitting in second appeal but whether the burden of proof has been correctly laid or not is a question of law which can be considered in second appeal. A.I.R. 1941 Nag. 188=1941 N.L.J. 117=I.L.R. (1942) Nag. 441=195 Ind. Cas. 527.

——S. 54—Revision—Powers of High Court.

The High Court has very wide powers of revision under the Insolvency Act, and it is immaterial whether is treats the case as an appeal or as a revision; it has to satisfy itself whether the order of the District Judge was or was not according to law. A.I.R. 1937 All. 4= 1936 A.W.R. 1149=166 Ind. Cas. 801.

2. Applicability and scope.

——S. 54 — Applicabiljty — Sale to secured creditor of properties some of which alone were mortgaged to him—Right to impugn—Transaction—If can be split into two.

A sale to a secured creditor which includes also properties not mortgaged to him can be impugned under S. 54 of the Provincial Insolvency Act. The deed of transfer in such a case cannot be separated into transactions, one dealing with the secured properties and the other dealing with the rest of the properties. 1950 A.W.R. 315=A.I.R. 1950 A. 479.

——S. 54—Whether applies to joint family property.

Section 54 does not say that it is only a transfer of the insolvent's own or separate property that can be annulled by the Court. So long as the transfer of property **ex facie** binds the whole property, such transfer can be annulled under S. 55 when the conditions are satisfied, even though it may be joint family property in which the minor sons had an interest.

An insolvent Hindu father has authority to mortgage the entire family property where the debt for which the mortgage is executed is an antecedent debt of his not tainted by illegality or immorality. And where he executes the mortgage in fraudulent preference of the creditors for paying of the antecedent debt, the mere fact that the sons who were joined in the document with the father representing them, does not show that it was intended to mortgage the sons' shares separately from the father's share and the transfer can be annulled as a whole. A.I.R. 1937 Mad. 791=46 L.W. 391=(1937) 2 M.L.J. 427=1937 M.W.N. 1088=173 Ind. Cas. 519.

——S. 54—Surrender, if transfer—Transfer of his village share by insolvent by sale of proprietary right and surrender of occupancy right.

A surrender is certainly a transfer of an interest in property. Where the insolvent has tried to transfer the whole of his village share by the device of doing it in two stages (a) by selling the proprietary right and (b) by surrendering the occupancy rights, the whole transaction has to be taken together and amounts to one complete transfer of the whole of the village share and the deed of surrender is operated by S. 54. A.I.R. 1941 Nag. 188=1941 N.L.J. 117=I.L.R. (1942) Nag. 441= 195 Ind. Cas. 527.

——S. 54—Section 54 covers transfers in favour of creditors only. A.I.R. 1940 Oudh 205=1940 O.W.N. 146=1940 A.W.R. 67=185 Ind. Cas. 771.

——S.54—Applicability—Necessary conditions.

The conditions which S. 54 requires are: First, that the payment is made by a person unable to pay his debts as they become due from his own money. Secondly, that it, in fact, prefers one creditor over others. Thirdly, that the dominant motive with which the payment was made was a desire to prefer that creditor to whom the payment was made. Where there was more than sufficient to pay the debts of the debtor, he cannot be described as a person who was unable to pay his debts. There need not be an actual threat or actual pressure of a creditor. A.I.R. 1946 Pat. 411=21 P.L.T. 150=6 B.R. 546=186 Ind. Cas. 368.

——S. 54—Applicability—Essentials for.

Under S. 54, when it is established by the Official Receiver that the object of the insolvent in making a transfer was to give preference to one of the creditors, the fraudulent character thereof is to be presumed. It is true that the mere fact that preference incidentally resulted from the transfer is not enough to attract the application of the section. What is required is to prove that the dominant motive or object of the transfer was to give preference to such creditor. If this conclusion is reached, the fraudulent character of the transaction is to be presumed. A.I.R. 1933 All. 431=1933 A.L.J. 504=143 Ind. Cas. 609.

——S. 54—Applicability—Essentials.

The conditions precedent to the applicability of S. 54, are that the act complained of which is to be deemed fraudulent and void against the Receiver should have been done by the insolvent with a view to give preference to a creditor over others and that such act should have been done within three months of the presentation of the petition.

Where, more than three months before presentation of the petition for insolvency, a consent decree has been passed in favour of one creditor, the proceedings taken in execution of that decree cannot be impugned as fraudulent under S 54, even if the proceedings had been instituted within three months of the presentation of the petition. The execution proceedings taken against the insolvents or the **ex parte** orders for payment passed against them cannot afford fresh starting point for computing the period of limitation of three months under this section. A.I.R. 1932 Sind 3=25 S.L.R. 371 =136 Ind. Cas- 522.

——S. 54—Applicability conditions.

Before an order could be passed declaring a document null and void under S. 54 (1), the Receiver has to prove (i) that the debtor was, at the date of the transaction, unable to pay his debts from his own money, (ii) that the transaction was in favour of a creditor, (iii) that the debtor acted with a view of giving such creditor a preference over his other creditors, and (iv) the debtor was adjudicated an insolvent on a petition presented within three months after the date of the transaction. A transaction could not be set aside under that section though it had the effect of giving preference to a creditor, if that was not the object or intention of the insolvent. A.I.R. 1931 All. 142 (2)=1931 A.L.J. 26=135 Ind. Cas. 117.

——S. 54—Applicability—Conditions as to.

Before S. 54 can be made to apply to any particular case, the following conditions are to be fulfilled: (i) the debtor must at the date of the transaction, be unable to pay his debt; (ii) the transactian must be in favour of creditor; (iii) the debtor must have acted with a view to giving such creditor a preference over other creditors; and (iv) the debtor must be adjudicated insolvent on a petition presented within three months of the date of the transaction attacked. 113 Ind. Cas. 813=A.I.R. 1928 Rang. 166.

——S. 54—(1907), Ss. 37 and 23—Application to avoid sale—Official Receiver—Creditor—Rights of.

An insolvent Estate Court is not only competent to entertain an application under S. 37 of the Provincial Insolvency Act but is bound to enquire judicially into the matter when it is brougnt to its notice. The proper procedure is for the Receiver to make the application or at least to be a party to it. 42 Ind. Cas. 845 and 35 Ind. Cas. 875, Foll.

If the Receiver fails to move in the matter, it is competent to a creditor to make the application. An application under S. 37 of the Provincial Insolvency Act is competent when two conditions are fulfilled, firstly, the application for insolvency must be made within three months of the transfer sought to be avoided, and secondly, the debtor must be adjudged an insolvent. The limitation for such an application is three years from the date when the right to apply accrues, i.e., from the date of the adjudication. 151 P.R. 1919=52 Ind. Cas. 188.

——S. 54—Applicability — Mortgage executed within three months of adjudication.

Where a mortgage, whereby the possession of all the property is handed over to the creditor, has the effect of giving the creditor a preference over other creditors, the mortgage deed, being executed within three months of the application for adjudicatlon comes under S. 54. 1930 A.L.J. 370=A.I.R. 1930 All. 282.

——S. 54—Where a mortgage is executed prior to but is registered subsequent to the mortgagor's putting it insolvency petition, it cannot be said that the document was invalid because at the time of registration, the transferor had no interest left in the property. A.I.R. 1939 Lah. 145=41 P.L.R. 575.

——Ss.54, 53, 4—Scope.

Section 53, empowers the Court to annul certain transfers which take place within two years of the insolvency and S. 54 to annul others which occurs within three months before but either section does not take away the general and wide jurisdiction and powers conferred by S. 4. Sections 53 and 54 are enabling sections. They confer certain additional powers on the Insolvency Court which an ordinary Civil Court does not have. They are not restrictive and do not take away anything which is already there. A.I.R. 1944 Nag. 44 =I.L.R. (1944) Nag. 342=213 Ind. Cas. 241 (F.B).

[Overruling A.I.R. 1938 Nag. 546=I.L.R. (1940) Nag. 293=181 Ind. Cas. 297.

——Ss. 54 and 33—Scope—Jurisdiction conferred under S. 41.

Per Madhavan Nair, J.—Section 4 is very widely worded and gives Insolvency Courts powers not only to decide all questions of title or priority but all other qusstions . . . . which the Courts may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property. The jurisdiction conferred under S. 4 on the Insolvency Court is not limited in any way by Ss. 53 and 54 of the Insolvency Act. A.I.R. 1933 Mad. 271= 1932 M.W.N. 821=143 Ind. Cas. 372.

——Ss. 54 and 53—Transfer made after presentation of petition for adjudication.

Sections 53, 54 deal with transfer which is voidable at the option of the creditors. The transfer made after the presentation of the creditor's petition on which an order of adjudication was passed is void ab initio and it is not covered by S. 53 or S. 54. A.I.R. 1939 Nag. 207= 1939 N.L.J. 267=I.L.R. (1939) Nag. 540=183 Ind. Cas. 172.

——S. 54—Transfer after insolvency petition, if void—Contract to mortgage property entered into more than three months before insolvency petition, existing—Official Receiver, if can sell it.

Transfers effected after the petition in Insolvency has been filed are, if the transferor is ultimately adjudicated insolvent, void as against the Official Receiver.

The existence of a contract to mortgage entered into more than three months before an insolvency would be no bar to the Official Receiver selling the property through it might furnish a cause of action is a suit for specific performance. The existence of such a contract does not constitute a danger which the Official Receiver is bound to forestal by an application under S. 54, A.I.R. 1938 Mad. 801=1938 M.W.N. 291=(1938) 2 M.L.J. 362=48 L.W. 522=179 Ind. Cas. 240.

——S.54—Per B.K. Mugherjea, J. Section 54 has nothing to do with the publicity or secrecy of the transaction; for it contemplates payment of money and incurring of other obligations which do not require registration in law and need not be made openly at all. The legislature has deliberately dealt more leniently with a favoured creditor than a voluntary transferee and the former can escape if the preference is given more than three months before the application for insolvency was presented. A.I.R. 1938 Cal. 417=I.L.R. (1938) 2 Cal. 275=42 C.W.N. 554=178 Ind. Cas. 727.

——Ss. 54, 75—Application praying that transferees be directed to refund amounts realized—Whether covered dy S. 54—Order on application—Second appeal.

Section 4, very wide in its terms. Where an application is made under Ss. 4 and 54, and it is prayed that the transferees be directed to refund the amounts realized by them and the point is also subsequently raised, that they were personally liable for the entire amounts of the debts transferred to them, the reliefs are not covered by S. 54 and from the order passed on the application, a second appeal is competent. A.I.R. 1937 Lah. 913=171 Ind. Cas. 82.

3. Bar of suit.

——S. 54—Bar of suit.

An order passed under Section 37 of Provincial Insolvency Act is not a summary order but a considered order passed after the alienee has had an opportunity of leading all the evidence that he might lead in a regular suit. The fact that the order is made subject to an appeal shows that the Legislature could not have contemplated the possibility of the alienee maintaining a separate suit to cancel the order of the insolvency Court. No separate suit lies. 42 Mad. 322 and 39 All. 626, followed. 22 P. R. 1917, overruled. 69 Ind. Cas. 752=A.I.R. 1922 Lah. 214.

4. Burden of proof.

——S. 54—Fraudulent preference—Burden of proof.

The burden of proving that the transaction impugned amounts to a fraudulent preference is on the Official Assignee or Receiver. And though the onus of proving the intent to prefer lies on the Receiver and never shifts, it is open to the Court to infer such intention when that is the only way of explaining the transaction and no other explanation is possible. A.I.R. 1941 Mad. 726 =54 L.W. 259=1941 M. W. N. 735=(1941) 2 M.L.J. 810=200 Ind. Cas 110.

——S. 54.

Although the onus to prove that the transfer is fraudulent is initially on the person applying for annulment, you were the evidence shows that with the exception of a small residential house, the insolvent transferred all his property on the eve of bankruptcy and the transfers are in respect of the old debts and are made in favour of a relation and there is evidence of other acts of preference in favour of other creditor committed by the debtor shortly before or after the transaction impugned, these circumstances are quite sufficient to shift the onus of proof on the transferees. A.I.R. 1941 Nag. 188=1941 N.L.J. 117=I.L.R. (1942) Nag. 441= 195 Ind. Cas. 527.

——S. 54—Onus—On whom lies—How discharged.

The onus lies primarily on the Official Receiver who applies for setting aside under S. 54, transfers by the insolvent, to show that the transfer was made with a view of giving preference to the creditor in whose favour it was made; but when once that has been proved, such transfer will be deemed fraudulent and void as against the Receiver if the debtor is adjudged insolvent upon a petition presented within three months of the date of such transfer. A.I.R. 1937 All. 4=1936 A.W.R. 1149= 166 Ind. Cas. 801.

——S. 54—Burden of proof.

The burden of proof lies upon the Receiver to show that the insolvent made the transfer with a view to giving one creditor, the transferee preference over other creditors, A.I.R. 1937 Nag. 117=I.L.R. (1937) Nag. 78=167 Ind. Cas. 832.

——S. 54—Onus—On whom lies.

When a transfer by the insolvent is sought to be impeached under S. 54 by the Receiver, it is for the Receiver to prove that the transfer was tainted with intent to prefer, and the intention that is material is the intention of the transferor. A.I.R. 1936 Rang. 170= 162 Ind. Cas. 247.

——S. 54—The burden of proving that a particular transaction is fraudulent within the meaning of S. 54 lies heavily on the Receiver. A.I.R. 1935 Lah. 167.

——S. 54—In a suit by the Official Receiver to act aside a transaction by insolvent on the ground of fraudulent preference the onus of proving that he intended to give preference to the particular creditor over the other creditors lies on the Official Receiver. A.I.R. 1934 Lah. 994=37 P.L.R. 155=154 Ind. Cas. 56.

——S. 54—Burden of proof—On whom lies.

In a case under S 54, the burden is on the Official Receiver to establish necessary elements that make the section applicable and the mortgage is not to prove that the mortgage in his favour is not executed with fraudulent motives. A.I.R. 1933 Lah. 354=34 P.L.R. 436= 144 Ind. Cas. 762.

——S. 54—Onus of fraudulent motive and pressure.

On applications under S. 54 the onus of proving fraudulent motive on the part of the debtor is in the first instance, on the Official Receiver but circumstances, may shift the onus on to the transferee.

Where a mortgage was effected on the eve of bankruptcy in lieu of an old debt without the creditor having sent even a notice for the amount to the debtor and the document itself recited that the transfer was made by the debtor of his own free will:

Held, the burden was on the mortgagee to establish that he brought pressure to bear upon the debtor and that the transfer was not void. A.I.R. 1932 Lah. 321=33 P.L.R. 255=137 Ind. Cas. 55.

——S. 54—Onus of proof—On whom lies.

In an application by the Official Receiver for annulment of a payment made by an insolvent as being fraudulent and void under S. 54, the onus of proof is on the Receiver. A.I.R. 1931 Rang. 136=9 R. 71=134 Ind. Cas. 744.

——S. 54—Burden of proof.

Normally the burden is on the Receiver to bring his case within the provisions of S. 54: 43 Cal. 640, Foll. 114 Ind. Cas. 709=A.I.R. 1929 Lah. 159.

——S. 54—The burden of proving that the transaction amounting to a fraudulent preference comes within the scope of S. 54 and is bad as fraudulent preference lies heavily on the Official Receiver. A.I.R. 1938 P.C. 77, Foll. 124 Ind. Cas. 213=A.I.R. 1929 Mad. 821.

——S. 54—In determining the question whether a transfer is to be deemed fraudulent and void as against the Official Assignee in bankruptcy, the onus is on the Assignee to show that the case is within the statute. 107 Ind. Cas. 233=30 Bom. L. R. 290=47 C.L.J. 339 =27 M. L. W. 744=A.I.R. 1928 P. C. 54=77 M. L. J. 337 (P. C.).

——S. 54—The onus is on the person challenging an alienation under S. 54, Provincial Insolvency Act, to prove that it was made with the dominant view of giving the particular creditors a preference over others, 110 Ind. Cas. 824=A.I.R. 1928 Lah. 744.

——S. 54—It is well established that in cases under S. 54 of the Act the onus of proving that the transfer was made with a view to giving preference lies upon those who impugn the transaction. 113 Ind. Cas. 813= A.I.R. 1928 Rang. 166.

——S. 54—In applications under S. 54, Provincial Insolvency Act, the onus is, in the first instance, on the Official Receiver to prove that the dominant or the substantial or effective, though not necessarily the sole motive which the insolvent had in view was to prefer a particular creditor. But this onus is shifted on to the creditor or transferee to prove the contrary where the insolvent has made the payment or transfer of property as the case may be in discharge of an old debt, and on the eve of bankruptcy. And where the reason of such payment or transfer remains un-explained it is competent for the Court to hold that a prima facie case of fraudulent preference has been established and to act on it: A.I.R. 1926 Sind 126, Foll. 107 Ind. Cas. 210 (Sind).

——S. 54—Fraudulent preference — Ordinarily onus is on Official Receiver—Insolvent paying some creditors on the eve of bankruptcy—Onus is oninsolvent to prove bona fides—Reasons for payment unexplained— Court may presume undue preference. 93 Ind. Cas. 372=A.I.R. 1926 Sind 128.

——S. 54—Onus of proving transferor's intention to prefer is on Official Receiver—Mortgagor's intention in paying creditors with the mortgage money can't shake honest mortgagee. 78 Ind. Cas. 16=A.I.R. 1925 Mad. 328.

——S. 54—Onus—Question, when material.

When all the circumstances have been ascertained, so far as the parties have thought fit to ascertain them, discussion on the point of burden of proof becomes immaterial and the decision must be come to on the whole of the circumstances so ascertained; and the question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it. A.I.R. 1937 All. 4= 1936 A.W.R. 1149=166 Ind. Cas. 801.

5. Effect of order.

——S. 54—Effect of order.

The effect of the order setting aside the transfers is to restore the status quo ante between all the parties concerned. The mere fact that some of the creditors managed to get certain debts of the insolvent assigned in their favour, which assignments have been annulled subsequently, cannot make the assignees liable to pay the entire amount of the debts to the Receiver from their own pocket. A.I.R. 1937 Lah. 913=171 Ind. Cas. 82.

6. Fraudulent Preference.

(a) Test.
(b) Proof.
(c) What is.
(d) What is not.

(a) Test.

——S. 54—Fraudulent Preference—Test.

There can be no fraudulent preference where, at the time of effecting a mortgagee, the mortgagor who subsequently became insolvent honestly believed that his property was considerably worth more than its real worth and that he could also deal with other creditors in due course in the same way. The real test is not whether his assets were actually less than his liabilities but whether he honestly believed they were worth more. A.I.R. 1941 Mad. 274=(1940) 2 M.L.J. 846=52 L. W. 768=1940 M.W.N. 1200.

——S. 54—Fraudulent preference—Determining factors.

Obiter—It is the dominant intention of a debtor that is the determining factor in all cases under S. 54. If a debtor transfers a valuable property on the eve of insolvency to a creditor of his, the consideration being the past debt due to the creditor, an inference of undue preference can legitimately be drawn. But if the debtor approaches a creditor for a loan and substantial advance is made by the latter who insists, as a part of the same bargain, on the payment of the existing debt, the debtor consenting to it cannot be said to have voluntarily given preference to the creditor. A.I.R. 1938 Cal. 417=I.L.R. (1938) 2 Cal. 275=42 C. W. N. 554= 178 Ind. Cas. 727.

——S. 54—Fraudulent preference—Test.

The test whether the conveyance amounts to a fraudulent preference under S. 54 is what is the dominant or operative motive of the debtor in making the transfer. A.I.R. 1938 Mad. 117 = 46 L. W. 895= 1937 M. W. N. 1219=(1937) 2 M. L. J. 863=176 Ind. Cas. 652.

——S. 54—Preference must be fraudulent.

Where an insolvent does an act not mainly with a view to prefer a creditor but with a view to securing some real or fancied advantage to himself, the transaction will not be set aside on the ground of fraudulent preference though, in fact, it may amount to a preference. A.I.R. 1937 Mad. 872=46 L. W. 439= (1937) 2 M.L.J. 378=1937 M. W. N. 1090 = 175 Ind. Cas. 749.

——S. 54—The words "with a view of giving that creditor a preference" in S. 54 should be interpreted as meaning that what the debtor did was an act of free will and that his dominant intention in performing that act was to prefer such creditor. A.I.R. 1937 All. 4= 1936 A.W.R. 1149=166 Ind. Cas. 801.

——S. 54—Fraudulent preference—Test.

In determining the nature of the transaction under S. 54, what the Court has to see is whether the dominant motive of the debtor in making the transfer was a desire to prefer a particular creditor or some other. A.I.R. 1935 Lah. 167.

——S. 54—Motive of debtor.

Where the the debtor's motive in giving a mortgage to a creditor is not to give him a preference but to obtain a further loan from him, the mortgage cannot be said to be a fraudulent preference. A.I.R. 1935 Mad. 300= 41 L.W. 358=1935 M.W.N. 316=159 Ind. Cas. 541.

——S. 54—Transfer to bona fide creditor — Pressure from creditor — Validity of transfer—to favour one creditor without pressure from him is invalid.

If a man is insolvent, and disposes of a portion of his property in favour of a bona fide creditor, although upon the eve of bankruptcy, and although this fact be known or believed by both parties, it may be a perfectly valid and legal transaction. To render it invalid, there must be a disposition on the part of the insolvent to favour that particular creditor, and this is generally shown by the fact that the first step or proposal towards the disposal of the property in favour of that creditor proceeds from the insolvent debtor. But if the creditor, although he knew that the debtor is insolvent, presses and insists upon having a security for his debt, and the debtor yields to that pressure and gives the security;

although it may be well known to both, at the same time that the effect will be to give to that particular creditor an advantage over the other creditors of the insolvent the transaction is perfectly good and valid. A.I.R. 1934 Rang. 208=153 Ind. Cas. 19 (2).

——S. 54 — Undue preference — Test — Insolvent's intention—Transfer to avoid crisis—Vaiidity.

The mere fact that the transfers have resulted in an undue preference in favour of one creditor over the other creditors is not necessarily an indication of the intention of the insolvent to give such preference; the real test of this in each case is the dominant motive of the insolvent. The transferee's intention is immaterial.

Where a transfer is made not with intent to prefer the transferee but to avoid a crisis in the business, it is not voidable under S. 54. A.I.R. 1932 Lah. 381= 33 P.L.R. 464=137 Ind. Cas. 6.

——S. 54—' Preference', meaning of.

The word ' preference ' imports a free choice and it is necessary for the Receiver to prove that the debtor's act was voluntary and not due to extraneous influence such as pressure or threat from the creditor. A.I.R. 1937 All. 4=1936 A.W.R. 1149=166 Ind. Cas. 801.

——S. 54—' Preference', meaning of.

In order to come within the statute it must be shown that the act of the debtor was a voluntary one, in other words, the term "preference" or " preferring a creditor" has always been interpreted as meaning purely a voluntary act on the part of the debtor which condition could not exist where there was anything in the nature of pressure or that which would lead the debtor to think that he was compelled to do what he had done. A.I.R. 1934 Pat. 526=15 P.L.T. 461=1 B.R. 78=152 Ind. Cas. 655.

——S. 54—'Preference' meaning of.

The word " preference" imports a free choice, and it is necessary for the Receiver to prove that the debtor's act was voluntary and not due to extraneous influence such as pressure or threat from the ereditor. A.I.R. 1933 Lah. 354=34 P.L.R. 436=144 Ind. Cas. 762.

——S. 54 — ' Preference ', meaning of — Fraudulent preference—Tests.

The word 'preference' in S. 54 implies an act of free will. An act done under pressure is not an act of free will and to avoid a transaction as a fraudulent preference, it is not sufficient that the creditor was preferred; it must further be shown that the transfer was made with the view of giving him preference over the other creditors. It is settled law that it is not necessary that it should have been the sole view; it is enough that it was the dominant or substantial view or "the operative effectual view". If the view to prefer a particular creditor was only a secondary view the transaction is not treated as a fraudulent preference. In each case, the Court is to see whether the insolvent has preferred the creditor, with the dominant view of giving him preference over the other creditors. If the dominant view in making the transfer was to protect himself from legal proceedings, the transaction would not be a fraudulent preference.

Where on the eve of insolvency, the insolvent made a transfer for which the creditor paid cash in addition to a prior debt as consideration, and it appeared that the insolvent's position was far from desperate though several suits were filed against him subsequently:

Held, that the transfer was not a fraudulent preference under S. 54. A.I.R. 1932 Mad. 459=140 Ind. Cas. 463.

——S. 54.—Voluntary character—Test of.

If real pressure is brought to bear by the particular creditors who have obtained preferences and the preferences are the direct result of that pressure, and that pressure is the dominant reason for granting them, the act of the insolvent in giving those preferences would not be voluntary : 119 Ind. Cas. 708=1929 M.W.N. 327=A.I.R. 1929 Mad. 471.

——S. 54—"Preference."

A mere payment of a debt by debtor in imminent expectation of bankruptcy is not by itself sufficient to prove the intention to give preference. The word "preference" involves and imports a free choice and it is necessary to prove that the debtor's act was "voluntary" and not due to extraneous influence such as pressure or threats from creditors: 130 P. R. 1919, Foll. 110 Ind. Cas. 824=A.I.R. 1928 Lah. 744.

——S. 54—Transfer under threat of criminal prosecution.

The word "preference" imports and involves freedom of choice, and no transfer which is not voluntary in the sense that it is free act of the insolvent, is a preference which can be deemed to be fraudulent and valid against the Receiver. Where the proper inference to draw from the facts is that in making the transfer to his creditor, the debtor was only doing what he felt bound or compelled to do and where it must have appeared to him that the alternative to handing over was a prosecution for criminal breach of trust, the case is not one of fraudulent preference within the statute: 43 Cal. 640 and A.I.R. 1928 P. C. 77, Foll. 113 Ind. Cas. 148=30 Bom.L.R. 893=A.I.R. 1928 Bom. 341.

——S. 54—Fraudulent preference—Preference in return for personal benefit.

A preference given in return for a money payment which was made for the benefit of the insolvent personally and which would not possibly be for the benefit of his business and therefore for his creditors would result in preference being given to the man who made it, which could only be described as fraudulent. 128 Ind. Cas. 589=A.I.R. 1933 Rang. 315.

——S. 54—Preference must be intended and not merely incidental.

In order that a payment made by the insolvent to a creditor may be voluntary on his part, it is necessary that there should be neither outside pressure nor even inward apprehension of such pressure. If preference results incidentally and the dominant motive is something else, it does not fall within the terms of S. 54 (1) of the Act. A.I.R. 1928 P.C. 77; A.I.R. 1928 Bom 341, Foll. 32 Bom.L.R. 294=A.I.R. 1930 Bom. 217.

——S. 54—Per Thiruvenkatachariar, J.—It cannot be said that if one the creditors insists on having his money and another creditor is content to take a mortgage, the granting of the mortgage to the latter would not be showing him preference as he was content with less. 119 Ind. Cas. 708=1929 M. W. N. 327=A. I. R. 1929 Mad. 471.

——S. 54—Intention of insolvent.

Every transfer made by a person who is unable to pay his debts does not **ipso facto** become void in the absence of an intention of giving the transferee a preference over the other creditors. It depends upon circumstances which may raise such a presumption, 114 Ind. Cas. 709=A.I.R. 1929 Lah. 159.

——S. 54—Dominant motive in making transfer.

In proceedings under S. 54 what the Court has to determine is "was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character." This is a question of fact. If the Court after inquiry finds that the insolvent's dominant motive in making the transfer was to prefer one particular creditor over others, then the transaction amounts to a fraudulent preference and will be set aside. A.I.R. 1928 P.C. 77, Foll. 124 Ind. Cas. 213=A.I.R. 1929 Mad. 821.

——S. 54—Where the dominant motive actuating the debtor was that in making the transfer he was only doing what he felt himself bound or compelled to do, the transfer is not void as against the Official Assignee. 107 Ind. Cas. 233=30 Bom.L.R. 290=47 C.L.J. 332= 27 M.L.W. 744=A.I R. 1928 P.C. 77: 54 M.L.J. 337 (P.C.).

——S. 54—Dominant motive must be looked to.

As regards the question of fraudulent perference, the real question is what was the dominant motive of the transfer, or was it to give a preference to the creditor over the rest. 113 Ind. Cas. 129=1928 M. W. N. 617=A.I.R. 1928 Mad. 860.

——S. 54—"Preference", meaning of.

The word "preference", as used in S. 54 does not connote priority in respect of payment of a debt. That no doubt is one meaning of the word "preference", but it means in the context, the favouring of one creditor to the detriment of others. In the sense of one creditor being given priority, the result of the transaction always is a preference of that creditor. Preference, in that sense, is the occasion for the moving of the Court under S. 54. The question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. In other words, the test is, did the debtor execute the deed, with a view to protect himself, or with the view to benefit the creditor.

The debtors were heavily involved in October, 1921. They were threatened with suits and applications for attachment and arrest before judgment. They executed two mortgages in favour of two creditors on 25th October. In the case of one, there was not even a written demand for payment.

The debtors closed their place of business on the 26th and they were declared insolvents on the 1st, November. The creditors were not related to the insolvents.

Held, under the circumstances there was fraudulent preference. The motive that operated on the mind of the debtors was not safeguarding their own interests and the averting of unpleasant consequences. Although in some cases, a writ may be pressure, there are cases where writs are of absolutely no importance to the debtor, no terror; and in such cases, the threat of a writ or the issuing of a writ ought not to be called pressure. 91 Ind. Cas. 522=22 M.L.W. 134=1925 M.W.N 561=A.I.R. 1925 Mad. 1089=49 M.L.J. 562.

——S. 54—Criterion is whether transfer or payment is voluntary.

As regards transfers made in favour of one creditor with a view to giving that creditor preference over others, the criterion in such cases is whether the transfer or payment is voluntary.

Where the dominant motive of the debtor in making the transfer was to save himself from exposure or from a criminal prosecution, it cannot be held that the transfer was voluntary or amounted to a fraudulent preference. 130 P.R. 1919, Foll. 59 Ind. Cas. 578=3 L.L.J. 44=A.I.R. 1921 Lah. 274.

——S. 54—Intention to give preference.

It is not sufficient to prove that the transfer had the effect of giving preference to a creditor; it must be proved further that there was the view or intention to give that creditor a preference. 63 Ind. Cas. 916=44 Mad. 818=14 M.L.W. 428=1921 M.W.N. 330=A.I.R. 1921 Mad. 294=40 M.L J. 570.

——S. 54—(1907), S. 37—Fraudulent preference—Test of—Onus of proof.

Where a transaction is impugned as amounting to fraudulent preference within S. 37 of the Act it is not sufficient to prove that it took place within three months of the insolvency and that in fact it had the effect of giving preference to the transferee, but it has to be shown positively that the transfer was made with a view to prefer the creditor to whom it is made. The burden lies on the receiver or the creditors who impugned the transfer to make out that the transfer was made with a view to give preference. 37 M.L.J. 246= 10 L.W. 354=(1912) M.W.N. 576=53 Ind. Cas. 642.

——S. 54—(1907), S. 37—Fraudulent preference—Payment to creditor on the eve of bankruptcy—Presumption.

To avoid a payment as a fraudulent preference it must be shown that the dominant view of the insolvent was to prefer a particular creditor over the others. If it is established that the payment is made of the debtors' own accord and not in the ordinary course of business and without any sort of pressure being brought to bear upon him and that the debtor was on the eve of bankruptcy, the onus shifts on to the creditor to show that the payment was not made with a view to prefer him. 130 P.R. 1919=53 Ind. Cas. 421.

——S. 54—(1907), S. 37—Fraudulent preference—Tests of.

S. 37 requires four conditions for its operation—(1) the debtor must be unable to pay his debts as they become due; (2) the transfer must be in favour of a creditor;(3) the debtor must have acted with a view to giving that creditor a preference over other creditors; (4) the debtor must be adjudged insolvent on a petition presented within three months from the date of the transfer. Where in the case of a transfer for a fair value the first, second and fourth conditions stated above the present the transfer does not become void under S. 37 merely because the transferee did not believe that it was possible for the debtor to pay of all his creditors with the money obtained by the transferor did not see to the disposal of the money by the bebtor. The question whether there has been fraudulent preference depends, not upon the mere fact that there has

been a preference but also on the state of the mind of the person who made it. Where a transfer in favour of a creditor has been made under pressure it is not made with the view of giving preference to the creditor. 41 Ind. Cas. 399 (Cal.).

——S. 54 (1907), S 37—Companies Act, 6 of 1882, S. 213—Fraudulent preference explained—Plea not to be set up except in insolvency court.

To support the plea of fraudulent preference it must be shown that the object was to give preference to same particular creditor for preventing reteable distribution amongst all the creditors and no such inference can be drawn where a creditor presses his debt and payment is made to avoid the pressure.

A plea of fraudulent preference set up by a debtor, not in the interests of the creditors in general, but to avoid his own obligation is of no avail except perhaps in Insolvency Court. 10 S.L.R. 123=37 Ind. Cas. 250.

——S. 54—(1907), S.37—Fraudulent transfer—Intention of transfer—Transfer under pressure—Transfer under threat of Civil or Cr. Proceedings.

Mere suspicion that the transfer was a fraudulent preference is not enough to invoke the provisions of S. 37. Whether a transfer comes within S. 37 depends upon the state of mind of the transferor. Intention here does not mean legal intention but the real intention working in the mind of the transferor. A previous oral agreement to mortgage sufficient property may remove a mortgage given later out of the scope of S. 37. Transfer in favour of a creditor which is the result of real pressure brought to bear on him by the creditor or in performance of a previous enforceable agreement does not come under S. 37. A transfer by a debtor brought out by threats of Civil suits or criminal proceedings is an act to be impugned under S. 37. 43 Cal. 640=20 C.W.N. 420=33 Ind. Cas. 548.

——S. 54—(1907), S. 37—Fraudulent preference—Predominant motive of debtor.

In deciding under S. 37 whether a transfer by the insolvent was made with a view to give preference to one creditor over the others, the predominant motive of the debtor at the time of the transfer is the thing to be considered. 9 S.L.R. 65=31 Ind. Cas. 50.

——S. 54—(1907), S. 37—Preference—Implication of.

The word 'Preference' in section 4 (c) of the Act implies freedom of choice and free will. Where money is paid to a creditor under a prior arrangement, there is no question of fraudulent preference. 11 A.L.J. 545=20 Ind. Cas. 395.

——S. 54—Fraudulent preference—Creditor's knowledge, necessity of.

Under the present law, both English and Indian, as to fraudulent preference, the fact that the preferred creditor had no knowledge of the debtor's intention to prefer him does not save the transaction. A I.R. 1935 Mad. 300=41 L.W. 358=1935 M.W.N. 316=159 Ind. Cas. 541.

——S. 54—(1907), S. 37 (1)—Fraudulent preference —Good faith, how far a protection to creditor.

Four conditions, that have to be fulfilled before a transfer by a debtor of any interest in his property is avoided under S. 37 (1), are laid down. The onus of proving a fraudulent preference is on the Receiver even if debtor was insolvent at time of payment and knew himself to be so. To determine the question whether a person is able or unable to pay his debts as they become due, a transaction in favour of a creditor will be set aside if the dominant view is proved to be to give that creditor a preference over other creditors. The proper test to ascertain whether the dominant view is "was the act done voluntarily". The state of debtor's mind is the prominent consideration in every case under S. 37. Good faith of the creditor affords him no protection if the intention of the debtor to give him a preference is established, although under sub-S. (2) of S. 37 good faith will be a protection to a purchaser from the creditor of an insolvent. 19 C.W.N. 157=21 C.L.J. 167=29 Ind. Cas. 128.

——S. 54—In annulling a transfer on the ground of fraudulent preference, it is the intention of the insolvent alone that is relevent and not that of the transferee. 109 Ind. Cas. 370=A.I.R. 1029 Lah. 79.

——S. 54—In a case of fraudulent preference. it is not necessary for the Official Receiver to make out that the property alienated was undervalued. The gist of fraudulent preference lies in preferring one creditor to another when the insolvent is unable to meet his liabilities fully. In such cases the Official Receiver has only to make out the intention of the insolvent. The intention or motive of the transferee is immaterial. Even if the creditor has taken a **bona fide** sale from the insolvent in discharge of a debt to him that does not make the transaction a valid transaction if the intention or the view of the insolvent is to prefer that creditor to others. 92 Ind. Cas. 726=23 M.L.W. 10=1926 M.W.N. 124=A I.R. 1926 Mad. 338.

6. (b). Fraudulent preference—Proof

——S. 54—Intention—Principles determining.

In judging intention under S. 54, it is not permissible to invoke the aid of the principle that the intention of a person must be judged by the obvious and natural consequences of his acts. The dominant intention in the mind of the insolvent must be found to have been actually to prefer a creditor. The bare fact that the creditor has actually received a preference in the disposal of the insolvent's estate is not enough. A.I R. 1941 Mad. 274=(1940) 2 M.L.J. 846=52 L.W. 768=1940 M.W.N. 1200.

——S. 54—Determination of intention.

"Intent to defeat or delay the creditors" or having a "view to give preference to a creditor" are mental acts and can only be determined if one looks into the surrounding circumstances. A.I.R. 1937 Pat. 134=17 P.L.T. 857=3 B.R. 397=168 Ind. Cas. 140.

——S. 54—Intention—Inference.

The only substantial fact that the transaction was effected by the debtors when they were in imminent expectation of bankruptcy by itself is not sufficient to prove the intention to give fraudulent preference. A.I.R. 1937 All. 4=1936 A.W.R. 1149=166 Ind. Cas. 801.

——S. 54—Fraudulent intent—Evidence.

Evidence of other acts of preference in favour of other creditors, committed by the debtor shortly before or after the transaction impugned is admissible to show the debtor's intent. A.I.R. 1937 Nag. 117=I.L.R. (1937) Nag. 78=167 Ind. Cas. 833.

——S. 54—Fraudulent preference—Evidence.

There is a distinction between the effect of undue preference of one creditor in a transaction where there is no question of bankruptcy and the effect of such preference with reference to a transaction where the transaction can be challenged in bankruptcy proceedings.

Mere suspicion is no ground on which to rest a judicial decision and in fact is a treacherous ground for legal decision. A.I.R. 1933 Cal. 689=37 C.W.N. 675=147 Ind. Cas. 449.

——S. 54—Question of fact Object of transfer.

The question as to whether the object of the transfer was to give preference to one of the creditors is a matter of inference from the circumstances of each case and is essentially a question of fact. A.I.R. 1933 All. 431=1933 A.L.J. 504=143 Ind. Cas. 609.

——S. 54—Intention of insolvent—Duty of Court.

The Court has to decide what was the intention of the insolvent on the date of the transfer, and the document by which the transfer was made must be looked at for the purpose of seeing what was the **prima facie** intention of the insolvent A.I.R. 1931 All. 142=1931 A.L.J. 26=135 Ind. Cas. 117.

——S. 54—Intention of insolvent—Material date.

Preference—State of mind insolvent on date of payment and not prior to it is to be considered. 32 Bom. L.R. 294=A.I.R. 1930 Bom. 217.

——S. 54—Transfer or payment to one creditor is not "preference" unless made with intention to give undue advantage to that creditor over others—What that intention was is to be decided from circumstances of each case. 119 Ind. Cas. 708=1029 M.W.N. 327=A.I.R. 1929 Mad. 471.

——S. 54—Pressure by several creditors—Payment made to one—No inference can be drawn that such payment was not with intention to defraud other creditors—Court, while considering whether payment was made due to pressure, cannot enter into question of degree of pressure. 1919 M. W. N. 327=A. I. R. 1929 Mad. 471.

(c) What is.

——S. 54—Fraudulent preference—Circumstances pointing to—Sale practically of all property.

The residence of the transferee creditors in the village of the insolvents can be no ground for inferring an intention to prefer when practically all the creditors of the insolvents also lived in the same village, nor can the execution and registration of the sale-deed in favour of the transferee at a place where both parties resided instead of at a place where it should ordinarily have been registered be evidence by itself of such intent.

The insolvents's financial condition was so hopeless that any threat or pressure of the creditors could have had no influence on him. The creditors were aware of this condition and were demanding payments for some reason which had not been affirmatively substantiated. The insolvent sold most of his properties to one of the creditors in partial discharge of the debt due to him. The sale had an effect of giving him a preference over other creditors.

Held, that an intention to prefer the transferee creditor over other creditors could properly be inferred in the circumstances of this case in the absence of any reason why the insolvent sold practically all his property to the transferee when his insolvency was imminent. A.I.R. 1941 Mad. 796=54 L.W. 259=1941 M.W.N. 735=(1941)-2 M.L.J. 810=202 Ind. Cas. 110.

——S. 54—**Held**, on facts that there was fraudulent intention, and the transfers were with a view of giving preference to certain creditors. A.I.R. 1937 All. 4=1936 A.W.R. 1149=166 Ind. Cas. 801.

——S. 54—Circumstantial evidence.

The facts that an insolvent executes a mortgage in favour of one of his creditors, eight months after the execution of the pro-note in lieu of which the mortgage is executed, and there is no threat or pressure of any sort and the creditor is related to the insolvent are sufficient to show that the insolvent executed the mortgage with the intention of preferring that creditor. A.I.R. 1937 Nag. 197=I.L.R. (1937) Nag. 403=169 Ind. Cas. 688.

——S. 54—Inference from circumstances.

If a man who is in serious pecuniary difficulties, his debts surpassing his assets, transfers a considerable portion of his properties or transfers properties in favour of some of the creditors having made no provision for the payment of debts due to others, perhaps a Court may come to the conclusion that the transfers were made with intent to defeat or delay the creditors or with a view to give preference to a particular creditor. A.I.R. 1937 Pat. 134=17 P.L.T. 857=3 B.R. 397=168 Ind. Cas. 140.

——S. 54—Debtor mortgaging whole property with fictitious consideration—Preference, if made out—Mortgagee persuading insolvent to give undue preference.

Where the debtors mortgage the whole of their property with the understanding that two fictitious amounts the mortgage amount and the amount advanced by the mortgagee should be part of the consideration, so that the total amount of the mortgage money be nearly equal to the value of the property and the other creditors may not be able to recover their debts to any appreciable extent by sale of the equity of redemption, the case is one in which the insolvents transferred practically the whole of their immovable property with a view to giving preference to one of their creditors over the others. If the object of the insolvents is to give undue preference to one of their creditors in consideration of a fresh advance, the fact that the mortgagees were able to persuade the insolvents to give such preference will not affect the matter and S. 54 will apply. A.I.R. 1936 All. 489=1936 A.L.J. 698=1936 A.W.R. 585=163 Ind. Cas. 831.

——S. 54—Fraudulent preference—Intention—Inference of.

Where a payment is made shortly before a petition for insolvency is put in, there is an intention of undue preference. A.I.R. 1935 Cal. 190=60 C.L.J. 253.

——Ss. 54, 53—Advance of fresh loan when giving preference to the creditor—Effect of.

Where a creditor, at the time of receiving a fraudulent preference by way of mortgage from a debtor in

embarrassed circumstances, advanced a fresh loan to the debtor :

Held. that though the transaction could not be strictly viewed as a fraudulent preference within S. 54 of the Act so far as the fresh advance was concerned, yet it could be avoided under S. 53 of the said Act even in respect of the fresh advance. A.I.R. 1935 Mad. 246= 1934 M.W.N. 801=155 Ind. Cas. 611.

——S. 54—Fraudulent preference—What is.

Where a debtor who was in embarrassed circumstances being pricked in mind on account of the refractory conduct of some of the creditors who declined to reduce the interest as desired by him created mortgage practically over his entire property in favour of one of them giving him a vindictive preference with a view to punish the other creditors:

Held, that the transaction came within S. 54. A.I.R. 1935 Mad. 246=1934 M. W. N. 801=155 Ind. Cas. 611.

——S. 54—Fraudulent preference—What is.

Where, at a suggestion from the debtor and not by pressure by a creditor, the debtor mortgaged his properties to the creditor who was only too pleased to advance a little more money in order to secure the debts which may or may not be proved to have been incurred:

Held, that the transfer should be annulled under S. 54. A I.R. 1935 Rang. 316=158 Ind. Cas. 638.

——S. 54—The execution of a mortgage for a sum more than double of what was really due to a near relative points both to the dishonest intention of the alienor to give undue preference to his creditor and to the **mala fides** of the alienee who obviously reserves the extra consideration for the concealed benefit of the insolvent and S. 54 applies to such cases. A.I.R. 1933 Lah. 856 =35 P.L.R. 171=147 Ind. Cas. 262.

——S. 54—Insolvents assigning all their valuable movable assets to relation—Transaction held, fraudulent.

Where the insolvents assigned a promissory note to a relation of theirs three days before filing an application for adjudication, in liquidation of a debt alleged to be due to him, and it was proved in proceedings under S. 54, Provincial Insolvency Act, for annulment of the transaction at the instance of the Official Receiver that the assignee did not make any demands on the debtors for payment while some of the other creditors were executing decrees against them and others making pressing demands by letters and telegrams, and it also appeared that the assignment consisted of the only valuable moveable assets of the insolvents:

Held, that it was clear that the transaction was not entered into in good faith and that the dominant intention of the debtors was to give the assignee fraudulent preference over the other creditors. A. I. R. 1933 Lah. 620=145 Ind. Cas 874 (1).

——S. 54—Transfer under pressure—Transfer of whole property—Presumption as to intent in English law—Applicability to India.

A perfectly **bona fide** transfer not with the object of preferring one creditor to another but on account of the pressure exerted by that creditor for the satisfaction of his debt is not a fraudulent transfer within the meaning of S. 54, when there is no suggestion as to relationship between the parties or as to collusion.

The English Law as to the presumption as a matter of law as to the intent when the whole property of the insolvent is transferred is not found in the Provincial Insolvency Act which specifically sets forth that a certain intent is necessary to bring the act within the meaning of the statute. A.I.R. 1933 Rang. 216=147 Ind. Cas. 1195.

——S. 54—Fraudulent preference.

In the case of a transfer of a man's whole assets to one creditor for no reason whatsoever, a fraudulent preference must be deduced. 128 Ind. Cas. 589= A.I.R. 1930 Nag. 315.

——S. 54—The re-payment of the debt not actually due by a person in insolvent circumstances amounts to undue preference. 83 Ind. Cas. 246=A.I.R. 1925 Nag. 225.

——S. 54—(1907), S. 37—Transfer within three months.

Where a sale is effected within 3 months of the insolvency in consideration of the balance of the account due since over 2 years to the purchaser—creditor the transaction may be void under S. 37. 69 Ind. Cas. 566=A.I.R. 1922 Nag. 260.

——S. 54—(1907), S. 37—Fraudulent preference—Effect of T.P. Act, S. 53—Difference between.

Where a debtor being unable to pay his debts mortgaged his whole assets to some of his creditors by which the debts were discharged some of them being upon Hundies which had not become due and the other creditors applied for adjudging the debtor insolvent.

Held, that the act of the debtor amounted to a fraudulent preference and that the transfers should be set aside.

In a case under S. 53 of the T.P. Act actual fraud must be proved but in a case under S. 37 of the Insolvency Act it is enough to show that there was a preference by the debtor of one creditor over another. 18 P.W.R. 1912=26 P.L.R. 1912=13 Ind. Cas. 68.

(d). What is not.

——S. 54—Attachment whether pressure in law.

Actual attachment of debtor's property by some of his creditors is such a pressure as would take out the transfer out of the purview of S. 54. 1941 Mad. 274= 1940 M.W.N. 1200=(1940) 2 M.L J. 846=42 L.W. 768.

——S. 54—Fraudulent preference—What is not.

So long as there is threat of civil proceedings to avoid which the debtor makes the alienation in favour of one of the creditors and so long as his dominant motive is not to fraudulently prefer a particular creditor, the validity of the alienation cannot be challenged under Ss. 53 and 54. A.I.R. 1940 Mad. 228=50 L.W. 771=1939 M.W.N. 1245=(1940)-1 M.L.J. 786=188 Ind. Cas. 208.

——S. 54—Transfer under pressure-

A person was appointed guardian of a minor under the Guardians and Wards Act. The guardian committed a breach of trust and misappropriated his ward's funds. The ward, having attained majority, applied to Court for directions against his guardian complaining about the misappropriation. The guardian admitted the breach of trust and offered to convey his immovable property to get released from his obligation and executed a sale-deed of the property in favour of the ward. The guardian was subsequently adjudged an insolvent:

Held, that the transfer of property by the guardian did not amount to fraudulent preference. A.I.R. 1938

Mad. 177=46 L.W. 895=1937 M.W.N. 1219=(1937) 2 M.L.J. 868=176 Ind. Cas. 652.

——S. 54—Fraudulent preference—What is not.

A debtor must not, of his own mere motion, without pressure or application, give a security to a creditor on the eve of bankruptcy, and if he does, that is a fraudulent preference. But if there be any pressure or negotiation for a security on the part of the creditor, then the fact that the creditor knows the debtor to be in embarrassed circumstances is no objection to the validity of the security.

The debtor mortgaged a portion of his assets which was not a substantial portion to one of his creditors. The evident object was to relieve himself from the pressure of such creditor to carry on his business as before and it was found that he had not sold the good will of the firm or shops or buildings:

Held, that there was no fraudulent preference. A.I.R. 1935 Cal. 650=158 Ind. Cas. 1017.

——S. 54—Transfer under pressure of suit.

A transfer made under pressure of a suit is beyond the purview of S. 54. A.I.R. 1935 Lah. 167.

——S. 54—Held on facts there was no preference.

The alienee Bank had already obtained a decree against debtor and in executing that decree, it had attached the sheep and goats of insolvent debtor who was a butcher. It was then that he settled matters completely with the Bank and mortgaged his house to them:

Held, that the Bank was pressing its debtor and in order to be able to obtain his sheep and goats for commercial purposes, he mortgaged his house to it. It could not be said that he did it with a view to give the Bank preference over the other creditors. A.I.R. 1934 Lah. 994=37 P.L.R. 155=154 Ind. Cas. 56.

——S. 54—Fraudulent preference—What is not.

Where a debtor in insolvent circumstances gives security to a creditor in pursuance of a previous contract to do so, the security is not an act of fraudulent preference and cannot be attacked. A.I.R. 1934 Mad 294=1933 M.W.N. 1049=39 L.W. 449=150 Ind. Cas. 339.

——S 54—Where the debtors, being pressed by some of their creditors, proceed in the course of their business to borrow money for payment of their debts, it cannot be said that it is an act of preferring one creditor or some creditors over the whole body of creditors. The question of preference is always question of fact. A.I.R. 1934 Pat. 526=15 P.L.T. 461=1 B.R. 78=152 Ind. Cas. 655.

——S. 54—Grant of mortgage to one of the creditors.

Per **Thiruvenkatachariar, J.**—Creditors, who from the outset bargain for their debtors giving security for their debts, have a right to insist on security being given to them for their debts and the act of the insolvents in executing mortgages to such creditors would not amount to fraudulent preference, even when other creditors are equally pressing for payment of their money. 119 Ind. Cas. 708=1929 M.W.N. 327=A.I.R. 1929 Mad. 471.

——S. 54—One creditor threatening debtor with insolveney proceedings—Debtor therefore entering into arrangement with that creditor—Such arrangement is not fraudulent preference. 117 Ind. Cas. 563=6 Rang. 536=A.I.R. 1928 Rang. 302.

——S. 54—Intention of debtor—Real object to gain advantage to debtor and not to prefer creditor—No preference.

To constitute a fraudulent preference within the meaning of S. 54, the Court must be satisfied that the dominant or substantial motive was to prefer the creditor and was not to obtain some advantage to the debtor. Where it was found that the debtor was in need of money that he went to mortgagee and asked him to advance a sum of Rs. 1800 who told him that he would not make the advance until his previous debt was secured and unless sufficient security was given for the new advance which he desired him to make and that the debtor agreed to the suggestion and probably in an endeavour to keep his business afloat as long as possible he granted the mortgage, **Held**, that these circumstances clearly show that the real intention of the debtor was not to prefer one creditor to other creditors but to gain a substantial advantage for himself and that the transfer was not fraudulent. 75 Ind. Cas. 861=A.I.R. 1924 Lah. 686.

——S. 54—An insolvent was unable to pay his creditors and had stopped a considerable portion of his business. He was all the while making genuine effort to set right his financial position without admitting defeat. In such circumstances his bankers, who had a legitimate grievance against him, exerted a severe pressure on him; whereupon the insolvent executed a registered security bond within three months prior to the date of his being adjudicated an insolvent.

Held, that the security bond was not executed with a view to giving the bankers a preference over other credtiors within the meaning of S. 54. 124 Ind. Cas. 213=A.I.R. 1929 Mad. 821.

——S. 54—Debtor's intention is the dominant factor in deciding fate of the transaction.

S. 54 does not avoid a transfer merely because its effect is to give one creditor preference over other creditors but makes the intention of the debtor the dominant factor in deciding the fact of the transaction.

Where the debtor unable to meet his liabilities and in need of further accommodation, approached the creditor and asked him to make a loan, intending thereby to benefit himself and not the creditor.

Held, that the transaction was not effected with a view of giving the creditor a preference over other creditors. 92 Ind. Cas. 296=A.I.R. 1926 Lah. 231.

——S. 54—Transfer to save himself from exposure and from Court proceedings, is not fraudulent preference.

Where the debtor in order to save himself from exposure and from proceedings in Court and in order to appease the Ludhiana Mills Company, one of the creditors, made equitable mortgage in favour of the Company.

Held, under these circumstances the mortgage cannot be said to be created with a view of giving preference to the Company over the other creditors. (3 Lah. L.J. 44, Foll.). 75 Ind. Cas. 441=A.I.R. 1923 Lah. 652.

——S. 54—Intention not to prefer but to obtain cash.

Where the real intention of the debtor is not to prefer any creditor but to obtain cash which could not be obtained unless he transferred property, the transfer is not fraudulent preference. 62 Ind. Cas. 732=43 All. 427=19 A.L.J. 240=A.I.R. 1921 All. 41.

——S. 54—(1907), S. 37—Preference—Transfer for consideration to all the body of creditors except one.

A sale of land for consideration even though made with a view to exclude the particular creditor in favour of the other creditors is not bad as intended to defraud creditors generally. 33 Ind. Cas. 695 (Mad.).

——S. 54—(1907), S. 37—Lease for consideration.

Lease of occupancy holding granted for reasonable rent shortly before filing petition of insolvency is not fraudulent under S. 37. If transaction is only colourable, it is void and the property can be placed in the hands of the Receiver. 38 All. 37=13 A.L.J. 1064=31 Ind. Cas. 716.

7. Interpretation.

(a) Creditor.
(b) Transfer.
(c) "Void".

(a) "Creditor".

——S. 54—Construction. "Creditor".

The word "creditor" in S. 54 means any person who at the date of payment or transfer is entitled, if bankruptcy supervenes, to prove in the bankruptcy and share in the distribution of the bankrupt's estate. 113 Ind. Cas. 813=A.I.R. 1928 Rang. 166.

——S. 54—"Creditor", meaning of.

A new creditor, who only becomes a creditor in respect of the transaction which gives rise to the question as to whether it was a fraudulent preference, can be a creditor within S. 54, as for example, where a transaction consists of two independent parts, (1) the consideration passing to the debtor, thereby creating a debt from the debtor to the creditor, and (2) then the debtor independently and voluntarily makes a transfer in respect of the debt. But where the transaction which results in the transfer is one transaction complete in itself, that view cannot apply. 62 Ind. Cas. 732=43 All. 427=19 A.L.J. 240=A.I.R. 1921 All. 41.

——S. 54—'Creditor'—Secured creditor.

A secured creditor is not a 'creditor' within the contemplation of the term as used in section. 37 80 Ind. Cas. 323=27 C.W.N. 816=A.I.R. 1923 Cal. 689.

——S. 54—A secured creditor is a creditor within the meaning of S. 37 of the Act. 68 Ind. Cas. 460=A.I.R. 1922 Nag. 235.

——S. 54—'Creditor'—Surety.

A surety, as such is clearly a creditor of the insolvent. He is clearly a creditor as soon as he pays the money on his behalf. Where the insolvent was unable to pay his debts in full as they became due from his own money, and the person in whose favour the transfer was made as a creditor, and the effect of the agreement to transfer was to pay the transferee the major portion of the debt due to him by the transfer, so that the properties might not go into the general fund to be divided rateably amongst all his creditors.

Held, the transfer is void as a fraudulent preference. 79 Ind. Cas. 813=2 Bur. L.J. 52=A.I.R. 1923 Rang. 149.

——S. 54—(1907), S. 37—Creditor—Surety.

A surety for the payment of a debt by the insolvent is a creditor within S. 37 and a sale to him is a fraudulent preference under S. 39. By the Division Bench.—A creditor can move the Court to set aside a sale by the insolvent. But the court should not hear the application unless due notice is given to the Official Receiver. 40 Mad. 783=32 M.L.J. 253=(1917) M.W.N. 238=21 M.L.T. 225=5 L.W. 830=38 Ind. Cas. 783 (F.B.).

——S. 54—(1907), S. 37—Creditor—Surety or Accommodation acceptor.

A surety or an accomodation acceptor is a contingent creditor; but he is not a creditor who can be fraudulently preferred under S. 56. 32 Ind. Cas. 795 (Mad.).

(b) "Transfer"

——S. 54—Transfer, meaning of.

The word 'transfer' in S. 54 means a valid and effective transfer which could only take place after registration and not by mere execution of document. A.I.R. 1938 Nag. 454=I.L.R. (1939) Nag. 377=178 Ind. Cas. 479.

(c) "void".

——S. 54—'Void', meaning of—Transfer that may be deemed void under S. 54—Whether void ab initio—Transferee, if in lawful possession until transfer is set aside—Liability for mesne profits.

The word 'void' in S. 54 means 'voidable'. It is clear from sub S. (2) of S. 54, that a transfer that may be deemed void under this section is not necessarily void **ab initio** and it is void only as against the Receiver while remaining valid as between the parties to the transaction. Consequently, such a transfer is not void **ab initio**, but is merely voidable. The transfer is valid until set aside and being in lawful possession, the transferee is not liable for mesne profits. A.I.R. 1936 Nag. 139=31 N.L.R. 178 Sup.=161 Ind. Cas. 689.

——S. 54—(1907), S. 37—'Void' meaning of.

The Official Receiver cannot object to the execution of a decree by a transferee under O. 21, R. 16, C. P. C. unless he has obtained an order of Court under S. 37. The term 'void' in the section means only voidable. 38 Ind. Cas. 231 (Mad.).

8. Limitation.

——S. 54—Limitation.

An application under S. 37 of Act 3 of 1907 is not governed by Art. 181 of the Limitation Act. According to the wording of S. 37, if the High Court chooses to take action itself under that section it is not bound by any period of limitation. Therefore the fact that the Court was moved to take action by the Receiver makes no difference. The Court if it so desires can take action under S. 37, at any time during the pendency of the proceedings, when a transfer open to objection under the said section is brought to its notice and therefore there is no reason why the Receiver should be restricted by Art. 181 of the Limitation Act in moving the Court to take action. **Obiter** : Even assuming Art. 181 to be applicable the right to move in the matter accrued to the Receiver from day to day as long as the proceedings continued. 69 Ind. Cas. 403=A.I.R. 1924 Lah. 331.

9. Mesne profits.

——S. 54—Application under, by Official Receiver—Transfers by insolvent prior to adjudication set aside—Subsequent application by Receiver for mesne profits and interest against transferee

held not barred by res judicata—Receiver held entitled to mesne profits and interest for three and six years respectively prior to date of application for same—Limitation Act (1908), Arts. 109, 120.

On 10th November, 1930, **A** was adjudicated insolvent. In April, 1930, **A** had sold certain motor buses to **B** for Rs. 10,000 and a motor shed for Rs. 170. On 5th April, 1935, the Official Receiver filed an application for setting aside the transfers by the insolvent on the ground that they constituted fraudulent preferences. The application was dismissed by the District Judge but on appeal to the High Court the transactions were set aside on 18th March, 1942. On 17th August, 1943, the Official Reeeiver filed an application for an order directing **B** to pay mesne profits in respect of the shed at Rs. 12 per month and interest on Rupees 10,000, the value of the buses, from the date of the alienation. It was contended, firstly, that the claim for mesne profits and interest was barred by **res judicata** as it was not raised in the previous application of 5th April, 1935 for setting aside the transfers and, secondly, under Art. 109, Limitation Act, mesne profits could be claimed only for a period of three years prior to 17th August, 1943 and under Art. 120, Limitation Act, interest on Rs. 10,000 could be claimed only for six years prior to 17th August, 1943:

Held that (1) the claim for mesne profits and interest was not barred by **res judicata**. As the District Judge, who heard the application of 5th April, 1935 under S. 54 dismissed it, the question of mesne profits and interest did not arise and in the High Court the only question was whether the transactions amounted fraudulent preferences and the High Court did not enter into a discussion of the amount which the Official Receiver was entitled to recover as mesne profits and interest, it being the intention of the Court that any further questions should be first decided by the insolvency Court;

(2) the plea of limitation was well founded and the Official Receiver was entitled to mesne profits only for three years prior to 17th August, 1943 and to interest on Rs. 10,000 for six years prior to that date. A.I.R. 1946 Mad. 207=(1945) 2 M.L.J. 557=1945 M.W.N. 772 =58 L.W. 665=224 Ind. Cas. 636.

——S. 54—Mesne profits, awarding of—Transaction set aside as fraudulent.

Section 54 does not in itself give power to the Insolvency Court to award mesne profits but the Insolvency Court has the same jurisdiction as the ordinary Civil Courts to pass such orders as equity may require. Mesne profits can be granted whenever the other party has been in wrongful possession and possession obtained by fraud is wrongful. If, therefore, a transaction is set aside as fraudulent under S. 54, the Court in its equitable jurisdiction, attempts to put the parties in the same position as if the fraud had not been committed and this can only be done by awarding mesne profits from the date of the transaction as if it were a void transaction. A.I.R. 1945 Mad. 253=1945 M.W.N. 276=58 L.W. 260=(1945) 1 M.L.J. 469.

10. Procedure.

——S. 54—Absence of formal application—Effect.

When parties have notice and there is thorough investigation an order passed under S. 54 will not be quashed simply because no formal application was filed. A.I.R. 1935 Cal. 190=60 C.L.J. 253.

——S. 54—Proceeding under—Continuance after annulment of adjudication.

On an annulment of adjudication under S. 43 owing to the failure of the insolvent to apply for his discharge within the specified time the property of the insolvent does not necessarily revert to him. Under S. 37 the Court should, in proper cases, order the property to vest in the Official Receiver. In this way the insolvency proceedings not having come to an end, the proceedings started before the annulment by the Official Receiver to set aside a mortgage under S. 54 must be deemed to be pending, and, therefore, can be continued after the annulment. 122 Ind. Cas. 351=52 Mad. 648=29 M.L.W. 649=1929 M.W.N. 489=A.I.R. 1930 Mad. 278=57 M.L.J. 116.

——S. 54—Order annulling transfer before adjudication.

Order, first annulling transfer, and then adjudicating debtor insolvent, is not illegal, though wrong in sequence. 109. Ind. Cas. 370=A.I.R. 1929 Lah. 79.

11. Right to impeach transfer.

——S 54—Official Receiver alone is the right person to complain to Court about fictitious nature on behalf of all creditors. 39 All. 152, A.I.R. 1924 Cal. 827; A. I. R. 1922 Mad. 246; 2 Pat. L.J. 101, Foll. 89 Ind. Cas. 357=47 All. 864=23 A.L.J. 792=6 L.R A. Civ. 397=A.I.R. 1926 All. 29.

——S. 54—A disposition of a Company's property cannot be impeached on the ground of fraudulent preference except on behalf of the general body of the creditors.

A person, who is not a creditor of the Bank but only a debtor, cannot do so. 59 Ind. Cas. 977=2 Lah. 102 =62 P.L.R. 1921=A.I R. 1921 Lah. 200.

12. Transfer beyond three months.

——S. 54—Transfer beyond three months.

The creditors of a debtor applied on 15th December, 1926 that the debtor be adjudged insolvent. The total debt payable by the debtor to the two creditors did not amount to Rs. 500 On 28th January, 1927, his third creditor was joined. The total debt payable to the three creditors then amounted to over Rs. 500. The debtor was then adjudged an insolvent.

Held, that 28th January, 1927 must be taken to be the date of the petition upon which the insolvent was adjudged as such; and transfers more than three months before that date could not be questioned under S. 54 (1). 111 Ind. Cas. 136=26 A.L.J. 941=A.I.R. 1928 All. 676.

——S.54—Transfer beyond three months—Validity.

In one sense, when one creditor obtains a preference for himself by taking a mortgage or sale, it may operate to the prejudice of other creditors, but such transactions are perfectly valid unless they are within three months from the adjudication. Where the primary object of the transaction is to protect himself and not to defeat other creditors a creditor is entitled to do it. A.I.R. 1915 P.C. 115 and 27 Bom. 322, Foll. 101 Ind. Cas. 568=39 M.L.T. 485=A.I.R. 1927 Mad. 1144.

——S 54—Creditor taking security from insolvent—Adjudication after three months—No suspicious circumstances—Transaction is valid. 101 Ind. Cas. 153= A.I.R. 1927 Mad. 1090.

13. "Within three months."

——S. 54—"Within three months"—Period of limitation.

The expression "a petition presented within three months after the date of thereof" in S. 54 is not only descriptive of the application but lays down a period of limitation. The Court-fees Act is a fiscal enactment and is not in **pari materia** with the Limitation Act. Section 54 prescribes a period of three months for making an application for annulment. That application must be governed by the principles bearing on the construction of the statute of limitation as contradistinguished from a fiscal enactment such as the Court-fees Act is. A.I.R. 1938 Nag. 454=I.L.R. (1939) Nag. 377=178 Ind. Cas. 473.

——S. 54—Starting point—Mortgage—Date of execution or registration.

Under S. 54, the period of three months in the case of a mortgage which is compulsorily registrable commences from the date of the execution of the deed and not from the date of its registration, as on registration, the deed takes effect from the date of the execution under S. 47, Registration Act. A.I.R. 1938 Cal. 417=I.L.R (1938) 2 Cal. 275=42 C.W.N. 554=178 Ind. Cas. 727.

——S. 54—Starting point—Date of registration or execution.

The requirement of registration of a document is an evidentiary requirement and an unregistered transfer is inchoate and is ineffective until registered. But it nevertheless exists and when registered operates from the date of its execution. The requirement of registration is a requirement of form only; the Registration Act looks not to the reality of the agreement between the parties but to the form in which that agreement is expressed. Once the form has been supplied, the reality of the transaction receives acknowledgment. And, accordingly, the period of three months referred to in S. 53 Prov. Insol. Act, begins to run from the date of execution of the transfer provided it has been properly registered within the specified time. A.I.R. 1937 Rang. 446=1937 Rang. L.R. 375=172 Ind. Cas. 126 (F.B.).

[Overrules 9 Rang. 263=A.I.R. 1934 Rang. 216=151 Ind. Cas. 670.]

——S. 54—Starting point—Deed of transfer—Date of execution or registration.

For the purpose of S. 54, the transfer cannot be antedated by the operation of S. 47. Registration Act. Date of the transfer is the date of registration. Consequently, under S. 54, a deed of transfer can be impeached even if the execution was more than three months before presentation of insolvency petition, if the registration is effected within the three months next preceding the presentation of the petition. A.I.R. 1938 Mad. 801=1938 M.W.N. 291=48 L.W. 522=(1938) 2 M.L.J. 362=179 Ind. Cas. 240.

——S. 54—Starting point—Transfer deed.

The three months' period contemplated in S. 54 runs from the date of registration of the transfer deed, because it is by registration that the transfer becomes effective and the title passes from the transferor to the transferee. A.I.R. 1938 Nag. 454=I.L.R. (1939) Nag. 377=178 Ind. Cas. 479.

——S. 56—It would be difficult to say that any particular date within period of three months was other than "on the eve of bankruptcy." A.I.R. 1937 All. 4=1936 A.W.R. 1149=166 Ind. Cas. 801 (D.B.).

——S. 54—Starting point—Date of registration or execution.

Under S. 54, a transfer can be set aside only if the insolvency petition is presented within three months after the date thereof, and in case of documents requiring registration, time must run from the date of the registration and not from the date of the execution of the deed. A.I.R. 1937 Nag. 197=I.L.R. (1937) Nag. 403=169 Ind. Cas. 683.

——S. 54—Starting point—Date of registration or execution.

In the case of a transfer of immovable property of the value of rupees one hundred or upwards, the period of three months prescribed in S. 54 should be calculated from the date of the registration of the deed of transfer and not from the date of the execution of the deed. A.I.R. 1933 Mad. 185=37 L.W. 130=64 M.L.J. 382=1933 M.W.N. 312=141 Ind. Cas. 101.

14. Miscellaneous.

——Ss. 54 and 37—Sale deed executed more than three months before insolvency petition—Compulsory registration within three months—Act of the transferor under S. 54—Sale of property by insolvent after insolvency proceedings—Binding effect on parties—Effect of annulment of insolvency—Set-off—Claims arising out of same transaction—Counter-claim made after limitation period—Sustainability in case between vendor and vendee.

Where the transferor had executed a sale-deed more than three months before the insolvency petition filed by his creditor, and it was shown that he had no reason to expect that the creditor would file the petition, and although he knew that the document would have to be registered he had no reason to think that it would not be registered until within three months of the filing of the insolvency application, and he was not a party to the registration of the deed which was done compulsorily within three months before the insolvency petition.

Held, that, under the circumstances the act of registration was not an act of the transferor within the meaning of S. 54 of the Provincial Insolvency Act.

There is no statutory prohibition against the sale of property by an insolvent after the insolvency proceedings have been initiated. The vesting of property in the Official Receiver is for the benefit of the creditors and so does not purport to affect transactions between the insolvent and other persons, except in so far as they affect the administration of the insolvent's estate for the benefit of the creditors. As far as the parties to the transactions are concerned they are binding on them.

The effect of the annulment of the adjudication relates back to the date of the adjudication and is as if no adjudication had taken place, except as regards the acts of the Court and the Official Receiver which are validated by S. 37 of the Provincial Insolvency Act.

Where at the time when the sale was executed the insolvent had every reason to believe that he had a title to the property and he purported to transfer the whole title to the vendee but on account of subsequent insolvency proceedings title could not be conveyed.

Held, that the transferee became entitled to the property by virtue of S. 43 of the Transfer of Property Act as soon as the insolvency proceedings had been annulled and title restored to the transferor.

The cause of action for the suit to recover unpaid purchase money arose because the sale had not been given effect to, in that the consideration for the sale

had not been paid. As effect had not been given to the sale because possession was not allowed to remain in the hands of the transferee, and was subsequently retained by the transferor, the first defendant prayed for a set-off of the amount due to him as mesne profits for the period he was kept out of possession.

Held, that the claims for mesne profits and for the unpaid purchase money arose out of the same transaction, and that they could be set-off against each other.

The ordinary rule is that a counter claim can only be allowed if it is not barred by time. Certain exceptions are recognised such as in accounts between a trustee and **cestui que trust**, or where the claim arises out of mutual accounting. But the case of a vendor and vendee cannot be brought under the exceptions to the rule. I.L.R. (1948) Mad. 872=61 L.W. 283=1948 M.W.N. 260=A.I.R. 1948 Mad. 430=(1948) 1 M. L.J. 290.

——S. 54—Creditor alleging mortgage by debtor as act of insolvency—Subsequent withdrawal of this allegation—Adjudication—Official Receiver, if estopped from impeaching mortgage.

Where creditors' application to adjudicate the debtor as insolvent alleged as one of the acts of insolvency a mortage effected by the debtor but subsequently the creditors withdrew the allegation and relied only on the other acts of insolvency and the Official Receiver put in an application under S. 54 to annul the mortgage on the ground that it was effected in order to give fraudulent preference over other creditors:

Held, that the Official Receiver who represented the entire body of creditors was not bound by the statement of the petitioning creditors and that as such, he was not estopped from challenging the mortgage. A.I.R. 1933 Lah. 354=34 P.L.R. 436=144 Ind. Cas. 762.

——S. 54—Moveable property.

So far as moveable property is concerned mere preference of one creditor at the expense of another if he is not injuriously affected will not make the transaction void or voidable under any law except Insolvency law. 118 Ind. Cas. 401=A.I.R. 1929 Rang. 110.

——S. 54—Enquiry under—Receiver's report is not legal evidence.

The report of the Official Receiver in connection with an enquiry under S. 53 or 54 is not by itself legal evidence. Wherever it was intended by the legislature that the report of an Official Receiver should be treated as evidence in the case, an express provision is made in the section dealing with that matter, e.g., in Ss. 38 and 42, on which a finding could be based. 89 Ind. Cas. 357=47 All. 864=23 A.L.J. 792=6 L.R.A. Civ. 397=A.I.R. 1926 All. 29.

——S. 54—(1907), S. 37—Sale before adjudication—Evidence at Insolvency proceedings—If can be used against purchaser.

In impugning a sale under S. 37 of the Act evidence given at the insolvency proceedings can be used against the purchaser, though he was not a party thereto. 23 Ind. Cas. 597 (Mad.).

——S. 54—Decree against insolvent—If binding on Receiver.

A decree obtained against the judgment-debtor is not binding against the Receiver in insolvency. There is always a possibility of its having been collusive between the parties, when the judgment-debtor has nothing in the world to bless himself with and does not care whether he has decrees for an unlimited amount against him or not. 84 Ind. Cas. 1008=A.I.R. 1923 All. 33.

——S. 54-A—Application for annulment of transfer by creditor—If competent.

The restrictions imposed by S. 54-A of the Provincial Insolvency Act apply only where a Receiver has been appointed in the case. If there is no receiver, any creditor can make an application for annulment of a transfer. 30 N.L.R. 35 and 9 P. 839, foll. A.I.R. 1931 Lah. 651, Not Foll. I.L.R. (1950) Nag. 331=1950 N.L.J. 105.

——S. 54-A—Applicability.

The restrictions placed by S. 54-A on the powers of a creditor to move the Court to take action under S. 53 apply only where a Receiver has been appointed. Where the Court is summarily administering the estate, any creditor may move the Court to take action under S. 53 of the Act. A I.R. 1931 Pat. 14=9 Pat. 839=129 Ind. Cas. 129.

——S. 54-A—Scope.

Section 54-A is only an enabling provision under which, in a case in which with the leave of the Court, any creditor who has proved his debt may file an application under S. 53 for annulment of a transfer. This does not mean that the transferee is not entitled to raise such defence as he could in order to show that the application under S. 53 is not tenable. A I.R. 1940 Nag. 393=1940 N.L.J. 420=I.L.R. (1940) Nag. 446=190 Ind. Cas. 885.

——S. 54-A—Creditor's right to apply.

A creditor cannot take action under S. 54-A, after the insolvent has been given an absolute discharge. A.I.R. 1943 Mad. 592=56 L. W. 253=1943 M.W.N. 281=(1943) 1 M.L.J. 356=I.L.R. (1944) Mad. 92=208 Ind. Cas. 548.

——S. 54-A—Fraudulent transfer by company—creditor's right to apply for setting aside.

When an Official Liquidator refuses to apply for setting aside a transfer by the company under S. 53 or S. 54, the creditors themselves may do it with the leave of the Court under S. 54-A. A.I.R. 1942 Oudh 417=18 Luck. 110=1942 O.W.N. 319=200 Ind. Cas. 485.

——S. 54-A—Leave of Court, necessity of.

Section 54-A, read with S. 53, makes it clear that before an application by a creditor for annulment of a transfer referred to in S. 53 is entertained the Court must give permission to him S. 54-A. Without the permission, the proceedings are **ultra vires**. A. I. R. 1942 Pesh. 90=1942 Pesh. L.J. 90=206 Ind. Cas. 93.

——S. 54-A—Revision.

The point that the proceedings are **ultra vires** as no leave of Court was obtained under S. 54-A is an objection on the ground of jurisdiction which can be taken even on revision provided no evidence is required to support it. A.I.R. 1942 Pesh. 90=1942 Besh. L.J. 90=205 Ind. Cas 93.

——S. 55—Applicability.

A purchased the properties belonging to an insolvent by a sale-deed executed subsequent to the filing of the insolvency petition and prior to the passing of the order of adjudication. The properties which he purchased as well as other properties were sold in execution of a decree obtained against the insolvent debtor before the petition to adjudge him an insolvent was filed. They were all sold in execution but pending the insolvency proceedings; the debtor by selling the properties in dispute to A for Rs. 1,750 and by selling the properties for Rs. 4,250 to another person raised Rs. 6,000 and directed the same to be paid into Court for having the Court sale set aside. The money was accordingly deposited by A and the other purchaser and the sale was set aside on 20th January, 1935. Fifteen days later, the adjudication was made. Even before A deposited the money into the executing Court, the Insolvency Court was moved by a creditor to stop the sale in execution of that decree, but the Insolvency Court passed an order directing the executing Court to proceed with the sale and deposit the sale proceeds to the credit of the insolvency petition. Accordingly, the money paid by A for setting aside the sale was credited to the insolvency proceedings. The Official Receiver applied to the Insolvency Court for payment of the amount to him. It was stated then by the Official Receiver that the sale was for a fair price and that it was out of the sale proceeds the amount due under the decree was deposited into Court to avert the Court sale. The Insolvency Court directed the payment of the money to the Official Receiver and he received the amount for distribution to the general body of creditors. Subsequently, the Official Receiver claimed a right to the properties as well and sold some of them on 9th May, 1935, at an auction-sale. A thereupon filed a petition under Ss. 4, 5 and 55 for a declaration that he was entitled to the properties:

Held, that the transactions were not binding on the Official Receiver nor did he adopt them. The sale to A did not confirm any title upon him and because the Official Receiver might have been pleased by what had happened, it did not mean that he adopted the sale to A.

A could not claim protection under S. 55 because he knew that the insolvency petition was pending when he agreed to buy the property from the insolvent. A.I.R. 1944 Mad. 278=57 L.W. 132=(1944) 1 M.L.J. 215=1944 M.W.N. 178=I.L.R. (1944) Mad. 779=218 Ind. Cas. 217.

——S. 55—Applicability.

Where the appellant filed a suit against the insolvent a day after the presentation of the insolvency petition and obtained a decree before the date of adjudication, the insolvent having withdrawn his defence:

Held, that this was not a transaction which is protected by S. 55, and, unless it comes within the protection of that section, by reason of the doctrine of relation back, the property of the insolvent must be deemed to have vested in the Official Receiver on the date of the presentation of the insolvency petition which was antecedent to the date of the filing of the suit and the subsequent decree. A.I.R. 1935 Mad. 817=1935 M.W.N. 716=69 M.L.J. 241=42 L.W. 220=58 Mad. 1032=158 Ind. Cas. 460.

——S. 55—Transactions protected by S. 55—"Transaction," meaning of.

Under S. 55, the only transactions which are protected are payments by the insolvent to any of his creditors, and payment or delivery to the insolvent, transfers by the insolvent for valuable consideration or contracts or dealings by or with the insolvent for valuable consideration provided that such transactions take place before the date of the order of adjudication and that the persons with whom such transactions take place have not, at the time, notice of the presentation of any insolvency petition by or against the debtor. The word "transaction" within the meaning of S. 55, contemplates something done by the insolvent. The word does not point to a proceeding in which the bankrupt is merely passive. A.I.R. 1935 Mad. 817=1935 M.W.N. 716=69 M.L.J. 241=42 L.W. 220=58 Mad. 1032=158 Ind. Cas. 460.

——S. 55—Applicability.

A person who claims the benefit of the proviso to S. 55 must show that he had no notice of the presentation of the insolvency petition. A.I.R. 1933 Sind 85=143 Ind. Cas. 628.

——S. 55—Scope.

S. 55 of the Act protects all transactions unless, they are in themselves acts of insolvency or fraudulent preferences, entered into with the insolvent by third persons for valuable consideration and bona fide namely, bona fide in the sense that the person with whom such transaction takes place had not, at the time, notice of the presentation of any insolvency petition by the debtor. 62 Ind. Cas. 732=43 All. 427=19 A.L.J. 240=A.I.R. 1921 All. 41.

——Ss. 55 (a), 56 (3), 4—Payment of money by debtor to creditor between commencement of insolvency proceedings and date of adjudication — When protected—Payment in violation of S. 55 (a)—Refund—Interest on sum, right to.

The payment of money by the debtor to his creditor between the commencement of the insolvency proceedings and the date of the order of adjudication is only protected if the person who receives the money has no notice of the presentation of an insolvency petition by or against the debtor. But if the money is received by the creditor with notice of the presentation of the insolvency petition, it is not protected and the creditor may be compelled to return it to the Receiver. By the order of adjudication, the property of the insolvent vests in the Court or the Receiver and under S. 28, the order relates back to the date of the filing of the insolvency petition. Where the creditor has received a sum of money from the insolvent in violation of the provisions of S. 55 (a), the money received by him continues to belong to the estate of the insolvent, which vested in the Receiver. S. 56 (3) read with S. 4 gives jurisdiction to the Insolvency Court to pass an order against the creditor to refund the amount which appertained to the estate of the insolvent. A.I.R. 1936 Nag. 28=31 N.L.R. 121 (Sup.)=161 Ind. Cas. 441.

——S. 55—Payments to insolvent in good faith.

Payments, in respect of debt due to the insol-

vent made bona fide that is, without notice of the insolvency proceedings, to the insolvent before the date of the order of adjudication are valid. The effect of the application of S. 38 seems to be this, that a debt vested in the receiver may be discharged by payments made under circumstances specified in that section to the insolvent. 73 Ind. Cas. 1037=19 N.L.R. 144=6 N.L.J. 213=A.I.R. 1923 Nag. 290.

——Ss. 55, 34, 61 (1) (a)—Execution of mortgage as security for payment of rent to Government—Rent not paid—Adjudication—Government selling properties without notice to Receiver—Validity of sale—Proper course for Crown.

Where a person who had executed a mortgage of his immovable property as security for due payment of rent due to Government and committed default in payment thereof was adjudicated insolvent and subsequently, the Government sold the property without notice to the Receiver who applied to have it set aside:

Held, that if the Crown wished to rely upon the protection given by S. 55 to bona fide transactions prior to the date of the order of adjudication, it was the duty of the Crown to have pleaded the protection of that section and further the burden was upon the Crown to show that at the time of the transaction in question, it had no notice of the presentation of an insolvency petition.

Held, also that the sale should be set aside but that as the debt due to the Crown was contracted by the insolvent before the date of adjudication, the debt due to the Crown is provable in the insolvency under the provisions of S. 34 (2), and on proof of the debt, the Crown would have priority in the distribution of the property of the insolvent under S. 61 (1) (a). A.I.R. 1935 Rang. 273=158 Ind. Cas. 361 (2).

——S. 55, Proviso—Scope—Mortgage during pendency of insolvency proceedings against mortgagor—Mortgagee having notice of same—Transaction, if protected.

Under S. 55, a transferee under a transaction made before the order of adjudication is protected only if the transfer is for valuable consideration and the transferee had no notice of the presentation of the insolvency petition. In order to bring his case under the proviso to that section, the plaintiff must show that both these conditions co-exist, but where it is found that he had notice of the fact that the petition of insolvency was pending at the time when the mortgage in his favour was executed, he cannot avail himself of the protection given by the proviso to S. 55.

It is a well-settled rule of interpretation of statutes that in the absence of a provision to the contrary, a new law ought not to be construed so as to interfere with vested rights. Where, therefore, the mortgage had been effected six months before the new Act 5 of 1920 came into force and according to the law then in force, the mortgage was valid notwithstanding the fact that it had been made at a time when a petition for the adjudication of the mortgagor was pending, for it was effected for valuable consideration and was protected by the proviso to S. 38 of Act 3 of 1907 and the mortgagee therefore, had acquired a valuable right and this right could not be lost by the subsequent change in the law made by the enactment of Act 5 of 1920 and repeal of Act 3 of 1907. A.I.R. 1934 Lah. 819=155 Ind. Cas. 1084.

——S. 55 (c)—S. 55, Cl. (c), means that insolvency itself will not invalidate the transfer except in cases provided for by the Act itself but the avoidance of transfers under the general law or under S. 53, T. P. Act, is not affected by that section. A.I.R. 1932 Cal. 642=59 Cal. 1135=36 C.W.N. 492=56 C.L.J. 446=139 Ind. Cas. 323.

——S. 55—Assignment for creditor's benefit.

A bona fide assignment by a debtor of his entire property for the benefit of his creditors divests him of any interest which can be the subject of attachment subsequently issued in execution of a decree against such debtor until the trusts of the deed of assignment have been carried out. A.I.R. 1924 Lah. 709; 1 B.H.C.R. 233 and 8 B.H.C.R. 245, Foll. 97 Ind. Cas. 257=A.I.R. 1927 Sind 78.

——S. 55—Transfer of expected surplus.

The bankrupt has not the ordinary right of a cestui que trust to intervene until the surplus has been ascertained to exist, and all the creditor's interest and costs have been paid. He cannot trouble the trustee by taxing the bill of costs or interfere with the administration of the estate in any way, but subject to that and subject to his non-interference with the administration and with the management of the trustee during the bankruptcy in the due course of the execution of his duty, he can demand the surplus—a right which he can dispose of by will or deed or otherwise during the pendency of the first bankruptcy, even before the surplus is ascertained although such disposition will of course be ineffectual unless in the event there is proved to be a surplus upon which it can operate. Moreover, his assignee cannot interfere with the administration of the estate by virtue of such assignment. It would be an assignment of a contingent interest would give no right to the assignee to intervene until it was ascertained whether or not there was a surplus. 1 Ch. 822, Foll. 73 Ind. Cas. 379=25 Bom.L.R. 499=A.I.R. 1924 Bom. 49.

——S. 56.

Synopsis.

1. Appeal.
2. Appointment of Receiver—Sub-S. (1).
3. Court's power to remove person in possession—Sub-S. (3).
4. Court's power to remove Receiver from possession.
5. Court's power to take action against Receiver—Sub-S. (4).
6. Interim Receiver.
7. Remuneration of Receiver — Sub-S. (2).
8. Rights and duties of Receiver.
9. Sale by Receiver.
10. Status of Receiver.
11. Vesting order.
12. Miscellaneous.

1. Appeal.

——S. 56—Rejection of Receiver's application for delivery of property to him—Competency of appeal.

No appeal lies from an order rejecting an application by the Receiver in insolvency praying the Court to direct that certain mortgaged properties in the custody of the Receiver appointed in the mortgage suits, be delivered to him (the Receiver in insolvency). A.I.R. 1935 Cal. 460=39 C. W.N. 384=62 C. 483=157 Ind. Cas. 140.

2. Appointment of Receiver—Sub-S. (1).

——S. 56—Appointment of Receiver—Choice.

Court cannot appoint as receiver a person who has purchased the bulk of insolvent's property after insolvency petition. 1942 N.L.J. 82.

——S. 56—Appointment of Receiver after discharge.

The order of discharge does not put an end to the insolvency proceedings and, therefore, a Receiver can be appointed without setting aside the order of discharge. At any time, a Receiver can be appointed when it is discovered that there is property of the insolvent which comes within the definition of "property" in S. 2 (1) (d) and to which S. 28 is applicable. A.I.R. 1940 Rang. 156=1940 Rang.L.R. 392=189 Ind. Cas. 421.

——S. 56—Court's power to appoint additional Receiver.

Section 56 does not operate to prohibit the Court appointing an additional Receiver (other than Official Receiver) for a speciai purpose. The Act contemplates the appointment of some one other than the Official Receiver in special circumstances and the Court has power to appoint an additional Receiver when the case demands it. All that the law requires is that the estate shall be represented by a Receiver appointed in the insolvency proceedings. A.I.R. 1939 Mad. 374=49 L.W. 23=(1939) 1 M.L.J. 88=1939 M.W.N. 130=I.L.R. (1939) Mad. 194=185 Ind. Cas. 154.

——S. 56—Appointment of Pleader as Receiver.

Ordinarily, it is objectionable to appoint a pleader who represents a party in the insolvency proceedings as Receiver by allowing him to throw up his brief in the middle of a case, but there may be special circumstances justifying this procedure. A.I.R. 1938 Nag. 230=1938 N.L.J. 40=I.L.R. (1940) Nag. 161=177 Ind. Cas. 650.

——S. 56—Appointment of Receiver — Subsequent appointment of Receiver in mortgage suit—Setting aside of subsequent appointment.

Considerations which apply in a suit between the mortgagee and his mortgagor may differ considerably from the considerations which arise where the interests affected are not of the mortgagor only but also of the mortgagor's creditors. The appointment of a Receiver in the mortgagee's suit will have the effect of depriving the creditors in the insolvency proceedings of the benefit of the usufruct of the mortgaged property although the mortgagee has not yet obtained a final decree in the mortgage suit. Therefore, the appointment of a Receiver in a mortgage suit subsequent to the appointment off a Receiver in insolvency will be set aside. A.I.R. 1936 Pat. 357=2 B.R. 643 (1) =17 P.L.T. 671=163 Ind. Cas. 811.

——S. 56—Receiver as to part of property.

A receiver could not be appointed as to part only of the insolvent's property. 89 Ind. Cas. 61=4 Bur.L.J. 56=A.I.R. 1925 Rang. 224.

——S. 56—Refusal to appoint — Illegal.

Refusal to appoint receiver to the insolvent's property on the ground of lapse of seven years after the order for adjudication is not legal. 83 Ind. Cas. 360=39 C.L.J. 432=A.I.R. 1924 Cal. 849.

3. Court's power to remove person in possession—Sub-S. (3).

——S. 56 (3)—Application by purchaser from Receiver—Maintainability — Person in possession claiming title in himself—Enquiry under S. 4—Power of Court.

An application under S. 56 (3) of the Provincial Insolvency Act can be made not merely by the Receiver, but by a purchaser from him as well.

On an application made to it under S. 56 (3), the Court can consider whether the person in possession is one whom the insolvent has a present right to remove and is not bound to throw out the application merely on finding that such person is claiming a title in himself. The true position is that if the Court finds that the claimant has a plausible case, it will not be entitled to proceed straightway to make an order for possession under S. 56 (3), but must direct that there must first be a proper enquiry under S. 4. Such enquiry should preferably be made on a separate application to which the Receiver ought to be made a party, if the application is not by him.

If in such enquiry the Court finds that the claimant has no title, it will be entitled to hold that he is a person whom the insolvent has a present right to remove and it can then make against him an order for possession under S. 56 (3). It can by no means be said that if the person in possession puts forward some kind of right, the insolvent cannot in the ordinary course remove him without obtaining a decree for ejectment and that, therefore, he has no present right to remove him. In that sense, nobody has a present right to remove another person, found in possession of his property. A.I.R. 1948 Cal. 343=53 C.W.N. 99.

——S. 56 (3)—Construction.

The expression "has not a present right so to remove" in S. 56 (3) does not mean "has not a present right to remove except under a decree of a Civil Court." A.I.R. 1940 Nag. 233=1940 N. L.J. 283=I.L.R. (1941) Nag. 757=190 Ind. Cas. 455.

——S. 56 (3)—Taking of possession by Receiver—Procedure.

What really happens is this. The Receiver makes an attempt to take possession of property in the occupation of a third party. That person resists. The Receiver has thereupon to make an application to the Insolvenc Court which thereupon proceeds to try and determine all questions raised by the objector including those of title. The result of this enquiry is either that the insolvent has a present right to dispossess the obstruc-

tor or that he has not. If he has, then action can be taken under S. 56 (3). A.I.R. 1940 Nag. 233=1940 N.L.J. 283=I.L.R. (1941) Nag. 757 =190 Ind. Cas. 455.

——S. 56 (3)—Removal of person in possession—Dispute regarding title—Nature of enquiry—Separate suit.

A discretion is left to the Insolvency Court and Insolvency Courts ought ordinarily to lean against enquiry into disputed titles unless the matter is simple. In disputes of the kind which cannot be tried summarily by affidavit under S. 56 (3), if the Insolvency Court decides to take upon itself the powers of a Civil Court under S. 4 and try the matter itself, it would have to proceed as a Civil Court would have proceeded, that is to say, it would have to record full and proper pleadings strike issues and take evidence in the ordinary way. Where this is done, there is nothing which calls for interference. But if the matter is dealt with summarily under S. 56 (3), that would be another matter. A.I.R. 1940 Nag. 233=1940 N.L.J. 283=I.L.R. (1941) Nag. 757=190 Ind. Cas. 455.

——S. 56—Court's power to remove person in possession.

The Court has no power under S. 56 summarily to direct a third person to deliver up possession of property of which he is in possession if he sets up a title, however flimsy, to it. The only power the Court has in such circumstances is to try the issue whether the insolvent is entitled to the property or not under S. 4. But before that can be done, a proper application has to be presented by the Receiver when there is one or by such one of the creditors or other person interested in preserving the insolvent's estate as the Court authorises to act when there is not. A.I.R. 1939 Nag. 10=I.L.R. (1941) Nag. 696=1938 N.L.J. 384 =179 Ind. Cas. 943.

——S. 56 (3)—Receiver realising assets in other people's hands—His remedy.

For the Receiver to realize the assets of the insolvent, they must be shown to belong to the insolvent. If they do not the Receiver has no present right to remove a stranger in possession; he would have to file a separate suit against him. A.I.R. 1938 Nag. 546=1938 N.L.J. 279=I.L.R. (1940) Nag. 293=181 Ind. Cas. 297.

——S. 56 (3)—Jurisdiction of Court to order refund.

Section 56 (3) read with S. 54 gives jurisdiction to the Insolvency Court to pass an order against the creditor to refund the amount which appertained to the estate of the insolvent. A.I.R. 1936 Nag. 28=31 N.L.R. 121 Sup.=161 Ind. Cas. 441.

——S. 56 (3), proviso—Property sold—Receiver claiming it as insolvent's — Delivery of possession to purchaser, when can be given.

The house in dispute was claimed by the Receiver as the property of the insolvents. The appellants denied the title of the insolvents and claimed to be the owners of the house in dispute. They preferred an objection in the Insolvency Court putting forward their claim, and denying the right of the insolvents. The appellants' objection was dismissed for non-appearance. The Receiver subsequently sold the house to the respondent, who applied to the Insolvency Court for delivery of possession of the house to her. The appellants objected to any delivery of possession being made. In their objection, they reiterated their title to the house and repudiated that of the insolvents. The Insolvency Judge summarily dismissed the objection on the ground that a similar objection had been previously dismissed:

Held, that before the question of title is decided either by a decree in a separate suit or by an order under S. 4, Insolvency Act, the appellants could not be dispossessed from the property which to all appearance, they claimed in perfect good faith to be their own and the fact that the appellant had not pressed his objection on a certain occasion did not justify the Insolvency Court in treating the property as belonging to the insolvent. A.I.R. 1935 All. 546=1935 A.L.J. 484 =1935 A.W.R. 497=155 Ind. Cas. 1037.

——S. 56—Court's power to remove person in possession.

The Insolvency Court has no power under the law to remove a person from the possession or custody of property, any person whom the insolvent has not the present right so to remove. Consequently, the Receiver appointed for the benefit of the mortgagee and at his instance cannot be removed by the Insolvency Court, the Receiver being a person in possession whom the insolvent judgment-debtor, in whose favour an order of adjudication was passed by the Insolvency Court has not the present right to remove. A.I.R. 1935 Cal. 460=39 C.W.N. 384=62 C. 483=157 Ind. Cas. 140.

——S. 56—Court's power to remove person in possession.

To ensure compliance with its orders, the Insolvency Court can remove a person in whose possession the property is but it cannot remove any person whom the insolvent has not a present right to remove. It cannot, therefore, pass any order which may amount to the divesting of any person of the possession of the property who has a present right to retain that possession against the insolvent. A.I.R. 1934 Lah. 1006=36 P.L.R. 205=156 Ind. Cas. 278.

——S. 56—Delivery of possession — Adjudication of father—Order removing obstruction.

A Hindu father was adjudicated insolvent and certain properties were sold by the Official Receiver. As there was obstruction to delivery, both the Official Receiver and the vendees moved the Court to have the obstruction removed and by an order of Court, this was done. A son of the insolvent subsequently filed a suit under S. 9, Specific Relief Act, and the suit was dismissed on the ground that the son had not been dispossessed otherwise than in due course of law:

Held, that the Insolvency Court was entitled to remove the obstruction, and at any rate, the case was not a fit one for interference in revision. A.I.R. 1933 Mad. 609=143 Ind. Cas. 833.

——S. 56—Power of Court.

Quaere.—Whether the Insolvency Court could have proceeded to put the purchaser in possession if the declaration of the liability of the son's shares had been made in proceedings under S. 4.

Though the Insolvency Court must have some powers of execution, the procedure is only analo-

gous to and not identical with that under O. 21, C. P. Code. A.I.R. 1933 Mad. 475=147 Ind. Cas. 494.

——S. 56—Breach of obligation by third party—Liability of arising out of—Power of Court.

Where a third person, who has been placed in a position to realise certain decretal amounts on behalf of another, upon the understanding that the money realized should be held for the use of the original creditor, embezzles the said money, he places himself under a legal liability to recoup the amount. The liability springs from a tortious breach of an obligation and the breach is actionable. The liability of such a person to recoup the money cannot be treated as amounting to his being in possession or custody of any property belonging to the insolvent, and the insolvency Court has no jurisdiction to initiate proceedings against such third person in case of the insolvency of the original decree-holder, in order to recover money due from him for breach of obligation to the insolvent. 1930 A.L.J. 1048=A.I.R. 1930 All. 622.

——S. 56—Property with third party—When order under S. 56 can be passed—Procedure—Effect.

Under S. 56 (3) an order cannot be passed against persons who claim adversely to the insolvent. The Court cannot, acting under S. 56, direct any person to deliver up property in his possession to the Official Receiver unless the insolvent is entitled on the date of such application to the possession of such property. If a title, however flimsy, is set up by the person in possession, the Court should not act under S. 56. The Court, however, may on a proper application being made under S. 4 of the Act, try the issue whether the insolvent is entitled to the property or not. But, in order to enable the Court to do that a proper application ought to be made under S. 4, and the other side should be asked to plead thereto. When an order is passed under S. 56 (3), it does not determine the rights of the parties, and though the Judge may incidentally determine the question, yet it cannot be said that the question is finally determined. 92 Ind. Cas. 573=49 Mad. 762=23 M.L.W. 94=1926 M.W.N. 121=1926 M.W.N. 172=A.I.R. 1926 Mad. 363=50 M.L.J. 180.

——S. 56 (3)—Property with third person—Conditions for realisation by receiver—Procedure.

Two inferences seem to be deducible from S. 56 (3) first, that the Court before it takes any action under this sub-section in the way of realization of property must have appointed a Receiver; and that means a Receiver in insolvency and not a Receiver **ad interim** before the adjudication. Secondly, the power to remove property from the possession of any person is reserved to the Court.

S. 4 read with S. 5 intends that the Court in such matters of forcible realization of property is to act with the procedure and no doubt with the judicial caution of a Civil Court. Under S. 4 decision of a dispute between the debtor and the debtor's estate on the one hand, and claimant against it on the other, is to be final and binding; and under S. 5 the Court in regard to the proceedings under the Act is to have the same powers and to follow the same procedure as it has and follows in the exercise of original civil jurisdiction. An enquiry by the so-called Receiver would not after adjudication be an enquiry of a person having authority under the Act, and he has no power to make any decision as is mentioned in S. 68, nor would a Receiver in insolvency have power under S. 56 to remove property from the possession of others than the insolvent. 94 Ind. Cas. 506=1926 P.H.C.C. 134=A.I.R. 1926 Pat. 291.

——S. 56 (3)—Giving possession of—Powers.

A purchaser from the Official Receiver of a property of the insolvent whom the Receiver represents, can obtain an order from the Insolvency Court for delivery of possession of the property, where his application is resisted by a third party.

Cl. 3 of S. 56 is not limited to the case of an application by the Receiver and the terms of the clause are general. The operation of this clause cannot be limited to applications by the Receiver himself. 65 Ind. Cas. 394=1922 M.W.N. 110 =15 M.L.W. 273=45 Mad. 434=31 M.L.T. 86 =A.I.R. 1922 Mad. 147=42 M.L.J. 185.

——S. 56—Execution sale after adjudication—Can be declared invalid.

Ss. 16 and 18 read together invest the Insolvency Court with jurisdiction to direct that property in the hands of a third party be delivered over to the insolvent.

Where after the date of adjudication insolvent's properties are sold in execution of a decree against the Insolvent, insolvency Court dealing with the insolvency has jurisdiction to declare the sale invalid and order delivery of possession of the property to the Official Receiver. The Official Receiver need not institute a suit for that purpose.

The mere fact that there has been a Court sale is not a ground for holding that the insolvent has no present right to the property. 62 Ind. Cas. 495=44 Mad. 524=14 M.L.W. 505=1921 M.W.N. 236=A.I.R. 1921 Mad. 204=40 M.L.J. 219.

——Ss. 56 (3), 59, 5—(1907), Ss. 18 (3), 20 and 47—Jurisdiction—Power of Court, to order delivery under—O. 21, Rr. 97, 98, C. P. Code.

S. 18 (3)[1] of the Act enables the Receiver to take possession of the insolvent's property. It does not provide for the determination of complicated questions of title as between the insolvent and third parties. An insolvency Court cannot institute an inquiry under O. 21, Rr. 97, 98, C. P. Code if a purchaser from the Receiver is obstructed by a stranger. Where property of a stranger was sold by the Official Receiver as belonging to the insolvent, and the purchaser being obstructed, in taking possession applied under O. 21, Rr. 97 and 98 and the Court passed an order for delivery.

Held, that the order of the Insolvency Court was without jurisdiction. Ss. 18, Cl. (3) and 47 of the Act had no application to such a case and the rules of the C. P. Code relating to the sale of the property in execution of a decree do not apply. 24 M.L.T. 106=(1918) M.W.N. 479=8 L.W. 136=47 Ind. Cas. 308.

——S. 56 (3)—(1907), S. 18 (3)—Person in possession claiming adversely to insolvent—Suit by Receiver—Creditor to supply funds.

S. 18, Cl. (3)[1] does not cover the case of a person in possession claiming adversely to the Insolvent. An appeal from an order under S. 18 (3) is subject to the leave of the District Court or the High Court.

A Receiver in insolvency is not a judicial offi-

cer and cannot make anything in the nature of a judicial enquiry.

A claim of a creditor or Receiver that a property really is the Insolvent's can only be enforced by suit, and not by the Insolvency Court, where the alleged benamidar is in possession and claims adversely to the Insolvent.

Where at the instance of a creditor the Court directs a suit to be filed by the Receiver it should make an order directing the creditor to put the Receiver in funds and indemnify him against the costs of the suit. 37 All. 65, Not Foll. 46 Ind. Cas. 377 (Cal.).

——S. 56 (3)—(1907), S. 18 (3) — Receiver's right to possession of Insolvent's property—Sale Benami.

Under S. 18 (3) of the Provincial Insolvency Act the property of the insolvent should be placed in the possession of the Receiver. Where the sale of the insolvent's property is a mere benami transaction, it is not necessary for the insolvent or the Receiver to have the sale set aside and cancelled in order to maintain his possession over the property. 35 Cal. 551 (P.C.), Foll. 39 All. 633 15 A.L.J. 738=40 Ind. Cas. 373.

——S. 56—(1907), S. 18—Power of Court.

S. 18 empowers a Court where it appoints a receiver, to remove any person who is found to be in possession of some of the properties of the Insolvent from the possession thereof provided the insolvent has a right to remove him. 37 All. 65 =12 A.L.J. 1273=26 Ind. Cas. 926.

4. Court's power to remove Receiver from possession.

——S. 56—Court's power to remove Receiver from possession.

Once possession of property has been given to the Receiver, the Court cannot order its re-delivery except in consequence of an order under S. 4 on the question of title. A.I.R. 1941 Mad. 75= 1940 M.W.N. 905=52 M.L.W. 377.

——S. 56—Removal of Receiver.

An Official Receiver was appointed to take charge of certain leasehold mining property. An application was made by the beneficiaries of the property: (1) that the estate had not been devolved; (2) that the estate was not being efficiently administered, i.e., want of activity and want of system; (3) that the Official Receiver had not and was not collecting the amounts properly due to the estate. The Court called for a report from the Official Receiver but in that report, the Receiver did not disclose the true position to the Court. The Official Receiver was not capable of dealing with statements regarding royalty submitted by one of the most important lessees of the estate. He, however, made no attempt to deal with them and ignored the whole problem. He was not capable of extricating the estate from tne position which it occupied or of dealing efficiently with the situation:

Held, that upon the facts, it would be wrong to allow the management to continue in the hands of the Receiver. The Official Receiver's legal knowledge was not of any advantage in dealing with the property. The Receiver should, therefore, be discharged and a Chartered Accountant be appointed in his place as a Receiver. A.I.R. 1938 Cal. 627=179 Ind. Cas. 113.

5. Court's power to take action against Receiver—Sub-S. (4).

——S. 56 (4)—Official Receiver paying dividend payable to creditor to third party on account of gross negligence—Court can direct it to be paid to creditor

Where it is found on evidence that the Official Receiver has paid the dividend payable to the creditor to a third party on account of gross negligence the Court is justified in directing the payment of the amount wrongly paid to the third party to the creditor under S. 56 (4). A.I.R. 1946 Mad. 382=(1946) 1 M.L.J. 278=1946 M. W.N. 388=59 M.L.W. 214.

——S. 56 (4) (c)—Loss caused by Receiver — Court's discretion to take action.

S. 56 (4) speaks of loss to the property and not loss to the insolvent. It is, therefore, necessary for the Court to determine whether there has been any loss "to the property." 1942 N.L.J. 82.

——S. 56—Receiver—Property vesting in him—Failure to account—Effect.

Once a Receiver is appointed all the insolvent's estate vests in him and it does not matter whether that property was in the hands of the receiver before his appointment or not. If the Receiver does not account, the Court can proceed against him at any stage of the proceedings. 1942 N.L. J. 82.

——S. 56—Gross negligence of Receiver—His liability—Remedy by way of suit.

Where after a Hindu was adjudicated insolvent and his property had vested in the Official Receiver, and sons of the insolvent born after adjudication filed a suit for partition and the Official Receiver, by his gross negligence, allowed an ex parte decree for partition to be passed and the creditors filed a suit for a declaration that the partition decree, being the result of gross negligence on the part of the Official Receiver was not binding upon the estate.

Held, that the suit was maintainable. Proceeding against the Official Receiver under S. 56 was not the only remedy of the creditor.

Held, further, that the fact that the Official Receiver had made an unsuccessful application for setting aside the partition decree under O. 9, R. 13, C. P. Code, was no bar to maintainability of the suit by the creditors:

Held, also, that the suit was not barred because the Provincial Insolvency Act contained a provision for proceeding against the Official Receiver under S. 56. A.I.R. 1936 Mad. 161=70 M.L. J. 90=1936 M.W.N. 79=43 L.W. 483=59 M. 770=161 Ind. Cas. 723.

6. Interim Receiver.

——S. 56—Interim Receiver—Applicability.

There is apparently no provision under which the Court can make a vesting order before adjudication, but the interim Receiver has very much S. 56, Insolvency Act, applies its provisions so far the same rights and liabilities as a Receiver, for

as may be to "Interim Receiver". 109 Ind. Cas. 148=1928 M.W.N. 216=A. I. R. 1928 Mad. 454.

——Ss. 56 and 53—(1907), Ss. 18, 36—Ad-Interim Receiver.

An ad-interim Receiver is inferior to one appointed on an adjudication. The latter is vested with some rights and is liable to all the creditors of the insolvent to the extent of the estate. Among the body of rights conferred upon him by Statute, the right to make an application under S. 36 of the Act is one which cannot be taken away by an order in a proceeding to which he is not a party. His right to apply under S. 36 of the Act is not debarred on the ground of **res judicata** when an order as to the validity of a transaction is passed upon an application impleading in it only the debtor and the creditors, while the estate is in the hands of the **ad interim** Receiver. 58 Ind. Cas. 783 (Pat.).

7. Remuneration of Receiver—Sub-S. (2).

——Ss. 56 (2) and 43—Remuneration of Receiver fixed on realizations and distribution — Receiver prevented from making realizations and disbursements owing to delaying tactics of debtor—Tenure of Receiver ending as result of order of annulment — Power of Court to compensate Receiver for his services.

Where on the adjudication of a debtor the Court appointed a Receiver on a remuneration fixed at a certain percentage on realization and on distributions but the debtor prevented the Receiver by his interference and delaying traltics from making realizations and disbursements until his tenure as a Receiver ended as a result of an order of annulment passed by the Insolvency Court under S. 43 of the Provincial Insolvency Act.

Held, that although the Receiver was not entitled to any commission under the express terms of the contract of appointment, the Court had equitable powers to compensate the Receiver on the principle of **"quantum meruit"** for his work done during the term of receivership. I.L.R. (1947) Nag. 397=230 Ind. Cas. 366=1947 N.L.J. 237=A.I.R. 1948 Nag. 92.

——S. 56—Remuneration of Receiver during period for which adjudication stands.

All the proceedings following the adjudication are not invalidated simply because the order of adjudication is subsequently set aside on appeal. Therefore, there can be little doubt that the Receiver is entitled to be paid for the period for which the adjudication order actually stands. A. I.R. 1938 Nag. 230=1938 N.L.J. 40=I.L.R. (1940) Nag. 161=177 Ind. Cas. 650.

——S. 56—Remuneration of Receiver — Rule of quantum meruit, application of.

Where the order appointing a Receiver does not specify the source from which the remuneration is to proceed, nor does it specify any particular time for payment though it fixes a rate, the order must naturally be construed in the light of S. 56 (1) (b), read with the rules framed under S. 79 (2) (a) and his remuneration must therefore, come from the assets of the insolvent. 'Assets' means "all a man's property of whatever kind which may be used to satisfy debts or demands existing against him." The mere fact that the appointment was determined later as a result of the Appellate Court's decision on another matter cannot change the order of appointment from Ss. 56 to 20.

Where the remuneration of the Receiver was to be "5 per cent. of assets realised upto maximum of Rs. 200" and on appeal, the adjudication was subsequently set aside:

Held, that it was clear that the sum to be paid was unascertainable until realisation of the assets. It was, therefore, equally clear that no payment was contemplated until that contingency should occur. Because of the order of the Appellate Court, the contingency contemplated could not now arise and therefore, the order as it stood; was inexecutable.

In these circumstances a **quantum meruit** was all that the Receiver could claim for the period of his actual work. The position was much the same as in contracts where a contract becomes void because a contingency contemplated becomes impossible. A.I.R. 1938 Nag. 230=1938 N.L.J. 40=I.L.R. (1940) Nag. 161=177 Ind. Cas. 650.

——S. 56—Remuneration of Receiver.

Where an insolvent's property subject to a mortgage is sold free from the mortgage and the Receiver realises the purchase-money, the whole of it is not assets available for distribution but only such part as remains in his hands after paying off the mortgage and it is only on such part that the Receiver is entitled to remuneration. A. I.R. 1934 Rang. 112=150 Ind. Cas. 960.

——S. 56—Remuneration — Burma.

In Burma the Receiver is entitled to commission on the amount of the mortgage money realized by the sale of the mortgaged property. A.I.R. 1928 Rang. 23, Foll. 117 Ind. Cas. 582 =7 Rang. 126=A.I.R. 1929 Rang. 168.

——S. 56—Bombay circular.

R. 16 of Chap. 23 of the Manual of the Circulars issued by the Bombay High Court directs that the remuneration of receivers, other than official receivers, shall be in such proportion to the amounts of the dividends distributed as the Court may direct, provided that it does not exceed five per centum of the amount of dividends and therefore, a Court is not justified in directing payment to the receivers at the rate of five per cent. on the whole amount realised. 90 Ind. Cas. 561=27 Bom.L.R. 1109=A.I.R. 1925 Bom. 472.

——S. 56—Where any part of the insolvent's property subject to a mortgage is sold free from the mortgage and the Receiver realises the purchase money, the whole of it is not assets available for distribution but only such part as remains in his hands after paying off the mortgage and it is only on such part that the receiver is entitled to remuneration. 7 Bom. 455; 12 Bom. 272 and 36 Cal. 990, Foll. 106 Ind. Cas. 200=5 Rang. 623=A.I.R. 1928 Rang. 23.

——S. 56—Sale of—Property subject to a mortgage.

Where any part of the insolvent's property is subject to a mortgage, the value of the insolvent's right to redeem that property can only be his assets available for distribution. If the Receiver sells the property free from the mortgage and rea-

lises the purchase-money, the whole of it is not assets available for distribution but only such part as remains in his hand after paying off the mortgagee. He is not entitled to a percentage on the whole of the purchase-money. 71 Ind. Cas. 558=A.I.R. 1923 Nag. 150.

8. Rights and Duties of Receiver.

——S. 56—Third party, Receiver's right against —Suit against third party for recovery of insolvent's property is not barred.

Section 56 provides for a summary remedy in insolvency for the recovery of the assets of the insolvent. It has no application to a case where suits are instituted in the interests of the body of creditors by a Receiver and such suits for recovery of the insolvent's property from third parties in whose possession it may be, are not barred by the section. A.I.R. 1946 Mad. 202=(1946) 1 M.L.J. 1=59 M.L.W. 18=1946 M.W.N. 37.

——S. 56 — Transfer by insolvent — Receiver's right against.

A certain person applied to be adjudicated insolvent. While his application was pending a petition was filed setting forth that shortly before the filing of the application the insolvent had executed a registered sale deed whereby he purported to sell certain property to the present appellant and asking that if an adjudication as insolvent was made an enquiry should be held as to the genuineness of the sale. No orders were passed on this application, but when the adjudication as insolvent was made, the Court appointed the bailiff of the Court, Receiver of the property sold by the insolvent to the appellant.

Held, that so long as the sale was not annulled the receiver had no authority against the appellant. 89 Ind. Cas. 61=4 Bur.L.J. 56=A.I.R. 1925 Rang. 224.

——Ss. 56 (4) and 68—(1907), Ss. 18 (4) and 22 —Right to apply for instructions.

A Receiver appointed under the Act can apply for instructions to the Court. 19 Bom. 660, Foll. 6 S.L.R. 286=19 Ind. Cas. 920.

——S. 56—(1907) S. 18—Duty of Receiver and Court.

The Receiver and Court should preserve the estate of the insolvent while administering his estate. 38 All. 37=13 A.L.J. 1064=31 Ind. Cas. 716.

9. Sale by Receiver.

——S. 56—Sale by receiver—Shares of minor sons—If passes.

Where the Official Receiver had power to sell not only the share of the adult insolvents but had also vested in him the power of these insolvents as father's to sell their sons' interest in the property for the payment of antecedent debts and where the recital in the deed was that the property belonging to all the members of the family was sold and there was no specific recital that the shares of the various persons were sold separately.

Held, the property which purported to be sold and which actually was vested in the Official Receiver would pass to the vendees and that property includes the shares of the sons. 43 C. 56; I.L.R. 25 A. 407 (P.C.)., (1915) M.W.N. 908, (1919) M.W.N. 356, Foll. 28 Ind. Cas. 365, Not appr. 83 Ind. Cas. 196=47 Mad. 462=34 M.L.T. 152=20 M.L.W. 357=A.I.R. 1924 Mad. 550=46 M.L.J. 314.

——Ss. 56, 59—(1907), Ss. 18 and 20 — Official Receiver—Sale by, of insolvent's properties.

Sales by the Receiver in whom the property of an insolvent vests under S. 18 of the Provincial Insolvents Act are really sales by the owner and may be held either by public auction or by private treaty. The procedure for sales in execution of decree under the C. P. Code does not apply to them. 24 C.W.N. 1072=60 Ind. Cas. 745.

10. Status of Receiver.

——S. 56—Status of Official Receiver — His position as regards ordinary Civil Courts.

The Official Receiver, so far as the ordinary Civil Courts are concerned is a suitor and a suitor only. He is not entitled to send reports as he does to the Insolvency Court and if he wants to either file a plaint or a written statement or a counter affidavit he ought to do it in the proper form. A.I.R. 1940 Mad. 733=1940 M.W.N. 519=193 Ind. Cas. 138.

——S. 56—Status of Receiver.

A Receiver is an officer of the Court appointed under statutory provisions and the fact that an Official Receiver is provided for a particular district, and the Insolvency Court appoints him to act as a Receiver in a certain case cannot make the Receiver a servant of the Secretary of State for India nor is the latter responsible for the Receiver's wrongful acts in the discharge of his duties. A.I.R. 1936 All. 89=1936 A.L.J. 79=1936 A.W.R. 34=160 Ind. Cas. 1025.

——S. 56 — Status of Receiver — Court, if can enquire into his conduct any time.

A Receiver in bankruptcy is a trustee for the creditors and consequently, if he has withheld sums which properly belong to the creditors then his conduct can be and should be enquired into by the Court at any time. A.I.R. 1934 Rang. 112 =150 Ind. Cas. 960.

——S. 56—Status of Receiver.

The position of a Receiver in insolvency is not merely that of a representative of the insolvent. There are cases in which he represents not only the insolvent but his creditors, for instance where he sues to set aside a fraudulent transaction effected by the insolvent. A.I.R. 1931 Oudh 405=8 O.W.N. 1126=134 Ind. Cas. 1013.

——S. 56—(1907), S. 18—Suit for arrears of rent against Insolvent — Party — Receiver—Position of.

A Receiver in a Mofussil Insolvency stands in much the same footing in this respect as the Official Assignee in the Presidency Towns. The Receiver is not a necessary party to a suit for arrears of rent against the insolvent. 46 Ind. Cas. 495 (Cal.).

11. Vesting order.

——S. 56—Sale prior to vesting order — Curing of.

The sale by the official receiver is void when no

vesting order has been passed, but the subsequent vesting order makes the previous sale valid. A. I.R. 1927 Mad. 1 (F.B.), Foll. 106 Ind. Cas. 641=27 M.L.W. 182=1927 M.W.N. 794=A. I.R. 1927 Mad. 1091.

——S. 56—A sale by Receiver of insolvent's properties before a vesting order in his favour is invalid and it cannot be validated by Court subsequently ratifying the sale. 99 Ind. Cas. 8=25 M.L.W. 128=50 Mad. 135=A.I.R. 1927 Mad. 1=51 M.L.J. 529=38 M.L.T. 92 (F.B.).

——S. 56—Vesting order—What may constitute.

Where the order of the District Judge on the insolvency petition was as follows: "Petitioner examined. No opposition. Adjudication order passed. Referred to Official Receiver for further proceedings."

Held, the Court having passed an order of adjudication and referred the insolvency petition to the Official Receiver for further proceedings, must have intended to appoint and be deemed to have appointed the gentleman called "Official Receiver" as the receiver in this particular insolvency. The proceedings referred to in the District Judge's order must not be read as meaning judicial proceedings only. 83 Ind. Cas. 196=47 Mad. 462=34 M. L. T. 152=20 M.L.W. 357=A.I.R. 1924 Mad. 550=46 M.L.J. 314.

——S. 56—Vesting order—What may not constitute.

The Official Receiver does not get a right to deal with the properties of the insolvent without an express vesting order by the District Judge. Where when the insolvency petition was filed by the insolvent in the District Court, the District Judge made an endorsement on that petition that it was transferred for disposal to the Official Receiver.

Held, that the wording of the order itself does not convey the idea of any vesting at all. (41 M. L.J. 78, 43 Mad. 869, 39 M.L.J. 438, 30 M.L. J. 415, Foll.). 78 Ind. Cas. 294=19 M.L.W. 450=34 M.L.T. 2=1924 M.W.N. 198=A.I.R. 1924 Mad. 461=46 M.L.J. 184.

——S. 56—(1907), S. 18—Time of vesting—Vesting order.

Before the properties can vest in the Official Receiver the Court should formally pass an order appointing a Receiver under S. 18. The properties do not vest in him by the mere act of passing an adjudication order. The practice of treating the properties (of an insolvent) as vesting in the Official Receiver after the order of the adjudication without a formal order appointing him as a Receiver under S. 18 of the Provincial Insolvency Act is illegal. 30 M.L.J. 415=34 Ind. Cas. 602.

12. Miscellaneous.

——S. 56—Foreign adjudication—Vesting order—Effect on prior attachments by Courts in British India.

In general, a vesting order made by a competent foreign Court operates upon the property of the insolvent within British India creating a title in the Official Receiver so invested with effect from the date of the order, and such a vesting order prevails against prior attachments effected by British Indian Courts inasmuch as attachment does not create any charge or lien and a vesting order is not a private transfer but transfer by law. Secunderabad Court is a foreign Court. A.I. R. 1931 Mad. 474=54 M. 727=33 L.W. 526= 1931 M. W. N. 444=61 M.L.J. 774=132 Ind. Cas. 297.

——S. 56, 22, 69—(1907), Ss. 18 and 43—Jurisdiction—Power of Court to hold summary enquiry for—Discovering properties of insolvents—Remedy of creditor—Bankruptcy Act, S. 27.

An Insolvency Court has no jurisdiction to hold summary proceedings for the purpose of summoning before it and examining persons in order to discover whether any portion of the insolvents' property has been concealed by him by having vested it in a **benamidar** and thereby directing the **benamidar** to transfer to the Official Receiver the property so vested in him. When a scheduled creditor in an insolvency proceeding has a **prima facie** case that a portion of the insolvent's property has been concealed by the insolvent by having vested it in a **benamidar,** his remedy is to apply to the Court to direct the Official Receiver to institute a suit against the **benamidar** to recover the property in question on condition that the creditor so applying shall put the Official Receiver in funds and properly indemnify him against the costs in the suit. 22 C.W.N. 702=44 Ind. Cas. 143.

——S. 56—(1907), S. 18—Decree—Attachment of before insolvency — Decree-holder if can execute decree—Vesting order.

Where in execution of a decree, a decree obtained by the judgment-debtor against another is attached, the attachment does not confer on the attaching decree-holder any right of property, but gives him the right to execute the decree. The subsequent insolvency of that person vests the decree in the receiver and in effect cancels the attachment and the receiver alone can execute the decree. 40 All. 86=15 A.L.J. 877=43 Ind. Cas. 129.

——S. 56—(1907), S. 18—Receiver—Suit to establish right in property vested in Receiver—Receiver whether a necessary party — Permission of Court.

To an insolvent's son's suit to establish his right after his objection was disallowed by the Court, the Receiver is a necessary party. Permission of Court is necessary for suing the Receiver but such permission is not a condition precedent to the maintainability of the suit. 54 P.R. 1917=132 P.W. R. 1917=41 Ind. Cas. 802.

——S. 56—(1907), S. 18—Suit to establish right to property—Sale by Receiver—Receiver whether a necessary party.

In a suit to establish title to property which has already been sold by the Receiver, the Receiver is not a necessary party and his being a defendant is not sufficient to defeat the claim of the plaintiff though permission of the Insolvency Court was not obtained for the prosecution of the claim. 55 P.R. 1917=30 P.W.R. 1917=134 P.L.R. 1917 =41 Ind. Cas. 809.

——S. 57—Position of official receiver — Validation of.

The Official Receiver or the Official Assignee is not an agent of the Court transferring an application for adjudication for disposal within the meaning of the Contract Act so as to enable the Court

to ratify any unauthorized acts done by the agent. 99 Ind. Cas. 8=25 M.L.W. 128=50 Mad. 135=A.I.R. 1927 Mad. 1=38 M.L.T. 92=51 M.L.J. 529.

——S. 57—Suit against receiver—Notice necessary.

As soon as a receiver is appointed under the Provincial Insolvency Act, he becomes a public officer within the meaning of S. 2, sub-S. 17 and he is protected by S. 80. An Official Receiver stands on a higher footing than a receiver appointed in a particular case and therefore no suit is maintainable against him without the requisite notice. 84 Ind. Cas. 739=47 All. 291=6 L.R. A. Civ. 106=22 A.L.J. 1116=A.I.R. 1925 All. 241.

——S. 57—Removal—Powers—Grounds.

The words "otherwise direct" refer not only to the point of time when the appointment of a Receiver under S. 56 is made but also the period subsequent to the appointment. That is to say, the Court may not only at the initial stage appoint a special Receiver for valid reasons but it may, if good grounds are shown, remove the Official Receiver appointed originally at any time whatsoever. All insolvencies should be kept within the control of the Official Receiver unless very exceptional reasons, such as reasons connected with the personality of the Receiver are put forward to deprive him of that control. 72 Ind. Cas. 225=46 Mad. 405=1923 M.W.N. 212=A.I.R. 1923 Mad. 355 =44 M.L.J. 251.

——S. 57—Vesting of property—In the local Official Receiver, written order necessary.

The property of a person adjudicated as insolvent under the Act does not **ipso facto** vest in the Official Receiver who may have been appointed for the local area in which the insolvent is residing but it is necessary that an order should have been passed appointing a Receiver before the property would vest in the local Official Receiver. Orders of Court are invariably reduced to writing and where there is no ground for supposing that any verbal order appointing the Official Receiver of a particular estate was passed it cannot be presumed that the Official Receiver must have been appointed Receiver for the estate in the absence of a written order. 30 M.L.J. 415; 43 Mad. 869, Foll. 62 Ind. Cas. 396=1921 M.W.N. 243=A.I.R. 1921 Mad. 642=41 M.L.J. 78.

——Ss. 57, 59—(1907), Ss. 19 and 20—Official Receiver to conduct proceedings on behalf of creditors.

Official Receiver should conduct the proceedings on behalf of the general body of creditors. 36 Ind. Cas. 906 (Mad.).

——Ss. 57, 59—(1907), Ss. 19 and 20—Official Receiver—Powers of.

An Official Receiver appointed under the Provincial Insolvency Act has, when duly authorised by the High Court the same powers as the District Court as regards dismissal of petition and adjudication of insolvency. His order of dismissal of a petition is open to appeal to the District Court under S. 22, Cl. (2) read with S. 52 of that Act. 38 Mad. 1[illegible]=24 M.L.J. 73=16 Ind. Cas. 820.

——S. 57 (4)—Official Receiver, remuneration of.

Where the insolvents owned two houses which were subject to an encumbrance of Rs. 2,500 and the insolvents' creditors and the mortgagee agreed that the houses should be sold to the mortgagee for Rs. 3,500 and he was to keep Rs. 3,125 for himself and pay Rs. 375 to the unsecured creditors:

Held, that the 'gross assets' referred to in U.P. Government Notification No. 339-VII-277, dated March 11, 1930, in the case would be Rs. 375 and that the Official Receiver was entitled to his remuneration calculated on this sum.

The word 'assets' means effects of an insolvent debtor or bankrupt applicable to the payment of his debts. This definition implies that the interest of the mortgagee is not to be taken into account in considering what are the assets of an insolvent debtor. What has already been parted with by the insolvent cannot be considered to be his property available for distribution among his unsecured creditors. A.I.R. 1932 All. 260=1932 A.L.J. 152=140 Ind. Cas. 111.

——S. 57 (4)—Official Receiver — Remuneration —Sale of property free from incumbrances—Commission—Power of Court to re-open accounts.

Even though an amount claimed by the Receiver has been passed by the Insolvency Court, if on an examination of the accounts by an auditor certain mistakes and overcharges are pointed out, it is open to the Court to re-open the accounts and make the Receiver refund what he has taken without justification.

Under the U. P. Government Notification of 1920 relating to the remuneration payable to Official Receivers, where property subject to a mortgage is sold free of the mortgage with the mortgagee's consent, the Receiver is entitled to charge 5 per cent. as commission on the gross amount, that is to say, the entire sale-proceeds of the property sold free from the prior mortgage and not only the value of the equity of redemption.

Per **Sulaiman, Actg. C. J.—Obiter** —If there were no authority to the contrary, the High Court would have been inclined to think that the assets spoken of in the Notification mean the assets of the insolvent and not moneys belonging to other persons. A.I.R. 1931 All. 723=1931 A.L.J. 670=133 Ind. Cas. 607.

——S. 57 (4)—Sale of property free from mortgage—Official Receiver's remuneration — 'Gross assets', meaning of.

Where property of an insolvent subject to a mortgage is sold by the Official Receiver free from the mortgage with the consent of the mortgagee, the Official Receiver is entitled to a remuneration of 5 per cent. on the entire sale proceeds not merely of what remains after deducting the amount payable to the mortgagee.

In the U. P. Government Notification of 1925 fixing the remuneration of the Official Receivers, the expression "gross assets" means the entire amount realised by the Official Receiver irrespective of whether the whole was distributable or not among the creditors. A.I.R. 1931 All. 94=1930 A.L.J. 1497=130 Ind. Cas. 695.

——S. 58—Powers of Court—Transfer of insolvent's mortgagee rights by Court — Registered deed is necessary.

The Insolvency Court obtains powers to realize the estate of an insolvent only under S. 58 read

with S. 59. Consequently, its powers of realization are the same as the powers which the Receiver, if a Receiver is appointed, has to realize the estate. A Receiver in insolvency cannot have recourse to O. 21, C. P. Code and the machinery to which it refers, since, the sale by a Receiver is not a proceeding under the Code. In the same way, having regard to the provisions of S. 58, the sale by the Court is not a proceeding under the Code. Hence a transfer of mortgagee rights of insolvent must be made by the Court by a registered deed as required by S. 54, T. P. Act. A. I.R. 1940 Rang. 186=1940 Rang.L.R. 263=190 Ind. Cas. 816.

——S. 58—Position of Court acting under—Is also as a Court.

The Court when acting under S. 23, Provincial Insolvency Act (1907) is not merely acting in the character of a Receiver and it cannot be said that anything done by it under that section is not a proceeding in Court, but only a private act. 62 Ind. Cas. 307=17 N.L.R. 49=A.I.R. 1921 Nag. 25.

——S. 58—(1907), S. 23—Receiver—Court.

Where no Receiver is actually appointed the Court is the Receiver under S. 23 of the Provincial Insolvency Act. 40 All. 197=16 A.L.J. 32 =43 Ind. Cas. 672.

——S. 59.

Synopsis.

1. Duties of Receiver.
2. Mortgage by Receiver.
3. Powers of Receiver.
4. Power and Duty of Court.
5. Proceedings by insolvent.
6. Sale by Receiver.
7. Setting aside sale by Receiver.
8. Status of Receiver.
9. Suit against insolvent.
10. Suit by Receiver.
11. Suit by unsuccessful claimant.
12. Miscellaneous.

1. Duties of Receiver.

——S. 59—Duties of Official Receiver.

The duties of the Official Receiver do not lie in simply receiving what the creditors may discover for themselves as assets of their debtor. It is his duty to collect the assets and go out and make enquiries to find what assets there are to be collected. A.I.R. 1937 Rang. 276=14 Rang. 704=170 Ind. Cas. 471.

——S. 59—Receiver refusing to act — Whether can be forced to do so at instance of insolvent.

Where a Receiver refuses to act on the ground that he is not interested in the subject-matter of the suit it is unreasonable that he should be forced to do so at the instance of the insolvent. A.I.R. 1937 Pesh. 42=168 Ind. Cas. 377.

——S. 59—Duties of Receiver.

The Official Receiver as an officer of the Court is bound to bring to the notice of the District Court before which an appeal against his order refusing to confirm sale of insolvent's property may be pending the facts that are likely to affect its decision. He should also represent the insolvent's estate on the appeal. 76 Ind. Cas. 977= 18 M.L.W. 282=A.I.R. 1924 Mad. 147.

——S. 59—When a creditor challenges an alienation or a payment as being in fraud of creditors, it is the Official Receiver's duty to give notice to such creditor and ask him to substantiate his allegation. A general notice which is sent as soon as a person is adjudicated insolvent asking the creditors to prove their claims is not such a notice as should be given to the creditor who impeaches a particular transaction of the insolvent as being in fraud of creditors. The Official Receiver should represent the estate for the benefit of creditors and place before the Court the result of his inquiry and help a creditor on his indemnity for costs even to appeal against the order of the Court. 79 Ind. Cas. 395=47 Mad. 673=18 M. L.W. 857=33 M.L.T. 196=A.I.R. 1924 Mad. 345.

2. Mortgage by Receiver.

——S. 59—Receiver's power of sale and mortgage —Leave of Court.

Under S. 59, the Receiver is entitled to sell any part of the property of the insolvent and to give receipts for any money received by him without the permission of the Court. If, however, he wishes to mortgage or pledge any part of the property of the insolvent for the purposes of raising money for payment of the debts of the insolvent, he must first obtain the leave of the Court. A.I. R. 1934 Lah. 867=35 P.L.R. 717=152 Ind. Cas. 638 (2).

——S. 59—Person not appointed Receiver mortgaging insolvent's property under orders of Court —Mortgage, if valid.

Where a person, after adjudication of the insolvent, though not formally appointed Receiver under the orders of the Insolvency Court acted as Receiver and mortgaged the insolvent's property and the mortgage was ratified by the Court:

Held, that the mortgage was analogous to a judicial sale and the mortgagee with valuable consideration got a good title. A.I.R. 1934 Lah. 867=35 P.L.R. 717=152 Ind. Cas. 638 (2).

3. Powers of Receiver

——S. 59—It is not within competence of receiver to enter into transaction involving insolvent estate into unnecessary litigation.

The property of an insolvent vests in a Receiver for a specific purpose. A Receiver is directed to realize the property of the debtor with all convenient speed and to distribute dividends among the creditors entitled thereto. The powers of Receiver enumerated in S. 59, cls. (a) to (i) have been given to him to discharge that duty. It is not, therefore within the competence of a Receiver to enter into a transaction which will involve the estate into unnecessary litigation or which is not for the benefit of the insolvent estate. A.I.R. 1946 Nag. 24=I.L.R. (1945) Nag. 826 =1945 N.L.J. 588.

——S. 59—Powers of Receiver, object of—Power not to be exercised to detriment of creditors.

The power of the Receiver to sell the property of the insolvent is one of the powers mentioned in S. 59 which enumerates the powers conferred on

the Receiver by the statute. The powers conferred upon the Receiver are exercisable only for the purpose of realising the property of the debtor in order to distribute dividends among the creditors. Money realised by the sale of the insolvents' property is devisible among the general body of creditors. But amongst the powers enumerated in S. 59, there is no power conferred on the Receiver to execute a conveyance which would result in valuable part of the insolvent's estate being lost to the general body of creditors without the purchase price being utilised to satisfy their claims. A.I.R. 1934 Pat. 514=15 P.L.T. 502=1 B.R. 32=152 Ind. Cas. 277.

——S. 59—Attachment of debtor's pay — Proper person to apply.

When an Official Receiver has been appointed, he represents the whole body of creditors and it is he who should move in the matter of attachment of the debtor's pay though it is open to a creditor to bring any matter to the notice of the Official Receiver or of the Conrt. A.I.R. 1933 All. 153 =146 Ind. Cas. 494.

——S. 59—Compromise without sanction — Not invalid.

A compromise (accepting a certain amount in full settlement of a claim) effected by the Official Receiver without sanction of the Court is not invalid. Sanction is taken by the Official Receiver for his own protection and the compromise is binding unless set aside. The provisions regarding sanctions are administrative only: 112 Ind. Cas. 452=A.I.R. 1929 Sind 41.

——S. 59—Appeal — Power to.

S 59 does not authorize the Official Receiver to appeal against a decree against the insolvent in a suit for damages. 98 Ind. Cas. 516=50 Mad. 161=25 M.L.W. 726=1926 M.W.N. 797=A.I.R. 1926 Mad. 1133=51 M.L.J. 613.

——S. 59—Important contention — Court should decide.

A contention raising a very important matter between the insolvent and the general body of creditors should be decided by the Court and not by an officer that may be appointed by the Court. 77 Ind. Cas. 589=2 Pat. 724=A.I.R. 1924 Pat. 259.

——S. 59—(1907), S. 20 — Discretion to contest suit—Costs of Receiver.

The Official Receiver from the moment of receiving the insolvent's estate represents the body of creditors and must protect their interests. If in his discretion he thinks it unnecessary to appear but finds that a particular creditor desires an appearance necessary, the proper practice is to obtain an indemnity from such creditor and to carry on the contest recovering his costs from him in case of failure. 36 Ind. Cas. 771 (Mad.).

——S. 59—(1907), S. 20—Receiver—Powers of

A Receiver under the Insolvency Act can be authorised by the Court to ascertain facts and report them to it with a view to the adoption of such step as may be deemed necessary in the interests of justice such as paying a surprise visit to the insolvent's house to see if he has conceaied properties. 23 C.L.J. 553=34 Ind. Cas. 777.

——Ss. 59 (c), 66 (1)—(1907), Ss. 20 (c) and 40 (1)—"Pilgrim business" if business or trade—Winding up.

The "Pilgrim business" of a hereditary priest attached to a temple is not business within S. 20 (c) nor is it a trade within S. 40 (1). The Court cannot appoint an insolvent priest to carry on pilgrim business for the benefit of his creditors. The insolvent's business can be carried on by the Receiver for the purpose of winding up but not for making a profit. 40 (Cal.) 678=21 Ind. Cas. 969.

——S. 59 (1907)—S. 20 (e)—Absence of vesting order—Acts of Receiver deemed to be acts of Court under Ss. 58 and 59 (e).

An insolvency petition was filed before the District Judge. He passed the following order: "The petition is transferred to the Official Receiver for adjudication and for the administration of the estate." In due course the Official Receiver passed an order of adjudication; but no separate order was passed by the District Judge vesting the property in the Official Receiver in accordance with the terms of S. 18, the Official Receiver assigned some of the insolvent's properties to a third person.

Held, that the District Judge by his order transferring the petition must be deemed to have appointed the Receiver to do the acts which the Court was empowered to do in the absence of a formal appointment of an Official Receiver qua Receiver under Ss 23 and 20 (e) and therefore the assignment by the Receiver was a valid assignment. 62 Ind. Cas. 346=44 Mad. 547=13 M.L.W. 227=1921 M.W.N. 135=A.I.R. 1921 Mad. 216=40 M.L.J. 209.

——S. 59—Receiver appointed by Aden Resident —Powers.

A Receiver, appointed by the Resident's Court at Aden, not under the provisions but under the spirit of the Provincial Insolvency Act, cannot make an order against the debtors of the insolvent. He can only call upon them to pay what they owe to the insolvent but if they do not obey the demand, he must seek his remedy by suit. If such a Receiver makes an order against the debtors of the insolvent, the aggrieved party may appeal to the Court appointing the Receiver or to the higher Court against the order. The party cannot file a suit. 84 Ind. Cas. 684=25 Bom.L.R. 155=47 Bom. 548=A.I.R. 1923 Bom. 233.

4. Power and duty of Court.

——S. 59—Delivery of possession of property by Court to Receiver.

It is only when the property proceeded against is the property of a person who has been adjudicated insolvent that the Court is bound to deliver it to the Receiver. A.I.R. 1940 Mad. 222=50 L.W. 839=(1939) 2 M.L.J. 708=1940 M.W.N. 349=189 Ind. Cas. 88.

——S. 59—Necessity of investigating debtor's account books.

If an insolvency case has to proceed, it is absolutely essential in order to allow a Receiver to go into the affairs of a debtor, to investigate the books and to come to some conclusion thereon. Without the books, it is impossible to say what exactly is the amount of debts and the value of assets. A.

I.R. 1934 Pat. 526=15 P.L.T. 461=1 B.R. 78 =152 Ind. Cas. 655.

——S. 59—(1907), S. 20—Power of Court to enquire into debts due to insolvent's estate—Jurisdiction.

A Court exercising insolvency jurisdiction has no power to inquire into and judicially ascertain claims by or on behalf of the insolvent's estate. 9 N.L.R. 182=22 Ind. Cas. 69.

——Ss. 59 (a), 75 (3)—(1907), Ss. 20 (a) and 46 (3)—Order directing the sale of Insolvent's property—Contention that it is exempt from sale—Not decided—Order if proper.

A District Judge cannot pass an order directing the sale of certain occupancy holdings belonging to an insolvent without deciding the contention of the judgment-debtor that the property was not liable to attachment. It is open to doubt whether the District Judge should direct the sale of an insolvent's property in view of the fact that the sale of the property lies within the discretion of the Receiver under S. 20 (a) of the Act. 18 C. L.J. 564=20 Ind. Cas. 273.

5. Proceedings by insolvent.

——S. 59—Proceedings by debtor pending insolvency.

A Hindu widow brought a suit against her father-in-law, defendant 1 for past as well as future maintenance. During the pendency of the suit, defendant 1 was adjudged insolvent on the application of the creditor and the Official Receiver was added as defendant 2. A personal decree was passed by which a charge for maintenance was also created upon the whole property held by defendant 1. In an appeal by defendant 1 to which defendant 2 was also made respondent, the widow contended that after the vesting of the estate in defendant 2, defendant 1 had no **locus standi** to appeal:

Held, that the liability of defendant 1 under the decree was personal one and, therefore, the objection under S. 59, Provincial Insolvency Act was not well founded.

Held, also, that the case did not come under O. 22, R. 10, C. P. Code, as defendant 1 did not become insolvent pending the appeal. Order 22, R. 10, being merely a permissive one, did not impose a disability upon a person already on record. Defendant 1, therefore, had **locus standi** to appeal. A.I.R. 1937 Mad. 915=1937 M.W.N. 1014=46 L.W. 550=177 Ind. Cas. 33.

——S. 59—Suits by insolvent after adjudication.

Where an undischarged insolvent files his suit without previous application to the Official Receiver or without requesting him to file the plaint on his behalf, such suits are not maintainable particularly when no permission of the Court has been obtained for the filing thereof. The Court should not grant the application for permission where the suits are barred on tne date of permission. The case would be analogous to those cases in which the plaintiff seeks permission to amend a plaint and it is a well known principle of law that such an amendment should not be allowed if its effect would be to deprive the defendant from pleading the bar of limitation. A.I.R. 1937 Mad. 165=1936 M.W.N. 996=170 Ind. Cas. 981.

——S. 59—Suit by insolvent after adjudication.

There is no bar to an undischarged insolvent bringing a suit for a declaration that certain land mortgaged to certain person had been redeemed, and making the Receiver also a party to such a suit, though he had not obtained the possession of the land and it did not vest in him by virtue of S. 28 (5), Provincial Insolvency Act being not attachable under S. 60, C. P. Code. A.I.R. 1937 Pesh. 42=168 Ind. Cas. 377.

——S. 59—Defamation—Insolvent's right to sue for damages.

An insolvent is entitled to sue for defamatory words whether published before or after his adjudication; and such damages as he may recover will not belong to his trustees. Even if in such a suit for damages for defamation of the insolvent a part of the claim refers to injury to the insolvent's estate, the insolvent may still carry on the suit as the right of action for the injnry to his character and reputation remains vested in him. A.I.R. 1932 Sind 33=26 S.L.R. 21=140 Ind. Cas. 233.

——S. 59 (d)—(1907), S. 20 (d)—Rights of Insolvent to sue.

An insolvent can institute, defend or continue any suit or other legal proceeding to set aside a decree against him. 12 A. L. J. 925=27 Ind. Cas. 876.

——S. 59 (d)—(1907), S. 20 (d)—Suit by Insolvent to recover deferred dower—Maintainability of.

An adjudicated insolvent whose estate is in the hands of Receiver cannot maintain a suit in his own name for the deferred dower of his daughter even though the Receiver has refused to bring such suit. 54 Ind. Cas. 699 (Pat.).

——S. 59—Insolvent's power to execute orders for costs—Leave of Court.

When an order for costs is made against a creditor in favour of the insolvent and the Receiver dies, the insolvent's estate vests in the Insolvency Court and the order cannot be executed by the insolvent or on his death by his heirs as agents under S. 59, without leave of the Court. A.I.R. 1936 Cal. 521=63 Cal. 1210=168 Ind. Cas. 391.

——S. 59—Insolvent's right to appeal after adjudication.

Where a person has been declared insolvent during execution proceedings, he has no **locus standi** to appeal from an order confirming a sale. The principle applies to a sale under O. 21, R. 90, C. P. Code. A.I.R. 1936 Lah. 368=38 P.L.R. 108=162 Ind. Cas. 299.

6. Sale by Receiver.

——S. 59—Court ordering sale of insolvent's property—Official Receiver selling property and Court accepting bid of purchaser — Purchaser, if entitled to sale certificate or sale-deed.

When an Official Receiver sells property of an insolvent, it cannot be said that it is transferred by operation of law or by, or in execution of a decree or order of a Court of competent jurisdiction within the meaning of S. 2 (d), T. P. Act. Even if the Insolvency Court has ordered that the Receiver should conduct the sale and has accepted the bid of the purchaser, it makes no difference as

regards the nature of sale. The Insolvency Court has no jurisdiction to order the sale or to order that the bid be accepted. It, therefore, cannot be said that S. 54 of the T. P. Act does not apply by virtue of S. 2 (d) of the Act, and no sale deed is necessary. The purchaser is not entitled to a sale certificate from the Court under O. 21, R. 94, C. P. Code. A.I.R. 1942 Oudh 424=1942 A.W.R.C.C. 262=1942 O.W.N. 396=18 Luck. 433=201 Ind. Cas. 286.

——S. 59—(1907), S. 20—Official Receiver—Conveyance by, essential to pass title.

There is nothing to exempt a conveyance by an Official Receiver in Insolvency from the operation of S. 54 of the T. P. Act. 46 Cal. 887=53 Ind. Cas. 121.

——S. 59—Sale of insolvent's property—Powers of Receiver.

The Official Receiver in the due course of his administration of the assets of the insolvent held a sale on August 30, 1937, which was duly advertised. The highest bidden was **A**; and the sale was knocked down in his favour for Rs. 113 of which he deposited Rs. 32 at once and a further Rs. 81 on September 13, 1937. In accordance with the practice of the Official Receiver, he said that the sale in **A's** favour would be subject to such further bids as might be offered by creditors. He sent notices to the other creditors telling them that if they did not make any higher bids, the sale would be confirmed in **A's** favour. On September 4, 1937, B sent an offer to the Official Receiver which reached him on September 6, 1937. The money should have been deposited with seven days of September 6, 1937, that is, on or before September 13, 1937. The money was not, however, paid and the Official Receiver, apparently not fully aware of the various bids that had been made and of the circulars he had issued, confirmed the sale in **A's** favour on November 30, 1937. On February 16, 1938, **B** deposited the Rs. 120 which was the amount of the offer that he had made. On May 6, 1938, the Official Receiver executed a sale deed in favour of **A**. In appeal, the District Judge, while concluding that the sale was really confirmed in **A's** favour on November 30, 1937, held that the sale was irregular, in that the Official Receiver had made it clear that he had no intention to confirm the sale in **A's** favour if there were higher bidders among the creditors. He, therefore, set it aside:

Held, that the confirmation of the sale in **A's** favour was not irregular. The Official Receiver was under no contractual obligation either to **B** or to any other person to accept their offers; and he might well have refused to confirm the sale in some other person's favour unless his bid was substantially higher than that of **A**. He was justified in confirming the sale in favour of **A**—especially as the bid of **B** was only Rs. 7 higher than that of **A**. Although the District Judge had power to set aside the sale and to pass an order in favour of B, yet he should not have done so lightly after there had been a legal conveyance of the property in favour of A.

Held, also that the practice of the Official Receiver in making the highest bid at the auction subject to further bids by creditors was objectionable. A.I.R. 1941 Mad. 827=54 L.W. 215=(1941) 2 M.L.J. 382=1941 M.W.N. 1016=200 Ind. Cas. 477.

——S. 59—Receiver's powers of sale.

The Official Receiver of an insolvent's estate has power to sell the son's share of the family property where such power was possessed by the insolvent father at the time when the estate vested in him. But there is, no doubt, a difference between the existence of a power and its exercise, and the mere existence of the power will not be sufficient to show that in any particular case, it was exercised by the Official Receiver.

It is well known that the Receiver is bound by his duty to sell the entire property of the insolvent for the benefit of the creditors, and where the insolvent's property included not merely his own share but also the power to sell his son's share in respect of his antecedent debts not tainted by illegality or immorality, it would have been contrary to his duty for him to have sold only the father's half share. On the other hand, it is most unlikely that the purchaser, who was making the purchase on behalf of a charity, would have purchased a half share in the properties. A.I.R. 1938 Mad. 299=182 Ind. Cas. 282.

——S. 59—Receiver's power of sale.

The Provincial Insolvency Act does not empower a Receiver to sell anything more than the property of the insolvent which vests in the Receiver by reason of the adjudication. A.I.R. 1936 Pat. 115=17 P.L.T. 39=2 B.R. 318=15 Pat. 363=161 Ind. Cas. 167.

——S. 59—Property liable to sale.

Held, that the right to sue for breach of contract being non transferable under S. 6 (e), T. P. Act, such a right to sue was not conveyed to the third party on sale by the Receiver. A.I.R. 1937 All. 317=1937 A.L.J. 304=1937 A.W.R. 241=168 Ind. Cas. 683.

——S. 59—Sale by purchaser, mode of.

The Provincial Insolvency Act contains no provision which requires or empowers the Official Receiver to attach the property as a necessary preliminary to sale as in the case of execution of decrees under C. P. Code. The Official Receiver may sell the insolvent's property as any other private individual having disposing power over certain property vested in him, can sell. He may advertise for sale of property in any manner he likes and can sell it to the highest bidder. The sale is not, in any sense, "in continuation" of attachment. It is a distinct act of the Receiver which can be objected to by the insolvent before the Insolvency Court by an application under S. 68. A.I.R. 1937 All. 226=1937 A.L.J. 129=167 Ind. Cas. 940.

——S. 59—Sale by Receiver—Procedure.

The rules laid down in the C. P. Code regulating sales under that Code are not applicable to sales by the Official Receivers in insolvency proceedings. Sale by the Official Receiver is not, therefore, irregular merely because it was held at his office and not at the spot. A.I.R. 1932 Lah. 320=33 P.L.R. 332=136 Ind. Cas. 267.

——S. 59—Purchase money — Payment by purchaser direct to creditors.

Any deviation from the letter or the spirit of insolvency law is calculated to open the door to fraud and profiteering. Both the realization and

the distribution of the assets of an insolvent should be entirely carried out by official agency. That is the only safeguard provided both for the insolvent and for his creditors. A purchaser from the Official Assignee of an insolvent's assets should never be allowed to pay creditors direct out of his purchase money. A.I.R. 1937 Mad. 962=46 L.W. 449=I.L.R. (1938) Mad. 426=(1937) 2 M.L.J. 508=1937 M.W.N. 942=175 Ind. Cas. 158.

——S. 59—Sale under—If voluntary sale or one by Court. See BENGAL TENANCY ACT, S. 26-F. 54 C.W.N. 286=A.I.R. 1948 Cal. 353.

——S. 59—Pre-emption — Sale of insolvent's property by Receiver.

The act of an Official Receiver in selling the property of an insolvent, is not an act in execution of the order of a Court and is, therefore, subject to the right of pre-emption. A.I.R. 1936 Lah. 35=38 P.L.R. 755=158 Ind. Cas. 658.

——S. 59—Official Receiver selling property of insolvent free from mortgage—Legality of.

The Official Receiver, who stands in the position of the insolvent mortgagor, can sell the property outright free from the mortgagee's debt, if on the facts, it could be held that the action of the mortgagee was equivalent to an authorization to sell on the mortgagee's behalf. Where, therefore, the Receiver who acted as auctioneer, issued notice without any reference to the mortgage and the mortgagee consented to have the properties sold free of mortgage, and at the sale, the mortgagee's agent was standing by, and in fact, bought the property himself:

Held, that the properties were sold free from mortgage and that the mistake of the Receiver in reporting that the sales were subject to mortgage was a **bona fide** mistake. A.I.R. 1934 Rang. 367=151 Ind. Cas. 606.

——S. 59—Sale by Receiver of mortgaged property—Insolvent's right to protest.

Where the property of the insolvent which is under a mortgage is sold by the Official Receiver without reference to the rights of the mortgagee, whether the mortgagee has or has not a right to protest against the sale, the insolvent has no right to protest against it. A.I.R. 1933 Lah. 1008=147 Ind. Cas. 778.

——S. 59—Sale of property alienated by insolvent—Nature — Not proper.

Sales by an Official Assignee of lands in possession of alienees from an insolvent as being part of the insolvent's estate are in substance, if not in form, nothing more than sales of the right to litigate and assuming that they do not come within the prohibition in the Transfer of Property Act against the transfer of a mere right to sue, they are open to the same objections and are strongly to be deprecated. 107 Ind. Cas. 237=27 M.L.W. 1=1928 M.W.N. 20=4 O.W.N. 1231=47 C.L.J. 136=32 C.W.N. 281=30 Bom. L. R. 220=6 Rang. 29=26 A.L.J. 371=A.I.R. 1927 P.C. 252=54 M.L.J. 88 (P.C.).

——S. 59—Sale before vesting order—Effect of. (Per Full Bench, Krishnan, J., dissenting).—

A sale by Official Receiver of the Insolvent's property is not a transfer contemplated by S. 2 (d) and S. 43 applies where the Receiver has sold the properties before the vesting order in his favour is made and the sale is subsequently ratified by the Court. 99 Ind. Cas. 8=38 M.L.T. 92=25 M.L.W. 128=50 Mad. 135=A.I.R. 1927 Mad. 1=51 M.L.J. 529.

——S. 59 — Simultaneous sale of two houses—Prejudicial.

Sale of two items of property consisting of separate dwelling-houses simultaneously, or a sale before the equities of a bona fide purchaser have been settled, is prejudicial to insolvent's estate. 98 Ind. Cas. 1065=A.I.R. 1927 Mad. 232.

——S. 59 (f)—(1907) S. 20 (f)—Leave of Court—Receiver entering into arrangement without leave—Sale by officers of Court—Contract Act.

The purchaser of property belonging to an insolvent cannot impugn the sale on the ground that the Receiver, who sold the property, entered into an arrangement with the purchaser for deferred payment of the purchase money wichout leave of the Court. The Contract Act has no application to sales by officers of Courts. 5 Bur.L.T. 79=15 Ind. Cas. 368.

7. Setting aside sale by Receiver.

——S. 59—Setting aside sale — Grounds — Sale not governed by O. 21, C. P. Code.

The Court has no jurisdiction to set aside a sale held or made by the Receiver in the absence of proof of fraud or collusion or material illegality or irregularity in conducting the sale or misconduct on his part causing injury to the estate. The sale may of course be set aside if the Receiver acts beyond his authority or in excess of the powers conferred on him.

Within a month after the sale of their property by the Receiver appointed under the Provincial Insolvency Act, insolvents tendered money to pay their creditors in full and a certain sum being 5 per cent. on the purchase money, to be paid to the purchaser as compensation for the cancellation of the sale, and further prayed for the annulment of the order of adjudication.

Held, that a Receiver's sale was not a "proceeeing" under the Act which meant a proceeding in Court, and sales by Receivers in bankruptcy were not governed by O. 21, C. P. Code. 107 Ind. Cas. 172=5 Rang. 768=A.I.R. 1928 Rang. 60.

——S. 59—Fraudulent misrepresentation by one of the creditors is not a ground for setting aside a sale. The principle of caveat emptor applies in such a case. 97 Ind. Cas. 781=1926 M.W.N. 688=A.I.R. 1926 Mad. 1080.

——S. 59—The Official Receiver has no power to set aside a sale held by him of the insolvent's property. 97 Ind. Cas. 781=1926 M.W.N. 688=A.I.R. 1926 Mad. 1080.

8. Status of Receiver.

——S. 59—Status of Receiver — Decree against Official Receiver in proceedings outside insolvency binds him only as representing insolvent and not creditors—Official Receiver, when can go behind decree.

The Official Receiver has two capacities, one as

representing the insolvent or his estate and secondly as representing the creditors. He does not, however, represent the creditors under all circumstances. In proceedings within the insolvency itself and in the Insolvency Court, the Official Receiver represents both the creditors and the insolvent, but in a case where the proceedings were outside the insolvency proceedings such as, a suit by the insolvent's creditor to recover his debts, the decree will only bind the Official Receiver in his capacity as representative of the insolvent and not the creditors. Such a decree must therefore, be proved by the creditor in accordance with the mode provided by the Act. A debt cannot be said to have been legally proved unless the method laid down in the Act is adopted.

The Official Receiver, till he is satisfied that there is evidence which would entitle him to go behind the decree, cannot do so. A.I.R. 1941 Lah. 6=I.L.R. (1940) Lah. 345=42 P.L.R. 751=192 Ind. Cas. 414.

——Ss. 59 (5)—(1907), Ss. 20 and 47—Official Receiver acting under Ss. 2 and 20—If court.

The Official Receiver acting under S. 20 Provincial Insolvency Act does not act as a Court and S. 47 has no application to the acts so done. S. 47 only lays down the procedure of a Court's proceedings, and does not authorise an Insolvency Judge to summarily decide questions of titles with respect to property claimed by third persons. 41 Mad. 440=6 L.W. 694=(1917) M.W.N. 857=42 Ind. Cas. 525.

9. Suit against insolvent.

——S. 59—Suits relating to insolvent's property—Necessity of impleading Receiver as party.

When mortgaged property has vested in a Receiver, the mortgagee cannot bring or continue a suit for foreclosure without making the Receiver the defendant and a decree obtained in his absence is not **res judicata** against him.

The plaintiff Bank brought a suit on mortgage against a joint family firm of which the manager was the only adult member. By the time the Bank brought their mortgage suit, the only adult male member of the family who was the **karta**, had been adjudicted insolvent and so had the firm against whom the suit was brought. This was known to the Bank but the Official Receiver was not impleaded. The **karta** died before preliminary decree and the minors were not represented. In execution, the mortgagee Bank purchased the property and being unable to take possession, brought a suit for possession impleading the Official Receiver as defendant:

Held that the proceedings were null and void and anything done in pursuance thereof was also null and void. It followed that no title passed to the plaintiff Bank by reason of the sale certificate while the defendants were in possession. The suit was, therefore, liable to dismissal. A.I.R. 1937 Lah. 402=39 P.L.R. 627=175 Ind. Cas. 59.

——S. 59—Insolvency of debtor pending suit against him—Official Assignee or Receiver, whether necessary or proper party.

While a suit is brought against defendant in respect of money due (i.e., a debt, or damages for breach of contract) and the defendant becomes insolvent, the plaintiff is not entitled to join the Official Assignee or Receiver as a party to the suit. The suit is not one relating to the property of the insolvent, and the Official Assignee or Receiver is neither a necessary nor a proper party to the suit. A.I.R. 1935 Rang. 439=160 Ind. Cas. 90.

10. Suit by Receiver.

——S. 59—Power of Receiver to file suit.

Where, by an order of the Insolvency Court, the property of the insolvent vests in the Official Receiver and later on the Court appoints two more persons as additional Receivers without vacating the previous order or making another order vesting the properties in a body of three Receivers the Official Receiver can, by himself, maintain suits to recover the estate of the insolvent. A.I.R. 1938 Lah. 264=178 Ind. Cas. 259.

——S. 59—Suit by Receiver—Plaint, requirements of.

The Official Receiver should never in the plaint describe himself merely as "the Official Receiver". He should invariably state that he is suing as a Receiver of the estate of some person to be mentioned particularly by name who is insolvent. When this is not done, the plaint should be returned for amendment. A.I.R. 1935 Rang. 327=158 Ind. Cas. 570.

——S. 59—Permission for suit—Form — Absence not fatal to suit.

The permission of the Insolvency Court required by S. 59 for institution of a suit by a Receiver need not be in writing. The mere fact that a Receiver appointed under the Act has not obtained the leave of the Court to institute a suit is not fatal to the suit brought by him, as the obtaining of such leave is a matter between the Receiver and the Insolvency Court whose officer he is and cannot be pleaded as a valid defence by a third person to that suit. 47 Cal. 555 and (1914) 2 K.B. 701, Foll. 89 Ind. Cas. 419=A.I.R. 1926 Nag. 156.

——S. 59 (d)—(1907), S. 20 (d) — Receiver — Power to continue—Suit in forma Pauperis.

Where a person obtains leave to sue in forma pauperis in a suit commenced before his insolvency the Receiver is entitled to continue the suit in the same way. 16 A.L.J. 440=47 Ind. Cas. 577.

——S. 59—Suit for return of deposit.

When the insolvent has filed a suit for return of the deposit money for breach of contract on the defendant's part, the Official Receiver is entitled to continue the suit. 98 Ind. Cas. 516=50 Mad. 161=25 M.L.W. 726=1926 M.W.N. 797=A.I.R. 1926 Mad. 1133=51 M.L.J. 613.

——S. 59 (d)—Interpretation—"Relating to"

There is no authority for holding that the words "relating to" must be taken to mean "affecting". 98 Ind. Cas. 516=50 Mad. 161=25 M.L.W. 726=1926 M.W.N. 797=A.I.R. 1926 Mad. 1133=51 M.L.J. 613.

11. Suit by unsuccessful claimant.

——S. 59—Suit by unsuccessful claimant—No bar.

Under the Provincial Insolvency Act, there is

no provision which expressly or impliedly precludes an unsuccessful claimant from bringing a regular action to establish his title to the property seized by the Insolvency Court or the Receiver. 22 P. R. 1917, Foll. 61 Ind. Cas. 332=2 Lah. 147=77 P. L. R. 1921=3 L.L.J. 233=A.I.R. 1921 Lah. 58.

12. Miscellaneous.

——S. 59—Lease of ancestral property by Receiver—Reversioners, remedy of.

Where ancestral property of insolvents has been leased by the Official Receiver, the reversioners having no present interest in the property, all that they can ask for is a declaration that the lease shall not be binding on them after the death of the insolvent if they prove that the debts, in satisfaction of which the lease has been given, were incurred for illegal or immoral purposes. It is open to the objectors to establish their rights in this respect by a separate suit. Nor is it necessary or even convenient to go into the question in the course of the insolvency proceedings. A. I. R. 1935 Lah. 952=37 P.L.R. 517=160 Ind. Cas. 794.

——S. 59—Transaction between creditor and insolvent—Should not be upset if proper.

Though the Act allows it, it is not desirable to encourage other creditors to come into the battlefield and endeavour to upset transactions between an insolvent and a competing creditor, when the Receiver who is really empowered by law to investigate the matter is satisfied that there is no ground for objection. 62 Ind. Cas. 732=43 All. 427=19 A.L.J. 240=A.I.R. 1921 All. 41.

——S. 60—Sale in contravention of—Effect.

The law draws a distinction between the case of an alienation of property which from its very nature, is incapable of alienation for all time and in all circumstances, and the case where the bar has been created for certain specific purposes. Where a grove is sold by the Official Receiver in contravention of S. 60 of the Provincial Insolvency Act, it is a bad sale not in the sense that it is void but in the sense that it could be avoided. If persons who are entitled to avoid it do not do so but ratify it, it is a good sale and cannot be subsequently avoided on any plea based on S. 60 of the Provincial Insolvency Act. 1947 A.L.J. 245=1947 A.W.R. (H.C.) 258=1947 A.L.W. 446=A.I.R. 1947 A. 293.

——S. 60 (1) and (2)—Applicability and scope.

It is incorrect to say that sub-S. (2) of S. 60 relates to immovable property paying revenue to Government or held or let for agricultural purposes as described in sub-S. (1). Sub-Ss. (1) and (2) of S. 60 are independent of each other. Sub-S. (1) relates to immovable property of the particular description mentioned therein; while sub-S. (2) is much wider in scope and applies to immovable property of whatever description, against which execution is prohibited or restricted by statute. A.I.R. 1943 Lah. 19=45 P.L.R. 57=I.L.R. (1943) Lah. 242=204 Ind. Cas. 344 (F. B.).

——S. 60—Rights under Agra Tenancy Act.

Per **Piggott, J.**—The provincial Insolvency Act does not apply at all so as to govern or affect the rights of a landholder against his tenant, enforceable by means of any suit or proceeding under the Local Tenancy Act. The Provincial Insolvency Act would not bar a suit by a landholder against his tenant brought before a Revenue Court under the provisions of the Tenancy Act, neither could it bar a proceeding in execution of a decree before such Court. A.I.R. 1921 All. 13 and 43 All. 510 (F.B.), approved.

Per **Walesh, J.**—As the law stands, it is quite clear that the jurisdiction of the Civil Courts strictly so-called and of the Insolvency Court respectively, on the one hand, and of the Revenue Court on the other, are mutually exclusive. A decree-holder, who is the landlord of an agricultural tenancy to which the Agra Tenancy Act applies is not a creditor under the Provincial Insolvency Act in respect of his rent or decree. His decree is not provable debt. 66 Ind. Cas. 214=44 All. 296=20 A.L.J. 147=A.I.R. 1922 All. 74.

——S. 60—(1907), S. 21—Applicability—Punjab.

The first clause of S. 21 is not applicable to the Punjab, as no declaration under S. 320 of the C. P. Code (1882), S. 68 of the Code of (1908) is in force. 61 Ind. Cas. 664=2 Lah. 78=71 P.L.R. 1921=A.I.R. 1921 Lah. 44.

——S. 60—Procedure explained — Sale — Nature of.

Under S. 60, the Insolvency Court does not make any order for the sale of any property. All that it is required to do is to collect certain "information and to forward a statement containing that information to the Collector." The Collector, after that, proceeds to sell the property or otherwise to raise money on the security thereof or by letting it in farm, not by virtue, or in pursuance, of any order made by the Insolvency Court to that effect, but by reason and in exercise of the statutory obligation imposed on him to do so. Hence the sale by the Collector cannot be said to be a sale in execution of any decree or order. (1945) 47 P.L.R. 62.

——S. 60—Proceedings by Collector — Interference by Court.

After the sale proceedings have been transferred to the Collector under S. 60, the Insolvency Court has no authority of any kind to interfere with the proceedings of the sale officer or to sanction a sale made by the Collector or his subordinate, nor has the sale officer any authority to refer the case to the Insolvency Court and to ask for sanction. 98 Ind. Cas. 1046=49 All. 272=25 A.L.J. 197=A.I.R. 1927 All. 203.

——S. 60—Arbitration — Award directing sale of revenue paying property.

Where during the pendency of the insolvency proceedings the Receiver and the secured creditors referred the matter to arbitration and the award directed the Receiver to bring the insolvent's property, which was ancestral and revenue paying, to sale and realize the sale proceeds through Court:

Held, the Insolvency Act has no provision to prevent secured creditors from acting according to the award, but the better way would be to obtain the insolvent's discharge under S. 38 and deal with the property outside the jurisdiction of the Insolvency Court. The Receiver would then

cease to be a Receiver under insolvency, but being a person vested by the arbitrator with authority to sell the property under the arbitration provisions would be able to sell the property under the terms of the award. 95 Ind. Cas. 416=48 All. 475=24 A.L.J. 480=A.I.R. 1926 All. 501.

——S. 60 (2) and U. P. Debt Redemption Act (13 of 1940), S. 17—Scope and effect of S. 60 (2)—Applicability of S. 17, Debt Redemption Act, to insolvency proceedings.

The provisions of sub-section (2) of S. 60 of the Provincial Insolvency Act puts the adjudication order, on the basis of which the property vests in the Official Receiver, on the same level as a decree and provides that any enactment for the time being in force prohibiting or restricting the execution of decrees would apply to the adjudication order. Hence, it follows that the benefit of S. 17 of the U. P. Debt Redemption Act would be available to the insolvent. I.L.R. (1948) All. 276=1948 A.L.J. 66=1948 A.W.R. (H.C.) 130=A.I.R. 1948 A. 297=1948 O.A. (H.C.) 130=1948 R.D. 219=1948 A.L.W. 185.

——S. 60 (2) does not incorporate provisions of S. 17 (1) (a), U. P. Debt Redemption Act (13 of 1940).

There are two conditions to be observed in applying a restrictive enactment under S. 60 (2) Provincial Insolvency Act, against the Receiver in the insolvency. Firstly, the restrictive enactment must only be applied in the insolvency **to the same extent** that it could operate in favour of the judgment-debtor outside the insolvency; and secondly, it must always be a condition precedent to its application in insolvency at all that **it can be so applied** without departing from its substantial purpose.

The decree contemplated by S. 17 (1) (a), U. P. Debt Redemption Act, must be a decree in favour of a particular person or persons in respect of a particular loan or loans; while an adjudication order is made not for the benefit of one debt but of many **some of which may be, and others of which may not be,** in respect of 'loans' as defined by the U. P. Debt Redemption Act. The provisions of S. 17 (1) (a), U. P. Debt Redemption Act, therefore, cannot be applied to insolvency and hence S. 60 (2), Provincial Insolvency Act, does not incorporate the provisions of S. 17 (1) (a), U. P. Debt Redemption Act, so as to prevent the Receiver, in administering the estate of an agriculturist insolvent in insolvency, from selling his property. A.I.R. 1946 All. 444=1946 Oudh W.N. H.C. 127=223 Ind. Cas. 489.

——S. 60 (2)—Construction — "For the time being in force" — Meaning explained — Residential house of insolvent vesting in Official Receiver—Receiver cannot sell house.

The combined effect of Ss. 28, 59 and 60 of the Act is that the Receiver cannot sell any immovable property of the insolvent, the sale of which is prohibited or restricted by statute. The expression "for the time being in force" in S. 60 (2) means in force when the Receiver is proceeding to sell the property of the insolvent. It is not necessary that the restrictive or prohibitory law should have been in force at the time when the vesting order was passed. Hence, where the residential house of the insolvent was not exempt from attachment and sale at the time when it became vested in the Official Receiver but before the Official Receiver proceeded to sell it, S. 60 (1) (ccc) C. P. Code as amended by the Punjab Act 12 of 1940 came into force, the insolvent would be entitled to the exemption of his residential house from attachment and sale under S. 60 (1) (ccc) C. P. Code and the Receiver's power to sell it would subsist no longer. A.I.R. 1943 Lah. 19=45 P.L.R. 57=I.L.R. (1943) Lah. 242=204 Ind. Cas. 344 (F.B.).

——Ss. 60 (2), 28—S. 60 (2), Scope of and applicability — Insolvent, member of agricultural tribe at time of sale by Receiver—Temporary alienation of insolvent's property, whether can be made.

Sub-section (2) of S. 60 is intended to supplement S. 28, and to save the operation of enactments prohibiting execution of decrees or orders against the immovable property of the insolvent even after the property has vested in the Receiver and must be held to apply to a sale by the Receiver. Section 16, Punjab Alienation of Land Act applies to a sale by the Receiver of the land belonging to an insolvent who is a member of a notified agricultural tribe as the sale is held in enforcement of an order of adjudication. While applying S. 16, Punjab Alienation of Land Act, the status of the insolvent at the time of the sale of the property must be taken into consideration, in the same way as it is in execution of decrees. The insolvent's acquiring the status of a member of an agricultural tribe after the adjudication does not prevent the operation of sub-S. (2) of S. 60 at the time of sale of the property. S. 16, Punjab Alienation of Land Act, does not prohibit the temporary alienation of such land, and it is, therefore open to the Receiver to arrange for the temporary alienation of the land of the insolvents according to law. A.I.R. 1939 Lah. 346=41 P.L.R. 816=I.L.R. (1940) Lah. 40=187 Ind. Cas. 839.

——S. 60 (2)—Land belonging to member of agricultural tribe — Sale by Receiver — Effect of Punjab Alienation of Land Act, 1900, S. 16.

S. 16, Punjab Alienation of Land Act, overrides the provisions of the Provincial Insolvency Act in respect of all matters which are done in "enforcement of the order of adjudication." An act done by the Receiver in pursuance of the authority which he derives from the order of adjudication is nothing but an enforcement of the order of adjudication and sale of land belonging to member of agricultural tribe is subject to provisions of S. 16, Punjab Alienation of Land Act. 31 Punj. L.R. 842=A.I.R. 1930 Lah. 1034.

——S. 60—Permanent alienation—By Court—No bar.

There is no absolute bar to the Insolvency Court permanently alienating the land of an insolvent or to its departing from the principles governing the execution of ordinary decrees if a fit case is made out for such action. 117 Ind. Cas. 669=29 P.L.R. 606=A.I.R. 1929 Lah. 66.

——S. 60—Legality of sale.

Where an immovable property belonging to an insolvent, whose claim however to it was in dispute, was sold by the Receiver for a low price.

Held: the sale is void either under S. 60 of the Insolvency Act or S. 6 of Transfer of Property Act. 11 O.L.J. 672=A.I.R. 1925 Oudh 299.

——S. 61—Applicability.

S. 61 applies only to cases of insolvency, and neither sub-S. (4) nor any other sub-section applies when a composition scheme is sanctioned under S. 38 and is in force and the insolvency has been annulled. A.I.R. 1943 Sind 76=I.L.R. (1942) Kar. 506=206 Ind. Cas. 262.

——S. 61—Applicability.

Where persons have sent their goods to the debtors to be sold by them as commission agents and the same are sold before the insolvency, the debtors are in possession only of the proceeds and the owners of the goods are not preferential creditors. A.I.R. 1943 Sind 76=I.L.R. (1942) Kar. 506=206 Ind. Cas. 262.

——S. 61—Priority of debts—Policy of law—Joint Hindu family—Father and son adjudicated insolvents by one order—Creditor holding debt incurred by father as manager, if has priority over debts of son.

It is the policy of the insolvency law to distribute the estate among the creditors fairly and unless a preference was given by the Act to any particular debt, no priority can legitimately be claimed in regard to the same.

There is a great deal of difference between the power of disposal in a property and the property itself. The former does, but the latter does not, vest in the Official Receiver on the father's adjudication. The father's power of disposal would cease to exist as soon as son's property comes on his insolvency to vest in the Official Receiver

Consequently, a creditor in insolvency, holding a debt which is free from any taint of immorality or illegality incurred by a father as manager of a joint Hindu family, cannot claim priority over the debts incurred by a son who was a junior member of the joint family when both the father and the son were adjudicated insolvents by one order. A. I.R. 1939 Mad. 276=48 L.W. 966=1939 M.W. N. 107=(1939) 1 M. L. J. 158=183 Ind. Cas. 693.

——S. 61—Priority of debts—Mortgage to secure debt payable to woman as stridhanam—Such sum deposited with Chettyar firm—Deed, liability of, to be set aside.

In an insolvency case against a **Chettyar** firm, the firm and all its partners were adjudicated insolvents on a creditor's petition, the creditor being a first cousin of one of the partners. The debt was given to the creditor as dowry or marriage settlement and a mortgage deed was executed to secure the repayment of the debt. On behalf of the debtor, it was contended that the transfer was made, not with a view to giving her preference but to escape the odium which would fall upon the firm if it did not repay this **stridhanam** property which was dowry offered at the marriage ceremony:

Held, that the debt, in the absence of proof to the contrary, could not be regarded as having any special sanctity in order to rank above ordinary debts and the deed was liable to be set aside.

Before the Insolvency Court, all persons, men and women, normally, are alike. Among the **Chettyar** community, the mere fact that a sum of money happens to be a woman's **stridhanam** does not give it any special sanctity so that the non-payment of it would be regarded as a peculiar disgrace to the man or firm from whom it had got to be recovered. A.I.R. 1936 Rang. 413=164 Ind. Cas. 893.

——S. 61—Winding up of company—Priority of debts.

Law applicable is Companies Act, S. 230 and not S. 61, Provincial Insolvency Act—Where there is a conflict between two Acts, the provisions of the Companies Act must prevail. A.I.R. 1931 Lah. 351=32 P.L.R. 367=12 L. 678=134 Ind. Cas. 200.

——S. 61—Joint family—Surety debt of father to a public body.

Since in a Hindu joint family the sons are liable to pay their father's suretyship debt, upon the insolvency of the father and the sons, the interests of the sons also in the joint family are answerable in the discharge of such debt to a public body in priority over all the debts, whether of the sons or of the joint family. The priority is not restricted to the interest of the father alone. 126 Ind. Cas. 477=A.I.R. 1930 Sind 244.

——S. 61—Contract of indemnity — In favour of insolvent—Collection—Distribution.

B has a claim upon **A,** but in respect of that claim, **A** has a right to be indemnified by **C. A** goes bankrupt. **A's** trustee in bankruptcy can force **C** to pay the amount of the claim to him but the sum recovered by virtue of the indemnity must be applied exclusively in paying that debt against which the debtor was entitled to be indemnified. 118 Ind. Cas. 882=33 C.W.N. 179 =56 Cal. 262=A.I.R. 1929 Cal. 208.

——S. 61—Discharge of insolvent—Distribution—Powers not affected.

The Insolvency Court undoubtedly has power to give directions as to the distribution of the assets among the creditors who have proved in the insolvency. The discharge of the insolvent does not put an end to the Court's power to give such directions. 117 Ind. Cas. 582=7 Rang. 126=A. I.R. 1929 Rang. 168.

——Ss. 61, 62—(1907), Ss. 33 and 39 — Proved debts—If can be excluded.

A creditor proved only one out of two degrees reserving the other for settlement after the discharge of the debtor. The order of exclusion of the proved decree as a punishment was incompetent in view of the provision for equal division of assets under Ss. 33 and 39 of the Act. 6 S.L. R. 163=19 Ind. Cas. 385.

——S. 61 (3)—Expenses of administration—Rent for premises where goods are stored, whether such expense.

Rent for premises in which the insolvent's goods are stored after adjudication clearly comes under expenses of administration within the meaning of S. 61 (3) and should take priority even over the debts of a secured creditor. But where the premises are vacated before the order of adjudication, the owner of the premises is not entitled to claim priority under S. 61 (3) for the amount due to him on account of rent. A.I.R. 1937 Lah. 96=39 P. L.R. 314=171 Ind. Cas. 992.

——S. 61 (4)—Applicability.

No exception in favour of the petitioning creditor can be allowed by Courts in India to the rule in S. 61, sub-S. (4). A.I.R. 1934 All. 521=1934 A.L.J. 676=56 A. 1041=3 A.W.R. 481=149 Ind. Cas. 935 (2).

——S. 61 (4)—Separate and partnership debts—Distinction between.

In sub-S. (4) of S. 61, the expression 'separate debt' is used as opposed to 'partnership debt'. A partnership debt means a debt which is due from a partnership and the fact that the insolvent partner is also personally liable for the debt would not deprive the debt of the character of a partnership debt for the purposes of S. 61 (4). A.I.R. 1933 Lah. 639=143 Ind. Cas. 755 (2).

——S. 61—Creditor's rights.

Where a receiving order is made against a partner any creditor to whom that partner is indebted jointly with other partners or any of them may prove his debt for the purpose of voting at any meeting of creditors and may vote but he cannot, where the partner is adjudged bankrupt, receive a dividend out of the separate property until all the separate creditors have received the full amount of their separate dues. 117 Ind. Cas. 145=A.I.R. 1930 Sind 127.

——S. 61—Joint debts and properties—Distribution—Principle underlying.

Where the persons have joint and separate property and joint and separate debts the joint properties are applied in the first instance on payment of joint debts and if there is a surplus it is dealt with as part of the separate property in proportion to the right and interest of each partner in the joint estate. Similarly the separate property is applicable in the first instance in payment of their separate debts and after such debts are discharged the surplus, if any, is dealt with as part of the joint property. 117 Ind. Cas. 145=A.I.R. 1930 Sind 127.

——S. 61—Partnership.

A decree obtained against the partnership property and also against one of the partners personally can in the event of insolvency of the partnership and the partners be executed against the separate property of the partner. 32 Bom.L.R. 702=A.I.R. 1930 Bom. 380.

——S. 61 (6)—Applicability and object of. See PROVINCIAL INSOLVENCY ACT, SS. 35 AND 61 (6). 1947 O.A. (C.C.) 134=A.I.R. 1947 Oudh 202.

——S. 61 (6)—Construction — "Debts entered in the schedule"—If include interest on principal of debt or restricted to original principal only—Right of creditor to interest on aggregate amount entered in schedule.

The expression "all debts entered in the schedule" in S. 61 (6) of the Provincial Insolvency Act, means the debts including both principal and interest and not the principal of the debts only. Interest will run on the aggregate of the debts entered in the schedule as due to any particular creditor from the date of adjudication. 26 Pat. 648=(1948) P.W.N. 15=A.I.R. 1949 Pat. 63.

——S. 61—Interest—Right to—Calculation.

As soon as the debtor is adjudged an insolvent, his entire estate vests in the Court or the receiver, and his estate becomes liable to distribution at once. Ordinarily, therefore, interest ceases to run automatically, and for purposes of dividend the rate of interest for all creditors is a uniform rate of 6 per cent. per annum. When however all the debts entered in the schedule have been paid off, the creditors are entitled to a further amount by way of interest at 6 per cent. per annum. But after this amount also has been paid, the surplus goes to the insolvent. 97 Ind. Cas. 556=24 A.L.J. 441=A.I.R. 1926 All. 361.

——S. 61—Second appeal.

No second appeal is competent against an order passed on an application made under S. 61 by a creditor claiming priority for certain debts due to him on account of rent for the premises in which the insolvent's goods were stored by the Official Receiver. A.I.R. 1937 Lah. 96=39 P.L.R. 314=171 Ind. Cas. 992.

——S. 61—Appeal—Leave to appeal—Procedure.

Where no application for leave to appeal from an order under S. 61 has been made, it cannot be inferred that leave was granted because the appeal was admitted. Leave could be granted at hearing and time extended under S. 5, Limitation Act. A.I.R. 1934 Lah. 33=149 Ind. Cas. 935 (1).

——S. 62—Declaration of dividend by Official Receiver—Sanction of Court, if necessary.

There is a clear distinction between the process of declaration and the process of distribution of dividend. But there is nothing, either in the Act or the rules which makes the Court's sanction necessary before the dividend is declared by the Official Receiver. It is the distribution statement which requires the sanction of the Court before the disbursement is made. Consequently, where, before the commencement of the Madras Agriculturists' Relief Act, the Official Receiver had definitely declared a dividend due under the insolvency to proved creditors under S. 62, Provincial Insolvency Act, the insolvent is not entitled to relief under the Madras Agriculturists' Relief Act by reason of S. 21 of that Act, even though the actual statement of distribution of dividend to the several creditors was placed before the Court for sanction after the Madras Agriculturists' Relief Act came into force. A.I.R. 1943 Mad. 556=(1943) 1 M.L.J. 411=1943 M.W.N. 350=210 Ind. Cas. 489.

——S. 62—Payment of dividends—Insolvent, if has rights over unclaimed dividend.

Once a dividend has been declared and moneys allocated to the payment of that dividend, those moneys cease to be, in any sense, the property of the debtor. They become the property of the creditor; and if for any reason, the creditor cannot be paid, they lapse to Government. A.I.R. 1935 Bom. 310=37 Bom. L.R. 449=59 B. 600=157 Ind. Cas. 930.

——S. 63—Receipt of dividend by secured creditor—Relinquishment of security.

Where a secured creditor not only had given proof for the whole debt but had actually received a dividend on the whole debt, by his conduct, the creditor must be taken to have relinquished his security because, unless he did so, he had no right to take the step which he did, of proving the debt and still less had he any right whatever to receive

the dividend which he did receive. A.I.R. 1936 Lah. 690=38 P.L.R. 414=164 Ind. Cas. 540.

——S. 63—Claims pending for admission before Official Receiver—Principle of rateable distribution, applicability of—Claims admitted first, if entitled to preference—Largeness of claim, if material—Admission of late claims subject to equitable conditions—Legality of.

As the general principle in the division of an insolvent's assets between competing creditors before a dividend is declared, is that of rateable distribution, so the same principle should apply to all claims pending for admission before the official Receiver when he proceeds to adjudicate upon the claims of late comers under S. 63. It is inequitable that claims filed at an earlier date should necessarily be postponed to others filed at a later date which the Official Receiver may have possibly on grounds of administrative convenience heard and admitted first.

A creditor is not entitled to have all the money in the hands of the Official Receiver because his claim is so large that nothing will be left for the other creditors in preference to other creditors whose claims were pending before the Official Receiver at the same time but he must share rateably with the other creditors whose claims were pending when his claim was admitted by the Official Receiver and whose claims have been admitted. Obviously, some time limit must be set but it is open to the Official Receiver to admit late claims subject to conditions. A condition that the Official Receiver should admit all claims, if proved, pending before him before the first of the pending claims is proved, to a share **pro rata** is an equitable condition. A.I.R. 1936 Sind 186=30 S.L.R. 161=166 Ind. Cas. 273.

——S. 63—Receiver already making distribution —Creditors coming in late—Distribution not to be interfered with.

Under S. 63, a creditor who has been guilty of delay by not proving his claim in time is not entitled to disturb the distribution of any dividend already made — whether or not it be the first or final dividend—though he may be entitled to be paid the dividend or dividends which he has failed to receive out of any money, which may be in the hands of the Receiver before the declaration of any future dividend. It is the general policy of the Court not to interfere with the distribution already made in the case where a creditor comes in late. A.I.R. 1935 Sind 57=29 S.L.R. 241=156 Ind. Cas. 421.

——S. 63—Failure of creditor to submit claim in time—Terms to be imposed—"Any creditor", meaning of.

Although in insolvency proceedings, a creditor may come in and prove as long as there are assets to distribute, yet where such creditor has failed to submit his claim before the schedule of creditors has been framed, he may only do so upon terms and if no injustice would be caused thereby. What terms the Court will impose will depend upon the circumstances of each case.

The expression 'any creditor' in S. 63 includes all creditors who come in late and prevents them from disturbing the dividends already declared. There is nothing in the section to suggest that it purports to deal with equities between creditors who are late. A.I.R. 1933 Sind 370=147 Ind. Cas. 410.

——Ss. 63 and 64—Distribution of dividend—Absence of individual notices, effect of—First dividend — Receiver, whether bound to send notices.

Unless it is quite clear at the time of the declaration of the dividend that it is the final dividend, it is not incumbent on the Receiver to give individual notices under S. 64, and the unexpected event that the first dividend happened to be the final dividend would not entitle the negligent creditor to re-open the distribution in contravention of the provisions of S. 63. Section 63 is not controlled by S. 64. A.I.R. 1931 Bom. 210=33 Bom.L.R. 148=55 B. 200=131 Ind. Cas. 881.

——S. 64—Scope—Proof of debt after discharge.

The provisions of S. 64 are subject to the rule laid down in S. 33 (3), which provides that a creditor; when he applies to have his name entered in the schedule of creditors in respect of any debt, must, at the same time; tender proof of his debt and that he must tender his proof and make his application at some time before the discharge of the insolvent. Hence, after the discharge of the insolvent, it is not open to a creditor to go to the Insolvency Court to tender proof of his debt and make an application that his debt should be entered in any schedule and should be discharged by the disposal of any property which might then be found to belong to the insolvent. A.I.R. 1942 All. 344=1942 A.L.J. 399=I.L.R. (1942) All. 84=1942 A.W.R. 283=203 Ind. Cas. 81.

——S. 64—Scope.

Section 64 requires a Receiver before declaring a final dividend to serve notice in the manner prescribed to persons whose claims to be creditors have been notified but not proved; and if such persons come and prove their claims within the time limited by the notice, then they will be entitled to a share in the final distribution. That contemplates that creditors who have not proved already can come in and prove their debts in time before the final dividend is declared and distributed by the Receiver. The time of the discharge of an insolvent has no relation to and can have no relation to, in any case, the time for declaring the final dividend. A.I.R. 1936 Cal. 434=I.L.R. (1937) 1 Cal. 127=166 Ind. Cas. 886.

——S. 64—Notice — To all creditors specified in S. 62.

The Official Receiver is bound to give notice under S. 64 of the Act not only to those creditors who have notified their claims, but to all such creditors whose claims have been notified to the Official Receiver either by the creditors themselves or by the insolvent that is to say, the notice is not to be confined to debts referred to in S. 62 Cl. (1), sub-Cls. (b) and (c) etc., but extends to debts referred to in sub-Cl. (a) of that section. A.I.R. 1924 Mad. 163, Foll. 107 Ind. Cas. 439 =22 S.L.R. 475=A.I.R. 1928 Sind 105.

——S. 64—Proof of representative title — Not necessary.

Under S. 64 of the Provincial Insolvency Act a creditor entered in the schedule is entitled to be paid his dividend out of the assets of the insolvent

and S. 4 of the Succession Certificate Act is not applicable to the payment of dividends by the Receiver. 97 Ind. Cas. 411=49 Mad. 952=24 M.L.W. 279=1926 M.W.N. 560=A.I.R. 1926 Mad. 899=51 M.L.J. 349.

——S. 66 (2)—Allowance for daughter's marriage —Procedure.

The making of the allowance is let to the discretion of the Court. It is not possible to hold that an application where a lump sum is claimed on behalf of the insolvent for meeting the marriage expenses of his daughter will come strictly within the scope of S. 66 (2). But under the category of "allowance for the support of himself and his family" the expenses that may be necessary for celebrating the marriage of the daughter of the insolvent may be brought. Therefore, the proper course for the insolvent to adopt is to ask for an increase in his allowance for the period during which he contemplated celebrating the marriage of his daughter. Such an application would be dealt with by the Court bearing in mind the considerations that ought to prevail in disposing of applications under S. 66 (2). The claim can certainly not be made as a matter of right. A.I.R. 1940 Mad. 675=(1940) 1 M.L.J. 334=51 L.W. 363=1940 M.W.N. 284=193 Ind. Cas. 521.

——S. 66 (2)—Maintenance — Setting apart immovable property not permissible.

The wife and children of the insolvent have no legal right under the general law for any provision being made for their maintenance out of the immovable property of the insolvent. Section 66 (2) is not meant for reserving the immovable property of the insolvent for the residence and maintenance of the insolvent's wife and children. That section is meant only for the purpose of reserving a money allowance for them. A.I.R. 1939 Lah. 39=40 P.L.R. 1057=179 Ind. Cas. 772.

——S. 66 (2)—Effect of fraudulent mortgage on maintenance.

Insolvent mortgaging certain land prior to his insolvency petition—Mortgage subsequently held void as being fraudulent at the instance of Official Receiver—Insolvent held cannot claim maintenance out of this land and its benefit must, in the absence of any special circumstances, go to the creditors. (1938) 40 P.L.R. 151.

——S. 66 (2)—Maintenance — Setting apart of immovable property not permissible.

Under S. 66 (2), the Court cannot reserve a portion of the insolvent's immovable property for his maintenance. The section contemplates only a money allowance for the maintenance of the insolvent or his family. (1938) 40 P.L.R. 151.

——S. 66 (2)—Discretion of Court—Maintenance —Right of members of family.

Section 66 only gives discretion to the Court to make an allowance to the insolvent for the maintenance of himself and his family. The section does not give any independent right to the members of the family of the insolvent to ask for any separate maintenance. A.I.R. 1935 Lah. 952=37 P.L.R. 517=160 Ind. Cas. 794.

——S. 66 (2)—Salary of Insolvent — Apportionment between creditors and Insolvent's family.

In considering what sum ought to be paid out of an insolvent's salary for the benefit of his creditors, the burden must be shared equitably between the insolvent the members of his family and the creditors. It is not right that it must always be exclusively the creditors who suffer. In such a case, an adequate sum out of the salary of the insolvent ought to be allocated for the benefit of creditors:

Held, that out of a salary of Rs. 89 per month, a sum of Rs. 20 should be allocated for the benefit of creditors. A.I.R. 1936 Rang. 412=165 Ind. Cas. 384.

——S. 66 (2)—Discretion of Court—Salary of Insolvent.

The Court is not bound to order that one-half of salary be given to the Receiver for distribution among the creditors. Having regard to the wording of S. 66 (2) the Court has an absolute jurisdiction to make a further reasonable allowance appropriate to the conditions and circumstances of the insolvent out of the remaining one-half which is otherwise divisible among the creditors.

The insolvent was in receipt of a salary of Rs. 107, and he had to maintain five school going children besides his wife and widowed sister and his insolvency was due to unforeseen circumstances for which he could not be held responsible. In view of these facts and other circumstances, the Court ordered the insolvent to pay Rs. 20 per mensem to the Official Receiver for the benefit of the creditors:

Held, that it could not be said that the Court exercised discretion perversely or contrary to sound legal principals, so as to justify interference on the revision side. A.I.R. 1935 Lah. 810=160 Ind. Cas. 173.

——S. 66 (2)—Allowance out of half salary—Absolute discretion.

Under S. 66 (2), Insolvency Courts in this country, in spite of the fact that they cannot attach the half salary which is removed from the grasp of the creditors by section 60, C. P. Code, have an absolute discretion to make a further reasonable allowance appropriate to the condition and the circumstance of the insolvent out of the remaining half which is otherwise devisible amongst the creditors. 73 Ind. Cas. 413=21 A.L.J. 216=45 All. 364=4 L.R.A. (Civ.) 149=A.I.R. 1923 All. 466.

——Ss. 66 (2), 28 (2)—(1907), Ss. 40 (2) and 16 (2)—Salary of Insolvent—C. P. Code, S. 60.

Under S. 16 (2) (a), Provincial Insolvency Act read with S. 60, C. P. Code, only half the salary is exempt from attachment and the other half vests in the Receiver and becomes divisible among his creditors and a Court cannot under S. 40 (2) Provincial Insolvency Act allow the insolvent to retain the whole amount. 2 U.B.R. (1916) 132 =38 Ind. Cas. 410.

——S. 66 (2)—Reserving house for family.

S. 66 (2) was not meant for the purpose of reserving a house for the residence or maintenance of the wife or family. 31 P.L.R. 661.

——Ss. 67 and 37—Insolvency of father—Sale of sons' shares—Surplus—Right of sons to.

Where in the exercise of the father's power of disposal, the Official Receiver sold the family properties including the shares of the sons to discharge the debts of the father, the surplus, if any;

remaining after the satisfaction of the father's creditors should be returned to the sons. 50 Bom. 110=32 Bom.L.R. 1362=A.I.R. 1931 Bom. 50.

——S. 68.

Synopsis.

1. Applicability and scope.
2. Appeal and Revision.
3. Appealable acts of Receiver.
4. Application under.
5. Interpretation—"May".
6. Limitation.
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1. Applicability and scope.

——S. 68—Applicability—Sale of property by Receiver under Court's instructions—Limitation.

Where the Receiver considers that certain property belonging to a deosthan of which the insolvent is the trustee should not be sold, and he merely invites bids under the instructions of the Court and refers these bids to the Court which accepts the highest bid, the sale, if a sale is held, is not the action of the Receiver and S. 68, Provincial Insolvency Act would not apply. An application to set aside such a sale does not, therefore, come under S. 68 but under S. 4 and is not barred by time even though it is filed after 21 days after the date of the sale.

S. 68 is intended to provide an appeal to the Court against the acts of the Receiver and not an appeal to the Court against the acts of the Court done through the Receiver. A.I.R. 1938 Nag. 320=178 Ind. Cas. 110.

——Ss. 68, 4—Applicability.

Where the Official Receiver moved the Court against a sale held by himself and his object was to rectify the error which had resulted in the loss to the assets of the debtor, to the detriment of the creditors, but the application was made long after the sale:

Held, that S. 68 had no application but the action of the Receiver fell within S. 4 and while taking action under S. 4, the Cout could set aside a transfer although made more than two years before the order of adjudication. A.I.R. 1936 Lah. 149=168 Ind. Cas. 911.

——S. 68—Sale by person not authorised — Not applicable.

Where the sales were made by a person who was not authorised to sell and were thus invalid.

Held, that it is impossible to hold that the limitation under S. 68 will apply as S. 68 presupposes that the decision is by a receiver properly appointed. 78 Ind. Cas. 294=19 M.L.W. 450=34 M. L.T. 2=1924 M.W.N. 198=A.I.R. 1924 Mad. 461=46 M.L.J. 184.

——S. 68—(1907), S. 22—Applicability of — Attachment of property in execution.

S. 22 of the Act has no application to a case where the plaintiff's property is attached in execution of a decree against a certain person who subsequent to the attachment became insolvent, and the plaintiff brings a suit for a declaration of his title to the property impleading the Receiver as a party. 40 All. 582=16 A.L.J. 456=46 Ind. Cas. 394.

——S. 68—(1907), S. 22—Applicability.

The section applies only to matters which the Receiver has done in the course of insolvency matter in respect of the insolvent's estate. 39 All. 204=15 A.L.J. 49=38 Ind. Cas. 613.

——Ss. 68, 4, 75, 28 (5)—Mortgage by Official Receiver of occupancy rights of discharged insolvent—Application to set aside act of Receiver—S. 4, if applies—Second appeal, competency of—Mortgage by Receiver of occupancy rights—Validity of—Interference in revision.

Where, after the discharge of the insolvent, the Official Receiver mortgaged certain occupancy rights under S. 6, Punjab Tenancy Act, belonging to the insolvent, in favour of a creditor and the discharged insolvent appealed to the Insolvency Judge from the Receiver's order and the Insolvency Judge thereupon set aside the mortgage, holding that the Official Receiver had become **funtus officio** after the discharge of the insolvent but on appeal, the District Judge held that the act of the Official Receiver was **ultra vires** not because he had become **functus officio** but because the occupancy rights under S. 6 of the Punjab Tenancy Act could not vest in the Official Receiver in view of the provisions of S. 28 (5) of the Provincial Insolvency Act, and the Official Receiver was, therefore, incompetent to mortgage the same although he set aside the order of the Insolvency Judge leaving the insolvent to resort to any other remedy that might be open to him to have the mortgage set aside:

Held, that it was an application made by the insolvent for setting aside an act of the Receiver and it clearly fell within the scope of S. 68 and in such circumstances, S. 4 which is subject to the other provisions of the Act, could not be held to be applicable and a second appeal was not competent;

Held, further, that although a second appeal was not competent, the High Court had ample powers to interfere in revision under S. 75. The act of the Official Receiver was clearly **ultra vires** as the occupancy rights under S. 6, Punjab Tenancy Act, had never vested in him and could not be mortgaged by him. The mortgage could not, moreover, be valid without sanction of the Court. As no such sanction had been given by the Court, the mortgage was illegal and must be set aside. A. I.R. 1936 Lah. 502=38 P. L. R. 233=160 Ind. Cas. 921 (2).

——S. 68—Scope—Powers of Court.

The Insolvency Court cannot summarily set aside a registered sale deed. Where, therefore, the Official Receiver sells a house of the insolvent at public auction and one person R offers the highest bid and deposits one-fourth of the price but subsequently, another person G offers a higher price and the Official Receiver, under order of the Court, executes a registered sale deed in G's favour, it is not open to R to apply to the Insolvency Court for cancellation of the sale-deed. The matter in controversy should be settled in more appropriate proceedings, granting leave, if necessary, for a suit against the Receiver and the third person claiming rights under the sale-deed. A.I.R. 1935 All. 687=1935 A.W.R. 506=155 Ind. Cas. 563.

——S. 68—Scope.

The remedy under S. 68 is not the only remedy open to a person aggrieved by an act of the Receiver. A stranger to insolvency proceedings may, at his option, seek his redress in the ordinary Civil Court or he may apply under S. 68 but if he takes the latter course, he must comply with the terms of the section. He cannot be heard to say in order to avoid the effect of the plain terms of the proviso to S. 68 that he makes his application under S. 4 and not under that section. A.I.R. 1934 Rang. 97=149 Ind. Cas. 43.

——S. 68—Remedy for aggrieved stranger—Appeal under or suit.

Under S. 68 a stranger who is aggrieved by an act of the Official Receiver may either seek his redress in the ordinary Civil Courts or may proceed under S. 68 of the Insolvency Act. But if he takes the latter course he must comply with the terms of the section of the Insolvency Act. 74 Ind. Cas. 802=26 O.C. 319=A.I.R. 1924 Oudh 294.

——S. 68—Scope of—Other remedies not barred.

S. 68 provides a speedy remedy to which recourse can be had if the person aggrieved chooses to seek it. But it is not the only remedy open to him. It is open to a third person who does not claim title through the insolvent to treat the receiver as a trespasser and maintain his claim in a Civil Court. 77 Ind. Cas. 57=21 A.L.J. 737=4 L.R.A. (Civ.) 483=46 All. 16=A.I.R. 1924 All. 40.

——S. 68—Remedies of creditors—Ss. 53 and 54.

The whole tenor of S. 68 is against the view that a creditor's only remedy against the refusal of the Official Receiver to take action under S. 53 or 54 of the Act is by way of appeal under S. 68. A creditor can at any time during the pendency of the insolvency proceedings move the Court under S. 53 or 54 on the ground that the Official Receiver has refused to move in the matter as there is no period of limitation provided for such an application.

It is no doubt the policy of the Insolvency law to prevent a scramble among creditors, to avoid a multiplicity of actions and to have the insolvent's estate wound up with the best possible expedition and with the least amount of expense in the interests of the creditors as well as of the insolvent. The jurisdiction of the Court to make an order under S. 53 or 54 of the Act on a proper consideration of the facts, no matter who moves the Court is not restricted by any of the provisions of the Provincial Insolvency Act. An order made under S. 53 or 55 enures for the benefit of all creditors and not merely for the benefit of a particular creditor. (37 All. 252 and 2 P.L.J. 101, Foll.). 79 Ind. Cas. 395=47 Mad. 673=18 M. L.W. 857=33 M.L.T. 196=A.I.R. 1924 Mad. 345.

——S. 68—Regular suit—No bar of.

If the plaintiffs do not elect to pursue their remedy under S. 22 and there is no determination on the merits before a suit is instituted, they are within their rights in seeking their remedy by a regular suit. 70 Ind. Cas. 97=44 All. 620=A. I.R. 1922 All. 407.

——S. 68—(1907), S. 22—Trespass by Receiver—Application under S. 22—Order on—Finality of.

Where in proceedings in insolvency a trespass is committed, whether by the Official Receiver or by any body else, upon the property of a stranger he has the ordinary right to seek redress in the ordinary Civil Court, and is not bound to apply to the Insolvency Court. If, however, he does so apply under S. 22 of the Provincial Insolvency Act, he must comply with the terms of the section. If he obtains a decision upon the merits the decision is final. 17 A.L.J. 787=1 U.P.L.R. (H.C.) 118=51 Ind. Cas. 113.

——Ss. 68, 28, 56—(1907), Ss. 22; 16 and 18—Omission to move District Court under S. 22—Effect of.

Omission to move the District Court under S. 22 to set aside an order of the Receiver does not deprive the persons setting up title as owner of his ordinary remedy by suit. 13 N.L.R. 210=42 Ind. Cas. 799.

——S. 68—(1907), S. 22—Suit against Receiver—Leave of Court.

No leave of the Insolvency Court is necessary before a plaintiff sues the Receiver in Insolvency, and S. 22 does not prohibit a suit without such leave being obtained. 10 S.L.R. 179=40 Ind. Cas. 122.

2. Appeal and Revision.

——Ss. 68, 80—(1907), Ss. 22 and 52 — Adjudication, petition for—Dismissal — Appeal.

An appeal lies to the High Court against an order of the District Judge confirming an order of the Official Receiver dismissing an application for adjudication. 40 Mad. 752=32 M.L.J. 449=39 Ind. Cas. 429.

——Ss. 68, 58—(1907), Ss. 22 and 23—Orders under—Seizure and release of goods — Appeal—Leave to.

After an adjudication in insolvency orders passed by the District Judge under S. 22 read with S. 23 cannot be appealed against except with leave obtained under S. 46 (3). 33 Ind. Cas. 773 (All.).

——Ss. 68 and 75—(1907), Ss. 22 and 46—Appeal — Parties — Order confirming sale—Appeal by insolvent—Auction-purchaser, if necessary party.

The auction purchasers are necessary parties to an appeal of an insolvent against an order confirming the auction sale of the property. If they are impleaded beyond the period of limitation, the appeal not only as against them but against the other parties as well will be time barred. 188 P.R. 1892, Foll. 51 Ind. Cas. 935 (Lah.).

——S. 68—(1907), S. 22—Suit against Insolvent—Receiver no party—Direction to Receiver to execute conveyance—Revision.

The Court below acted with material irregularity in passing the order directing the Official Receiver to execute the deed without making him a party. 18 All. 4. Foll. The High Court converted a time barred appeal into a revision and set aside the order under S. 107 of the Government of India Act. 39 Mad. 593=18 M.L.T. 200=30 Ind. Cas. 703.

3. Appealable acts of Receiver.

——S. 68—Appealable acts of Receiver.

The acts of an Official Receiver in holding a sale of the insolvent's assets in confirming it and in executing a saledeed in favour of the purchaser can all be the subject of an application under S. 68. On each of the aforesaid occasions, there is a cause of action, and therefore, an application under S. 68 to set aside the sale filed within 21 days of the execution of the sale-deed in favour of the purchaser after confirmation of sale must be held to be within time. A.I.R. 1941 Mad. 827=(1941) 2 M.L.J. 382=54 L.W. 215=1941 M.W.N. 1016=200 Ind Cas. 477.

——S. 68—"Act", meaning of.

The word "act" in S. 68 is not limited to acts of the Receiver in management of the estate but includes also statements made by him in Court in the course of the insolvency proceedings. A.I.R. 1940 Nag. 142=1940 N.L.J. 90=188 Ind. Cas. 173.

——S. 68—Attachment by Court through Receiver—Claim not preferred within 21 days—Power of Court to enquire—'Act of Receiver', what constitutes.

Where, on an application made by a creditor, the Insolvency Court ordered the Official Receiver to take possession of certain property alleged to belong to the insolvent and the Official Receiver, in pursuance of the said order, attached this property:

Held, that the attachment was not an act or decision of the Receiver within the meaning of S. 68 and a claim put forward by a stranger to the said property could be enquired into even though it was made more than 21 days after the date of the attachment. A.I.R. 1932 All. 408=1932 A.L.J. 391=136 Ind. Cas. 791.

——S. 68—(1907), S. 22—Appeal to District Court—Orders of Official Receiver.

The right of appeal given by S. 22 to the Dt. Court against an order of the Receiver is not confined only to such orders as are passed under Ss. 18, 19 and 20. An appeal lies to the District Court against an order of the Receiver dismissing an insolvency petition under the powers given to him, under S. 52 (2) of the Act. 38 Mad. 15=24 M.L.J. 73=16 Ind. Cas. 820.

4. Application under.

(a) Competency.
(b) Decision, if res judicata.
(c) Parties.

(a). Competency.

——S. 68—Application before final decision of Receiver—Maintainability.

Where a mortgage executed by an insolvent was annuled by the Court under S. 54 (1) but in the same proceeding, the Court found that the mortgage-debt was true and supported by consideration, but the Official Receiver declared that he would not admit the debt to the schedule without further enquiry and against this declaration, the mortgagee, applied to the Court contending that the Receiver was bound to accept proof of the debt and to admit it to the schedule:

Held (1) that the Official Receiver was entitled to hold a further enquiry;

(2) that the mortgagee was not entitled to make an application under S. 68 until the Receiver had come to a final decision whether to admit the debt or not. A.I.R. 1937 Mad. 151=71 M.L.J. 809=168 Ind. Cas. 476.

——S. 68—Sons of Hindu Insolvent — Right to apply.

Where a Hindu father who has been adjudicated insolvent has already sold the property including the interests of his sons acting as their guardian during their minority, then although the sales have been declared void as against the Receiver, the sons have no locus standi to apply under S. 68 if the order setting aside the sale does not show that the sales were not binding on the interests of the sons. 98 Ind. Cas. 1065=A.I.R. 1927 Mad. 232.

——S. 68—Application by purchaser.

The District Judge has jurisdiction to deal with an application, by a person who purports to have purchased the property of an insolvent at a sale held by the Official Receiver, to the effect that his bid might be accepted and that the sale to another person be held to be invalid. A regular suit is not necessary. 64 Ind. Cas. 524=14 M.L.W. 234=A.I.R. 1921 Mad. 313=41 M.L.J. 211.

(b). Decision, if res judicata.

——Ss. 68, 75—(1907), Ss. 22 and 46—Objection to attachment — Dismissal by insolvency Court—Res judicata.

Plaintiff objected to the attachment of a house by the Receiver of an Insolvent's estate as the property of the insolvent. The objection was dismissed and the order upheld on appeal.

Held, that a subsequent suit by the plaintiff for declaration of his title was barred by res judicata. 41 All. 378=17 A.L.J. 374=49 Ind. Cas. 590.

——Ss. 68, 75—(1907), Ss. 22 and 46—Attachment by Receiver—Application for release Dismissal — Subsequent suit.

A stranger to the bankruptcy whose property is wrongfully ceased by the Receiver can either apply under S. 22 of the Act or sue in a Civil Court for a return of his property. If he chooses the remedy provided by S. 22 and fails he cannot again raise the same issue in a Civil Court. 39 All. 626=43 Ind. Cas. 573.

——S. 68—(1907), S. 22—Attachment of property by Receiver — Rival claimants — Insolvency Court adjudging in favour of one—Suit by other in Civil Court—Res judicata.

Where a Receiver attached certain timber as belonging to the insolvent and two persons claimed it, the Judge in insolvency awarding it to one, on which the other brought a suit, held, that the suit was maintainable and the principle of res judicata did not apply as the Insolvency Judge could only decide whether the attachment could be maintained and that he had no jurisdiction to hear the subsequent suit based on title. 39 All. 353=15 A.L.J. 188=38 Ind. Cas. 151.

——Ss. 68, 58—(1907), Ss. 22 and 23—Application under S. 22—Decision by Insolvency Court—Res Judicata.

An application under S. 22 is in the nature of suit. An adjudication by an Insolvency Court operates as res judicata and bars a subsequent suit in the Civil Court for the same relief. 15 A. L.J. 661=33 Ind. Cas. 798.

(c). Parties.

——S. 68—Application under S. 68—Parties to—Auction-purchaser, if necessary party.

According to S. 68, the insolvent or any creditor or any other person aggrieved by any act or decision of the Receiver may apply to the Court within 21 days from the date of the act or decision complained of and the Court may confirm, reverse or modify the act or decision complained of and make such order as it may think fit. The proceedings under this section are more akin to an appeal than to a suit and the provisions of S. 22, Limitation Act, have no bearing on the question. There is no law which requires that certain parties should be formally mentioned as respondents in an application under S. 68. The phrascology of S. 68 negatives such a necessity. The application is directed against an action of the Official Receiver and normally he is the only necessary party to be heard against the application. But the Court may hear other parties who are interested, as for instance, a purchaser. But it is not necessary that the purchaser should be formally named as a party at the hearing of the application. A.I.R. 1937 Lah. 611=168 Ind. Cas. 389.

——S. 68—Parties to appeal—Receiver not necessary.

Other creditors opposed a claim of one creditor in proceedings before the Official Receiver. The creditor on failure appealed to the District Court without making the Official Receiver a party.

Held, that there was no illegality and that the District Judge could act on the evidence recorded by the Official Receiver who however could, if he chose, appear and claim to be heard. 78 Ind. Cas. 857=34 M.L.T. 337=19 M.L.W. 193=1924 M.W.N. 212=A.I.R. 1924 Mad. 830=46 M.L.J. 242.

5. Interpretation — 'May'.

——S. 68—Interpretation — 'May.'

The word "May" in S. 68 does not mean "Must". 77 Ind. Cas. 57=21 A.L.J. 737=4 L.R.A. Civ. 483=46 All. 16=A.I.R. 1924 All. 40.

6. Limitation.

——S. 68—Appeal by insolvent, limitation.

Though an insolvent who is aggrieved by an act of the Receiver is entitled to move the Court under S. 68, he must take action within the period prescribed by the proviso to that section. A.I.R. 1932 Lah. 320=33 P.L.R. 332=136 Ind. Cas. 267.

——S. 68—Limitation — Question, when does not arise.

The land of an insolvent who belonged to an agricultural tribe was sold by the Official Receiver and the proceedings of sale were submitted to the District Judge for confirmation or otherwise. In the meantime the insolvent presented an application objecting to the sale of his land on the ground that the same could not be sold under the provisions of the Punjab Alienation of Land Act. The District Judge thereupon refused to confirm the sale, thus upholding the objection of the insolvent. It was contended that as the objection was raised by the insolvent after the expiry of 21 days from the date of sale, the Judge acted illegally in entertaining it:

Held, that as the proceedings were before the District Judge for confirmation on the report of Official Receiver, no question of limitation arose and the District Judge had power to refuse to confirm the sale on the ground raised by the insolvent. A.I.R. 1931 Lah. 133=132 Ind. Cas. 701.

——S. 68—Limitation—Computation — Limitation Act, S. 29.

By reason of the express terms of S. 29 (2) (a), Limitation Act, S. 4 of the said Act which provides that where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred, or made on the day that the Court re-open applies to applications under S. 68, Provincial Insolvency Act. A.I.R. 1931 Rang. 209=9 R. 150=134 Ind. Cas. 223.

——Ss. 68, 50 (2)—(1907), Ss. 22 and 26 (2)—Application under S. 26 (2)—Limitation.

The 21 days rule of limitation in S. 22 of the Provincial Insolvency Act does not apply to the Court taking action under S. 26, Cl. (2). 42 Mad. 13=35 M.L.J. 531=48 Ind. Cas. 952.

——S. 68—(1907), S. 22 — Limitation Act, S. 5, applicability of.

S. 5 of the Limitation Act does not apply to applications under S. 22 of the Provincial Insolvency Act no extension of time can be granted in respect of such an application. 35 All. 410=11 A.L.J. 603=20 Ind. Cas. 673.

——S. 68—Supplementing grounds after limitation—No bar.

Although the act or decision of the receiver must be challenged, if at all, by an application presented within 21 days from date of such act or decision there is nothing in the Act to show that all the grounds upon which it is challenged must be stated in that application, or that the grounds mentioned therein may not be supplemented or amplified later on. 103 Ind. Cas. 695=A.I.R. 1927 Cal. 834.

7. Person aggrieved.

——Ss. 68 and 75—Person aggrieved—Insolvent when entitled to apply to the Court as such under S. 68 or appeal under S. 75 questioning the acts of the Official Receiver—Presidency Towns Insolvency Act (3 of 1909), Ss. 86 and 8 (2).

In view of fthe explicit and all embracing language of Ss. 68 and 75 of Act 5 of 1920, it cannot be maintained that the insolvent can never apply to the Court under S. 68 questioning the acts of the Official Receiver or appeal under S. 75 from an adverse order of the Court passed on such application. The Full Bench decision in 50 M.L.J. 358=I.L.R. 49 Mad. 461 (F.B.), in

so far as it laid down that the insolvent could, in no circumstances, apply to the Court under S. 86 of the Presidency Towns Insolvency Act (corresponding to S. 68 of Act 5 of 1920) to set aside a sale by the Official Assignee because he had no legal interest in the estate and could not, for the same reason, appeal against an adverse order under S. 8 (2) of that Act (corresponding to S. 75 of Act 5 of 1920) is erroneous and must be overruled.

If there is a flagrant case of a sale by the receiver for a gross under-value, if a sale or lease is granted secretly and without public notice for a wholly inadequate price or rental, or if a sale or lease is granted in favour of a benamidar or a person in whom the receiver is personally interested without disclosing that fact to the Court, if property on which there is no subsisting encumbrance is sold for an under-value as if it were subject to prior encumbrances, if there is a concealment of material facts or a misrepresentation of such facts so as to prevent purchasers from having a fair idea of the real value of the property sold, if the property sold is so incorrectly described as to mislead purchasers into thinking that its value is negligible when in fact it is valuable, in cases like these, the insolvent is an "aggrieved person" and would have a remedy by way of an application to the Court under S. 68 and an appeal under S. 75 of the Provincial Insolvency Act. But sales held by the Official Receiver should not be interfered with at the instance of the insolvent except in cases where there has been a fraud, illegality or serious irregularity which has resulted in substantial loss to the estate.

In ordinary cases questions as to the proof of a creditor ought to be left to be dealt with by the receiver. But if the receiver either fraudulently or under a mistake of fact or law admits proof of a debt which does not exist or which has ceased to be legally recoverable wholly or in part, as for instance under the law of limitation or under the several enactments for the relief of debtors, there is no reason why the insolvent should not be held to be an aggrieved person entitled to apply to the Court under S. 68 and to appeal under S. 75 against an adverse order.

Even atter adjudication, Ss. 38 and 39 of Act 5 of 1920 give an insolvent debtor an opportunity of having his adjudication annulled and his property or such part of it as remains undisposed of, re-vested in him. The insolvent is directly interested in and is himself a party to the proceedings under Ss. 38 to 40 of the Act. He would be an "aggrieved person" by an adverse order of the Court passed under Ss. 38 to 40 and he would have a right to appeal against such orders under S. 75. The Court is required by S. 38 to frame a schedule of creditors whose claims have to be satisfied under a composition or scheme. Under S. 50 (2) of the Act the Court is empowered to expunge a debt or reduce the amount of a debt upon the application of the debtor in the case of a composition or scheme and if the Court passes an order adverse to the insolvent under S. 50 (2) he has a right to appeal under S. 75 as a person aggrieved by the order. Where an application by a debtor purports to be made with reference to a scheme or composition and for expunging the debt of a creditor from the list of creditors, an appeal would lie against an order rejecting the application. I.L.R. (1951) Mad. 77=63 L.W. 333=1950 M.W.N. 267=A,I.R. 1950 Mad. 492 =(1950) 1 M.L.J. 484 (F.B.).

——S. 68—Sale by Official Receiver—Application by insolvent's widow to set aside sale — Sale set aside on payment of amounts due to creditors and 5 per cent., as compensation to purchaser—Order, held good.

The main function of the Insolvency Court is to safeguard first the interest of the creditors of the insolvent. Secondly, if the Court is in a position to safeguard the interests of the insolvent, the Court should do so. Finally the interests of the outside public, including any one who may purchase property in sale held by the Official Receiver should not lightly be disregarded.

Hence, where a sale of the insolvent's property is ordered by the Court to be set aside on the application of the insolvent's widow on a condition of her paying full amounts with interest due to the creditors and a sum equal to five per cent. of the purchase price to the purchaser as compensation, the order is good and not beyond the powers conferred by S. 68 upon the Court. A. I.R. 1945 Mad. 287=(1945) 1 M.L.J. 315=1945 M.W.N. 234=58 L.W. 184=I. L. R. (1946) Mad. 50.

——S. 68—Sale by Receiver—Insolvent's right of appeal after annulment of adjudication.

Even after the adjudication is annulled and the insolvent's property is continued to vest in the Official Receiver, the insolvent has no higher rights than before and has no **locus standi** to apply to the Insolvency Court to have the sale by the Official Receiver set aside as the insolvent is not a person aggrieved within the meaning of S. 68. A. I. R. 1943 Mad. 266=1943 M.W.N. 134=(1943) 1 M.L.J. 127=56 L. W. 125=210 Ind. Cas. 460.

——S. 68—Sale by Receiver—Insolvent's right of appeal.

An insolvent cannot impeach the sale made by the Receiver since all his property vests in the Receiver. The insolvent cannot be said to have been aggrieved by the act of the Receiver, as at the date of the sale, the property did not belong to the insolvent but was vested in the Receiver for the benefit of his creditors. A.I.R. 1941 Bom. 415 =43 Bom.L.R. 805=197 Ind. Cas. 409.

——S. 68—Sale by Receiver—Insolvent's right of appeal.

On the wording of S. 68, Provincial Insolvency Act, the insolvent has clearly a right to appeal to the Insolvency Judge against the act of the Receiver to set aside the sale by him of property. A.I.R. 1939 Lah. 499=187 Ind. Cas. 241.

——S. 68—Insolvent's right of appeal.

Once an insolvent's property has vested is an Official Receiver, he has no further interest therein and is not aggrieved by the disposal of that property for the benefit of the creditors by the Official Receiver. Consequently, the insolvent has no **locus standi** to appeal against the sale. A.I.R. 1936 Pesh. 151=163 Ind. Cas. 621.

——S. 68—Appeal by insolvent.

Where the Receiver has done an act, that is to say, has decided that a certain debt is due by the insolvent, such a decision would, undoubtedly,

aggrieve the insolvent and under S. 22 the insolvent has a right of appeal. 62 Ind. Cas. 441= 15 S.L.R. 28=A.I.R. 1921 Sind 36.

——S. 68—"Person aggrieved", meaning of—Petition to set aside sale by creditor who has been added as supplemental creditor on the day of order on petition — Creditor is person aggrieved and Court is .competent to entertain matter—Court has inherent power to review conduct of Receiver.

In an application to set aside sales under S. 68 Provincial Insolvency Act, it was contended that the petitioner had no locus standi as he had not proved his debt either by the date of the sales or by the date of the application:

Held, that the creditor having been added in the list of proved creditors on the date of the order his application was maintainable. A.I.R. 1946 Mad. 89=58 L.W. 641=(1945) 2 M.L.J. 553=1945 M.W.N. 769=223 Ind. Cas. 536.

——S. 63—Party entitled to appeal.

Where a creditor is aggrieved by an order of the Insolvency Court, he would come within the terms of S. 75 and would be entitled to prefer an appeal against the order even though he was not a party to the proceedings.

Where a creditor filed an application under S. 68 to set aside a sale by the Receiver but withdrew it collusively:

Held, that it was competent to another creditor who was aggrieved by the order, to prefer an appeal from the order dismissing the application though he was not a party to the application. A. I.R. 1932 Mad. 162=61 M.L.J. 714=34 L.W. 684=1932 M.W.N. 552=55 M. 313=135 Ind. Cas. 742.

——S. 68—Person aggrieved—Beneficiary under pro-note.

Section 68 authorises among others "a person aggrieved by any act or decision of the Receiver" to prefer an appeal. A beneficiary under a promissory note can, therefore, prefer an appeal if he is aggrieved. A.I.R. 1945 All. 213=1945 A. L.J. 177=1945 A.W.R. H.C. 96=1945 O.W. N.H.C. 106=I.L.R. (1945) All. 260.

——S. 68—(1907), S. 22 — Aggrieved person—Attachment of property as Insolvents.

When a Receiver attaches property of the insolvent for the benefit of the creditors a third person claiming the property becomes aggrieved and he must apply under the section within 21 days of Receiver's taking possession. 47 Ind. Cas. 62 (Cal.).

——S. 68 — (1907), S. 22—Person 'aggrieved'—Meaning of.

The word "aggrieved" in S. 22 is a somewhat wider term than "injured" and a person is 'aggrieved' if a decision has been pronounced which has wrongfully refused him something he is legally entitled to. 33 M.L.J. 612=22 M.L.T. 371 =6 L.W. 445=(1917) M.W.N. 677=42 Ind. Cas. 789.

——S. 68 — (1907), S. 22—Person aggrieved—Meaning of—Application for directing Receiver to execute a conveyance.

A "person aggrieved" within S. 22 is a man against whom a decision has been pronounced, which wrongfully deprived him of something or wrongfully affected his title to something. The decision must not merely impede the person concerned in his assertion for the right claimed but should affect the right claimed. One V was adjudicated insolvent and his property vested in the Official Receiver and on 24th May, 1908, V had executed in favour of his father, the respondent, a pro-note and an agreement, that in case the former were not discharged within a year it should be discharged by a conveyance of certain property. The respondent asked the Court on 6th October, 1913 to order the Receiver to execute the necessary conveyance alleging that he had already applied for such execution either by the Court or Receiver and that no order had been passed thereon. One of the creditors who held a mortgage over the property opposed the petition. The Receiver was not made a party originally to the proceedings in the lower court and therefore the High Court remanded the case. The Receiver had no objection to execute the conveyance and accordingly the Court directed the execution of the conveyance.

Held, on appeal by the mortgagee creditor that as the application of the 6th October, 1913 was founded on the failure of the respondent's previous petition to the Court and not to the Receiver the order of the Court was without jurisdiction either under S. 22 or any other provision of the Act. 20 M.L.T. 486=(1917) M.W.N. 75 =5 L.W. 255=37 Ind. Cas. 773.

——S. 68—(1907), S. 22—Receiver, position of—Court's power to review conduct of Receiver—Person aggrieved — Meaning of.

A Receiver in insolvency is an officer of the Court and if he is about to act in excess of his authority even a stranger can bring the fact to the notice of the Court, which has inherent power to review the conduct of the Receiver and to make an appropriate order so that the stranger may not be prejudiced by the unlawful act of its own officer.

The Court may hold a summary inquiry for this purpose. 9 Ind. Cas. 344, Appr. Where a mortgagor was declared insolvent after the mortgaged property was sold in execution of the mortgage decree, and the Receiver in insolvency thereupon sent to the Court a notice of proclamation for sale of the insolvent's property including the property sold.

Held, that the purchaser in execution is not a 'person aggrieved', by the act of the Receiver and his application to the Court objecting to Receiver's act, is not subject to the period of limitation prescribed by the proviso. The Court must inquire into the application. 18 C.L.J. 359=18 C. W.N. 366=20 Ind. Cas. 683.

8. Powers and Duty of Court.

——S. 68—Court has inherent power to review conduct of Receiver.

The Court has inherent power to take action when it is brought to its notice, that an act of one of its officers is objectionable. Even a stranger can bring the fact to the notice of the Court. A. I.R. 1946 Mad. 89=58 L.W. 641=(1945) 2 M. L.J. 553=1945 M.W.N. 769=223 Ind. Cas. 536.

——S. 68—Expiry of limitation—Court's inherent power to rectify mistakes.

The Insolvency Court has inherent power to

rectify the Receiver's errors or mistakes or to reverse or modify his acts or decisions and the fact that the time for making an application under S. 68 has expired does not preclude the Court from exercising its powers. A.I.R. 1932 Lah. 84=32 P.L.R. 698=133 Ind. Cas. 876 (2).

——S. 68—(1907), S. 22—Error of Official Receiver—Jurisdiction.

A Court or itself can rectify or reverse or modify the acts or decisions of the Official Receiver and S. 22 of the Act is no bar thereto. The conduct of the Official Receiver can be brought to the notice of the Court by any person. 1 Lah. 307=58 Ind. Cas. 6.

——S. 68—Sale by Official Receiver — Disobedience of directions of Court—Ground for setting aside.

When the Official Receiver is about to sell properties subject to mortgages which mortgages were liable to be scaled down under the Madras Agriculturists' Relief Act, an application can be made to the Insolvency Court to give directions to the Official Receiver to suspend the sale until the scaling down process is completed, and if the Official Receiver holds the sale in disobedience to such directions, that can be a ground under S. 68 Provincial Insolvency Act for setting aside the sale. A.I.R. 1942 Mad. 254=54 L.W. 513= 1941 M.W.N. 947=(1941) 2 M.L.J. 698=200 Ind. Cas. 784.

——S. 68—Sale by Receiver — Court's power to set aside sale.

The Court would not readily set aside a sale held by the Receiver of the property of the insolvent unless, in the circumstances of the case, the Court is satisfied that it would not be fair and just that the sale should stand. If fraud or collusion is proved in connection with the sale, there would be a ground upon which the Court would set aside the sale, or again, if there is material irregularity in the conduct of the sale, the Court probably in that case also, would be disposed to set aside the sale. But the Court is not fettered in its discretion to set aside the sale in any case in which it thinks that the sale was neither fair nor a just one.

Where the Receiver expressly refrained from selling the property of the insolvent on a particular day in the absence of one creditor, but held the sale the next day in the absence of the other creditor at an earlier hour than that at which sales normally are held and long before the other creditor could reasonably be expected to be present and without making enquiries to ascertain whether the other creditor was at that place or giving him any opportunity to be present when the sale took place and the two creditors were the only prospective bidders:

Held, that it was neither fair nor just to allow the sale to stand and the Court had power to set aside the sale.

The sale of the property of an insolvent by the Receiver in an 'act' of the Receiver within S. 68. A.I.R. 1931 Rang. 122=9 R. 131=131 Ind. Cas. 732 (S.B.).

[Overrules A.I.R. 1928 Rang. 60=107 Ind. Cas. 172].

——S. 68—(1907), S. 22 — Condiions of sale changed just before sale—Power of Court to set aside sale.

Where an Official Receiver changed the conditions of sale just before holding the sale by stating that the property was to be sold free of incumbrances while as originally arranged, it was to be sold subject to two prior mortgages, **held,** that the Court had jurisdiction to set aside the sale at the instance of a creditor under S. 22. Where an action of the Official Receiver was irregular and had prejudiced the interests of the creditors the Court will interfere. Any person who is entitled to demand a decision of the Court in respect of the property of an insolvent and would damnified if the decision goes against him is a person aggrieved within the meaning of S. 22. 39 Mad. 479=29 M.L.J. 755=17 M.L.T. 429=29 Ind. Cas. 294.

——S. 68—(1907), S. 22—Official Receiver—Contract of sale—Jurisdiction of District Judge to stop—C. P. Code, O. 21, R. 90—Applicability.

O. 21, R. 90 of the C. P. Code has no application to a contract of a sale entered into by a Receiver under the Provincial Insolvency Act on an application made within 21 days of the contract. The District Judge may in the exercise of his powers of supervision over the Receiver direct him not to complete the sale. 23 M.L.T. 319=7 L.W. 406=(1918) M.W.N. 345=44 Ind. Cas. 885.

——S. 68—Duty of Court.

The right conferred by S. 68 is a right of appeal and when there is a right of appeal (unlike a right of review or revision), the Court to which the appeal is preferred is bound to investigate the claim on the merits unless its hands are otherwise tied. The Court, therefore is bound to investigate on merits the matter complained of against the Receiver. A.I.R. 1940 Nag. 142= 1940 N.L.J. 90=188 Ind. Cas. 173.

9. Miscellaneous.

——S. 68—Termination of Insolvency—Conduct of Receiver cannot be enquired.

The High Court has no jurisdiction to hold an enquiry into the conduct of the Official Receiver after the insolvency has come to an end, though in an existing insolvency it might as a special case tender advice or give directions to the Insolvency Judge. 102 Ind. Cas. 191=49 All. 321=25 A. L.J. 219=A.I.R. 1927 All. 266.

——S. 68—Confirmation before twenty-one days—Not proper except by consent.

The District Judge has no jurisdiction to confirm the Receiver's report **except by consent** of parties until twenty-one days have elapsed within which the creditors aggrieved can apply to the Court for the reversal or modification of the act or decision by which they are aggrieved. 94 Ind. Cas. 332=A.I.R. 1926 Cal. 822.

——S. 68—Failure to appeal — Cannot question sale.

Where the aggrieved party did not appeal, against the Official Receiver's order to simply notify the objection to District Court under S. 68.

Held, that the objection cannot be gone into later on as an objection to the validity of sale.

76 Ind. Cas. 977=18 M.L.W. 282=A.I.R. 1924 Mad. 147.

——S. 68—Burden of proof—On receiver—Case of claim by third party.

Where a property is attached by the Receiver as being the insolvent's and is claimed by another as his, the onus is on the Receiver to show that the property was the property of the insolvent. The question cannot be treated as though it were an ordinary suit by an alleged owner against somebody in possession, and the old maxim that the plaintiff must succeed on the strength of his own title and not on the weakness of his adversary's does not strictly apply. 63 Ind. Cas. 519=19 A. L.J. 497=A.I.R. 1921 All. 164.

——Ss. 68, 75—(1907), Ss. 22, 46—One, out of a body of creditors, right of—Application for attachment, procedure.

In the case of an application made against the insolvent's estate by an adverse claimant one out of a body of creditors has no place, nor any right to appeal against the decision in the matter. A creditor cannot in the first instance move the Insolvency Court for attachment of the Insolvent's property represented by the Receiver, the proper course being to move the Receiver, and if he refuses to act, or gives an adverse decision, then to move the Court under S. 22 of the Act for the proceedings under which the Receiver must be made a party. 39 All. 152=15 A.L.J. 1=37 Ind. Cas. 76.

——S. 69.

Synopsis.

1. Applicability and scope.
2. Appeal.
3. Procedure.
4. Prosecution of debtor.
5. Revision.
6. Miscellaneous.

1. Applicability and scope.

——S. 69 (a)—Applicability.

Where the processes issued are full of defects and do not purport to give notice to the debtor of the admission of any insolvency petition at all, the debtor cannot be fixed with liability under S. 69 (a) for failure to comply with them. The fact that he might have had a shrewd idea of what the proceedings really were is not sufficient to fix him with liability. A.I.R. 1936 Nag. 237=38 Cr.L.J. 230=I.L.R. (1937) Nag. 185=166 Ind. Cas. 303.

——S. 69 (a)—Applicability.

Unless orders have been issued regarding adjudication, the insolvent is not bound to carry on the duties imposed under S. 22 and prosecution must fail. 1935 M.W.N. 919.

——S. 69 (a) and (b)—Charge under S. 69 (a)—Conviction under S. 69 (b)—Legality—'Wilfully'—Significance of—Nature of proof necessary.

The elements of the offences contemplated by the two clauses of S. 69 are not the same and the Court cannot convict a person under S. 69 (b) on a charge framed under S. 69 (a) as prejudice will be caused thereby to him.

For failure to comply with the order of the Court to produce the account books and thereby failing to perform this duty which is cast upon him by the second part of S. 22 the accused can only be convicted under S. 69 (a). To fulfil the requirements of the word 'wilfully' in S. 69 (a), it will have to be proved that the account books required to be produced were in the possession or power of the petitioner to produce. A.I.R. 1934 Cal. 409 =35 Cr.L.J. 937=38 C.W.N. 642=61 Cal. 537 =149 Ind. Cas. 352.

——S. 69—Property in possession of Receiver.

Insolvent receiving sums within 17 days after adjudication—It may fairly be presumed that the source of the trade consisted of assets in possession of the insolvent at the time of the adjudication. 1931 M.W.N. 1312.

——Ss. 69, 41—(1907), Ss. 43 and 67—Fraudulent concealment of property—Offence — Discharge of Insolvent.

Obiter.—Fraudulent concealment of assets is not a reason for dismissing his petition though it may be a reason for refusing a discharge under S. 44, or for punishing the debtor under S. 43. 6 N.L.R. 145=8 Ind. Cas. 1115.

——S. 69 (c) (i)—Scope.

S. 69 (c) (1) refers to debts incurred before the order of adjudication and not to debts incurred after that order. A.I.R. 1932 Nag. 17=27 N. L.R. 304=134 Ind. Cas. 861.

——S. 69 (c) (ii)—Judgment-debtor applying to be adjudged insolvent—Insolvency Court putting to sale flour mill of insolvent—Mill purchased by one M but no delivery made — Insolvent subsequently removing essential parts of machinery—Conviction under S. 69 (c) (ii) legal. A.I.R. 1939 All. 166=1938 A.L.J. 1217=40 Cr. L. J. 347=1939 A.W.R. 69=180 Ind. Cas. 230.

——S. 69 (c) (ii)—Applicability.

The petitioner had, at one time, Rs. 7,500 in a bank. He withdrew Rs. 4,000 of this deposit and made a re-deposit in the name of his wife. He then went on operating on the account. Subsequently, the wife brought a suit against the bank for the return of Rs. 4,000. This was the subject of a settlement decree but nothing further was known of it. The petitioner filed an insolvency petition and when he filed his schedule it was said that he concealed his interest which was a benami interest in the four thousand rupees in the hands of the bank. He was convicted under S. 69:

Held, that the facts did not disclose a criminal intention beyond, per adventure, although in all possibility a Judge in insolvency would be perfectly justified in refusing him his discharge unless a better disclosure is made. It was impossible to say that the petitioner had concealed property which, at the time of filing of the schedule, was not his property at all in the absence of a decision by a competent Court. A.I.R. 1937 Cal. 234=38 Cr.L.J. 710=169 Ind. Cas. 101.

——S. 69 (c) (ii)—Applicability.

It is only when the execution of the mortgage deed is combined with the fraudulent intent to defraud the creditors of the executant that it can be brought within the purview of the offence defined in S. 69. The gist of the offence is the actual diminution of the sum to be divided among

the creditors. A.I.R. 1933 Nag. 33=34 Cr.L.J. 1038=145 Ind. Cas. 550.

——S. 69 (c) (ii)—'Made away with', meaning of.

The words "made away with" in S. 69 are sufficiently wide to cover cases of gift of immovable property and, therefore, a case of a gift fraudulently made by an insolvent with intent to diminish the sum to be divided among his creditors is as much liable to punishment under the section as a case of charge or mortgage. A.I.R. 1932 Oudh 61=8 O.W.N. 1318=135 Ind. Cas. 893.

——S. 69—Offence under—'Concealed'.

A man in the position of an insolvent who has the means of ascertaining where property of his has been disposed of, even if he has not been actually a party to the making away with it, and who does not use the means, is just as guilty of concealment within the meaning of the section as if he actively concealed the locality in which the property actually is. 64 Ind. Cas. 37=43 All. 406 =19 A.L.J. 378=22 Cr.L.J. 725=A.I.R. 1921 All. 87.

——S. 69—(1907), S. 43—Provident fund—Disposal of, by insolvent, whether fraudulent.

The disposal of the Provident fund by insolvent is not fraudulent and punishable under S. 43 of Provincial Insolvency Act. 44 Bom. 673=22 Bom.L.R. 322=56 Ind. Cas. 450.

——S. 69—(1907), S. 43, cl. (2)—Omission to enter property in schedule—Offence.

An Insolvent who, not knowing that an equity of a redemption was valuable property failed to show it in his schedule of assets is not guilty of an offence under S. 43 (2) of the Act. 2 P.W.R. 1918 Cr.=158 P.L.R. 1917=19 Cr.L.J. 272 =44 Ind. Cas. 128.

——S. 69—Propriety of prosecution.

The insolvent was in jail and had only omitted to mention the equity of redemption of certain property which he had mortgaged many years ago. He admitted the mortgage at once when the fact was brought to his notice.

Held, that prosecution under S. 69 was hardly warranted. A.I.R. 1937 Lah. 432=39 P.L.R. 213=170 Ind. Cas. 849.

——S. 69 (c) (2)—Propriety of prosecution.

Before directing a prosecution of the insolvent for concealing his assets, in the proper exercise of the Judge's judicial discretion, there should be some sort of proportion between the value of the property alleged to have been concealed and that of the indebtedness of the insolvent. A.I.R. 1935 Pat. 126=16 P.L.T. 140=2 B.R. 52=159 Ind. Cas. 171.

2. Appeal.

——Ss. 69, 70 and 75 (3)—Order of District Judge sitting in insolvency under S. 70—Appeal, if maintainable.

Where a District Judge, sitting in insolvency, has made a preliminary enquiry and consequent on that makes a complaint to the Magistrate, so that the Magistrate should deal with it under S. 69 of the Act, no appeal lies. It is really an attempt to appeal against an order of the District Judge, sitting in insolvency made under S. 70. If there is any appeal against such an order, it must be under S. 75, sub-S. (3) of the Act, and only by leave of either the District Court or the High Court and a very strong case will be needed to justify the granting of such leave because it would be tantamount to stopping the proceedings under S. 69 and S. 70 in limine and before the facts have been fully enquired into by a Magistrate. Where no such leave has been obtained, the appeal is incompetent, nor does an appeal lie from the order under S. 476-B, Cr. P. Code. A.I.R. 1939 Cal. 264=40 Cr.L.J. 335=42 C.W.N. 787=I.L.R. (1938) 2 Cal. 478=180 Ind. Cas. 237.

——S. 69—Appeal—Right, when arises.

A right to appeal from an order of prosecution under S. 70 arises only when the finding is completed by the forwarding of the complaint. 1939 N.L.J. 495.

——S. 69—Appeal — Order making complaint.

An order passed by the Insolvency Judge under S. 70 recording the finding that there are prima facie grounds for an inquiry into the offence referred to in S. 69 and appearing to have been committed by the insolvents and making a complaint of the offence in writing to a Magistrate of competent jurisdiction is appealable. A.I.R. 1936 Lah. 871=38 P.L.R. 1160=167 Ind. Cas. 279.

——Ss. 69, 75—(1907), Ss. 43 (2) and 46—Appeal—Order to show cause why an order under S. 43 (2) should not be made.

An order requiring a person who has already been adjudicated to show cause why an order under S. 43 (2) should not be made against him is not appealable under S. 46 (2) but it is doubtful whether it can be appealed against by obtaining permission under S. 46 (3). 23 C.L.J. 553=34 Ind. Cas. 777.

——S. 69—Appeal by creditor.

Where the Court refuses to prosecute the insolvent under S. 72 on a creditor's application it is doubtful whether the creditor has a right of appeal. A.I.R. 1941 Mad. 285=52 L.W. 604=1940 M.W.N. 1069=(1940) 2 M.L.J. 672=194 Ind. Cas. 33.

——S. 69—Creditor's right to appeal.

When sanction to prosecute an insolvent is refused under S. 69, the creditor is not an aggrieved person and cannot appeal from the order under S. 75. A.I.R. 1937 Lah. 432=39 P.L.R. 213 =170 Ind. Cas. 849.

——S. 69—Creditor's right of appeal.

Where a creditor's application to prosecute an insolvent for an offence under S. 69 has been rejected, he has no right to appeal against the order as he is not a person aggrieved by the decision of the Judge. A.I.R. 1933 Nag. 9=28 N.L.R. 286=141 Ind. Cas. 350.

——S. 69—Appeal.

No appeal lies from an order of an Insolvency Court refusing to convict an insolvent for an offence under S. 69. A.I.R. 1932 All. 4=1931 A.L.J. 999=133 Ind. Cas. 907.

——S. 69—Appeal.

A creditor is a person aggrieved by an order refusing to punish an insolvent under S. 69 and is, therefore, entitled to appeal from such an order under S. 75. A.I.R. 1932 Oudh 61=8 O.W.N. 1318=135 Ind. Cas. 893.

——S. 69—Appeal — Refusal of sanction — Creditor cannot appeal.

Although a creditor, as such, is indirectly interested in seeing the person, who is believed to have committed an offence under S. 69, brought to justice, he does not come within the definition of a person against whom a decision has been pronounced: a decision that has wrongfully refused him something which he had a right to demand. An order, therefore, refusing to sanction prosecution is not one which can be appealed against by a creditor. 118 Ind. Cas. 198=A.I.R. 1930 Sind 2.

——S. 69—(1907), S. 43—Appeal.

A creditor is not a 'person aggrieved' by the final order passed after enquiry by the Court under S. 43. 79 Ind. Cas. 340=18 M.L.W. 837=33 M.L.T. 188=1923 M.W.N. 838=A.I.R. 1924 Mad. 185=45 M.L.J. 804.

——S. 69—(1907), S. 43—No enquiry—Creditor can appeal.

A creditor is entitled to have his petition under S. 43 enquired into otherwise he would be 'a person aggrieved' by the order, within the meaning of the term in S. 46 of the Act and therefore entitled to appeal. 79 Ind. Cas. 340=18 M.L.W. 837=33 M.L.T. 188=1923 M.W.N. 838=A.I.R. 1924 Mad. 185=45 M.L.J. 804.

——Ss. 69 and 75 — (1907), Ss. 43 and 46—Application by creditor to take action against insolvent — Appeal.

An order refusing an application by a creditor to take action against the insolvent under S. 43 of the Act is not appealable because the application is not one which the Insolvency Act entitles a creditor to make, and the applicant is therefore not a 'person aggrieved' by the order refusing the application within S. 46 nor is the order open to revision. 40 Mad. 630; 39 All. 161, followed. 1 Lah. 213=56 Ind. Cas. 744.

——S. 69—Appeal by Creditor.

A Creditor whose allegations against the insolvent are found against by Court, is not "aggrieved' and so cannot appeal. The term aggrieved person under S. 46 (2) of the Act is not applicable to a Creditor against whom the Court decides that his allegations of an insolvent's offence under S. 43 (2) of the Act are not made out and such a creditor has no right of appeal against the decision of the Court. The offences dealt with under S. 43 (2) are in the value of disciplinary offences and not offences against the criminal law. 39 All. 171=15 A.L.J. 31=37 Ind. Cas. 996.

——Ss. 69 (b) (i), 75—(1907), Ss. 43 and 46 (1)—Application under S. 43—Order refusing to take action against Insolvent—Appeal — Failure of insolvent to produce his books.

Under S. 43, of the Provincial Insolvency Act the creditor has no right to set the Court in motion for the insolvent's failure to produce his books of account although in practice the Court may avail itself of any assistance which the creditor may render to it by bringing to its notice the delinquency of the debtor. The person who is aggrieved by the failure of the insolvent to produce his account-books is the Court and not the creditor. No appeal lies at the instance of the latter against the order of the Court refusing to proceed against the insolvent under S. 43 of the Act. 11 L.W. 145=38 M.L.J. 338=54 Ind. Cas. 740.

——S. 69—(1907), S. 43—A Receiver in insolvency is not entitled to appeal against an order under S. 43. 61 Ind. Cas. 802=19 A.L.J. 701=A.I.R. 1921 All. 246.

——S. 69—Appeal—Forum.

A Sessions Judge is not prohibited in law from hearing an appeal from a conviction by a Magistrate in a case where as an Insolvency Judge, on the application of a creditor, he allowed the prosecution to proceed. 71 Ind. Cas. 368=21 A.L.J. 90=24 Cr.L.J. 144=4 L.R.A. Cr. 12=A.I.R. 1923 All. 193.

——Ss. 69 and 75 — (1907), Ss. 43 (2) and 46—Forum of Appeal — Small Cause Court invested with powers of District Judge.

When a Small Cause Court is given the powers of a District Judge an appeal against an order passed under S. 46 of the Provincial Insolvency Act lies to the Chief Court.

Quaere.—Whether the Small Cause Court, Lahore is given the powers of a District Judge under the Provincial Insolvency Act. 94 P.L.R. 1917.

——Ss. 69, 75—(1907), Ss. 43 (2) and 46—Subordinate Judge — Declining to take action under S. 43 (2)—Appeal to District Judge against order 'Court', meaning of.

No appeal lies to the District Judge against an order of the sub-judge invested with the insolvency jurisdiction under S. 3 declining to take action against the insolvent under S. 43 (2) of the Provincial Insolvency Act.

Per **Newbould, J.**—The word 'court' in S. 43 of the Act does not mean the Court or original jurisdiction only. 40 Mad. 630 Foll. 22 C.W.N. 958=48 Ind. Cas. 333.

——S. 69—(1907), S. 43—Order of Additional District Judge—Appeal — Jurisdiction.

An order by an Additional District Judge under S. 43 of the Act is appealable to the High Court and not to the District Judge. 34 All. 382=9 A.L.J. 371=14 Ind. Cas. 162.

——S. 69—(1907), Ss. 43 and 47—Sentence under S. 43—Appeal — Suspension of sentence pending disposal of appeal—High Court—Powers of.

Under O. 41, R. 5 read with S. 47 (2) Provincial Insolvency Act the High Court can suspend the sentence of imprisonment under S. 43 of Provincial Insolvency Act till the disposal of the appeal from the sentence. 44 Bom. 673=22 Bom.L.R. 322=56 Ind. Cas. 449.

3. Procedure.

——S. 69—Scope and Procedure—S. 42.

It would be an assistance to Judges dealing with offences under the Insolvency Act to frame the charges strictly in the language of the section, which defines the offence, together with the particulars of the conduct of the insolvent relied upon to establish the charges, just as is done in a formal charge of an offence, particularly an offence of embezzlement or falsification of books under the Penal Code. S. 69 is peculiar to India, inasmuch as it embraces acts "whether before or after making an order of adjudication." Although

circumstances could be proved in a business concern, where the method of keeping the books was such that even though the absence of the principal person was shown the subordinate might be equally guilty; yet where there are more partners than one and it is sought to establish this charge against any one or two of them. It must be proved as a fact who were the person, or persons, actually responsible for keeping such books. It must always be borne in mind in dealing with questions of books of account even where they are false or so badly kept, as to amount not merely to negligence, but to a suggestion of dishonesty that S. 42 itself provides and defines a quasi offence with regard to the keeping of books, which if established, is a ground for a kind of penal order, postponing the absolute discharge of the insolvent when he applies for it. 100 Ind. Cas. 550=25 A.L.J. 331=A.I.R. 1927 All. 352.

——S. 69 (b) (i)—(1907) S. 43 (2) (a)—Proceedings under—Charge.

In a proceeding under S. 43 (2) of Provincial Insolvency Act, it is not essential that there should be a definite charge, finding and a conviction. It is enough if the principles underlying a criminal trial are observed in essentials. In such a proceeding if the insolvent is informed of the nature of the proceedings, the offence he is charged with, and its consequences the essentials of a criminal trial would be held to have been complied with. 19 Cr.L.J. 627=45 Ind. Cas. 675 (Nag.).

——S. 69—(1907) S. 43—Criminal proceedings—Procedure.

Proceedings under S. 43 are criminal proceedings and a Judge has therefore to observe the formalities in an enquiry into the commission of offences. There ought to be definite charges and evidence ought to be taken in support of the charges, as also any evidence which the accused may let in on his side. An insolvent cannot be punished under S. 43 on evidence given on behalf of the creditors when they were opposing his application to be adjudged an insolvent. 20 O.C. 123=18 Cr.L.J. 618=39 Ind. Cas. 986.

——S. 69—(1907) S. 43—Cr. P. Code (1898).

Proceedings under the section should be carried on in analogy with the Criminal Procedure Code and something in the nature of a charge should be drawn up and a day or time fixed for the hearing of the evidence on that charge the insolvent being given an opportunity to defend himself. 18 Cr. L.J. 409=38 Ind. Cas. 969 (All.).

——S. 69—(1907) S. 43—Nature of proceedings—Effect of irregularity.

Proceedings under S. 43 being in the nature of criminal proceedings it is necessary that there should be a charge, a finding and a conviction as a foundation of the sentence, if a substantial defect should appear in any one of these particulars the proceedings must be reversed. 27 B. 394; 27 Ind. Cas. 199; 17 C. 209; 30 Ind Cas. 839, Foll. 62 P.W.R. 1916=110 P.R. 1916=17 Cr. L. J. 318=145 P.L.R. 1916=35 Ind. Cas. 494.

——S. 69—(1907) S. 43—Proceedings under—Nature of.

Proceedings against insolvents under S. 43 of the Act are in the nature of Criminal proceedings and the procedure adopted in a Criminal trial should be followed. If a judge arrives at the conclusion of guilt of an insolvent not on evidence but substantially on the report of the Official Receiver, the conviction cannot be sustained. 18 C. W.N. 692=16 Cr.L.J. 135=27 Ind. Cas. 199.

——S. 69—(1907) S. 43—Imprisonment—Charge—Opportunity to answer charge.

If an order under the section results in a sentence of imprisonment, the case is a criminal case.

An opportunity should be given of answering the charge when it is framed. 19 C.L.J. 430=19 Ind. Cas. 920.

——S. 69—(1907) S. 83—Evidence—Admissibility of.

Evidence on behalf of creditors adduced at the time of opposing the application should not be the sole basis of conviction of an insolvent. Evidence of commission of an offence on some specific occasion must be taken **de novo** after a charge is framed. 32 All. 547=7 A.L.J. 602=6 Ind. Cas. 870.

4. Prosecution of debtor.

——S. 69—Adjudication refused—Prosecution ultra vires.

Proceedings under S. 69, cannot be taken after a petition for adjudication has been dismissed and it is known that the alleged debtor is not going to be made insolvent at all. An order to prosecute passed under those circumstances is entirely **ultra vires**. A.I.R. 1931 Cal. 508=58 Cal. 334 =134 Ind. Cas. 534.

——S. 69—(1907) S. 43—Permission to Official Receiver to prosecute insolvent, if can be granted by Court—Cr. P. Code, Ss. 476, 195—Receiver's report — Evidentiary value of—Penal Code—Ss. 421, 424—General Clauses Act (10 of 1897), S. 26.

A District Court can grant permission to the Official Receiver to prosecute an insolvent for an offence under Ss. 421 and 424 of the I. P. Code upon the strength of the Receiver's report which is sufficiently material for that purpose though it may not be evidence on which a conviction can be legally based. The permission referred to above does not amount to a sanction under S. 195 or to an order under S. 476 of the Cr. P. Code. 6 L.W. 283=18 Cr.L.J. 992=42 Ind. Cas. 608.

——S. 69—(1907) S. 43—Action under—When to be taken.

The power of the Court under S. 43 of the Provincial Insolvency Act can be put in motion by a creditor at any time. It is not necessary that before taking action under that section the Court should wait till the debtor makes an application for discharge. 3 U.B.R. (1918) 97=49 Ind. Cas. 55.

——Ss. 69, 75—(1907) Ss. 43 and 46—Punishment for acts under S. 43 need not be deferred.

Punishment for acts and omission mentioned in S. 43 of the above act need not be deferred by the Court until the insolvent applies for an order of his discharge. 19 O.C. 89=18 Cr.L.J. 270=37 Ind. Cas. 638.

——S. 69 (a)—(1907) S. 43—Bad faith—Proof of.

Under S. 43 a Judge can take cognisance of the bad faith of a debtor at any time whether before

or after adjudication though the Court has no power to refuse adjudication because an act of bad faith was committed. 17 O.C. 138=25 Ind. Cas. 363.

——S. 69—(1907) S. 43—Acts of bad faith—Question of, when to be determined—Punishment.

The question whether the insolvent has or has not committed acts of bad faith should be considered at the time of an application for discharge and not when an adjudication has to be made. 32 A. 547, Diss. An insolvent committing an act of bad faith can either be dealt with under S. 43 or may be refused a discharge. 1 U.B.R. (1911) 84 =11 Ind. Cas. 743.

5. Revision.

——S. 69—Revision.

No application to revision lies against an order of a Judge exercising insolvency jurisdiction refusing to take proceedings against the insolvent under S. 69 on an application of a creditor, in as much as the order in question is appealable to the District Court under S. 75 (1). 170 Ind. Cas. 542=1937 O.W.N. 762.

6. Miscellaneous.

——S. 69—Magistrate competent to try.

When the Insolvency Court, under S. 70, Provincial Insolvency Act makes a complaint to a Criminal Court, such Criminal Court does not derive its jurisdiction to try the offence from the Insolvency Court but from the Criminal Procedure Code. In determining whether a particular Magistrate has jurisdiction to try an offence about which a complaint is laid before him, the Court has to be guided entirely by the provisions of the Cr. P. Code. The complaint must be made to the nearest First Class Magistrate having jurisdiction.

When a mortgage-deed is executed at A with intent to defraud creditors at B and the consequence of diminution of the sum available for division among the creditors actually ensues from it, the Court at B will have jurisdiction to try the offence. A.I.R. 1933 Nag. 33=34 Cr.L.J. 1038 =145 Ind. Cas. 550.

——S. 69—Position of receiver—Ordinary litigant.

Official Receiver is merely an ordinary litigant who may be entitled to move the Court in the usual manner that is, by presentation of a proper application which is to be heard in the presence of the parties and proceedings taken in his absence by the Court must be set aside on the proper application before the Court. 120 Ind. Cas. 175=A. I.R. 1929 Lah. 805.

——S. 69—(1907) S. 43—Non-mentioning of property.

Omission of a person to mention property in an insolvency application was held to be fraudulent and vexatious under S. 43 (2) (b). Transfer in S. 43 means, a sale, a gift, a mortgage. 2 U.B.R. (1914) 1=24 Ind. Cas. 767.

——S. 70—Direction for prosecution—Preliminary enquiry as to whether acts contemplated by S. 69 of the Act were in fact committed—If necessary.

It is unnecessary under S. 70 of the Provincial Insolvency Act, to establish, before launching a prosecution, the various offences referred to in S. 69. All that S. 70 requires is that the Court should be satisfied that there is ground for enquiring into any offences referred to in S. 69. It is not necessary, and the Court is not bound, so far as the language goes, to make a preliminary enquiry even. (1950) 2 M.L.J. 630.

——S. 70—Preliminary enquiry—Notice, necessity of.

Under S. 70, as amended by Act 9 of 1926, it is not obligatory on the Insolvency Judge to give notice to the insolvent before holding that there are prima facie grounds for enquiry into an offence under S. 69 against the insolvent. The amended section leaves it to the discretion of the Judge even to hold a preliminary enquiry into the matter. A. I.R. 1936 Lah. 871=38 P.L.R. 1160=167 Ind. Cas. 279.

——S. 70—Notice—Requirements.

S. 70, Cl. (1), does not provide that notice is to be served on the debtor to show cause why a complaint in writing should not be made. It only requires that a notice shall be served calling on him to show cause why a charge or charges should not, be framed against him. 106 Ind. Cas. 486 =22 S.L.R. 463=A.I.R. 1928 Sind 85.

——S. 70—Interpretation.

Considering the history of S. 70, Provincial Insolvency Act, it would appear that the legislature intended that the judge should satisfy himself in any way he thinks proper before ordering a prosecution of the insolvent; and this interpretation is justified by the omission from the amending Act of the direction which made it necessary for the Court to serve a notice on the debtor and hear him before ordering his prosecution.

(Doubted) Whether the words "preliminary enquiry" in S. 70 of the Act necessarily mean a judicial enquiry on sworn evidence. 111 Ind. Cas. 372=55 Cal. 783=47 C.L.J. 250=A.I.R. 1928 Cal. 211.

——S. 72—Interpretation.

The Insolvency Acts render the very person who obtains credit liable to be prosecuted; and it is immaterial if he obtains such credit solely on his own behalf or on behalfof himself and another person or if he joins another person and both together obtain such credit. The fact that the words "either alone or jointly with any other person" have not been reproduced in S. 72 does not limit the scope of that section, but, if at all, it is intended to expand its scope. 107 Ind. Cas. 442 =23 S.L.R. 63=A.I.R. 1928 Sind 114.

——S. 72—Questions to be considered.

With regard to the application under S. 72 (1) for which the opponent has due notice the questions to be answered by the Court are very simple, and they are:

(1) Is the opponent an undischarged insolvent?

(2) Did he obtain credit to the extent of Rs. 50 or upwards?

(3). Did he in fact inform the person from whom he obtained credit that he was an undischarged insolvent? (1924) 1 K.B. 311, Foll. 107 Ind. Cas. 442=23 S.L.R. 63=A.I.R. 1928 Sind 114.

——S. 72—Scope.

Per Suhrawardy and Ghose, JJ.—S. 72 lays down the only mode by which a person accused

of an offence udeer the first sub-section may be proceeded against, that is, by the method laid down in sub-S. (2). Both clauses of S. 72 should be read together and no prosecution under the first clause can be initiated without the Insolvency Court sending the case for trial to the nearest Magistrate of the First Class.

Per **Duval, J.**—S. 72 only lays down the procedure which the Court may adopt when it determines to prosecute for an offence under this section. This sub-section cannot take away the right of a private party to prosecute on his own motion if he is aggrieved by what has occurred. 98 Ind. Cas. 116=53 Cal. 929=44 C.L.J. 350=27 Cr.L.J. 1268=A.I.R. 1927 Cal. 149.

——S. 72 (2)—Notice to insolvent.

Substantially the provisions of S. 72 (2) are analogous to those of S. 476, Cr. P. Code, and the Insolvency Court should ordinarily give notice to the insolvent before directing his prosecution. A.I.R. 1941 Mad. 285=52 L.W. 604=1940 M.W.N. 1069=(1940) 2 M.L.J. 672=194 Ind. Cas. 33.

——S. 72 (2)—Power to prosecute—Purpose and scope—Bar of res judicata against Court.

Under S. 72 (2), there is power given, not to the interested party, but to the Court itself on being satisfied that an offence of the kind contemplated had been committed to send the case to the Magistrate. This is a power conferred, not in the interests of this or that party, but in order that the Court itself may prevent an offence against the insolvency law. Hence, there can be no question of a bar of **res judicata** operating against the Court. The Insolvency Court can, therefore, consider a decision of its own not to prosecute in the light of a second application from the creditor, although the Court will not ordinarily prosecute on the strength of information on which it has previously declined to act. A.I.R. 1941 Mad. 285=52 L.W. 604=1940 M.W.N. 1069=(1940) 2 M.L.J. 672=194 Ind. Cas. 33.

——S. 72 (2)—Effect of discharge on prosecution.

Where the Insolvency Court prosecutes an undischarged insolvent under S. 72 (2), and before the dismissal of his appeal against the prosecution, the insolvent obtains his discharge, the discharge cannot render the proceedings against the insolvent void. A.I.R. 1941 Mad. 285=52 L.W. 604=1940 M.W.N. 1069=(1940) 2 M.L.J. 672=194 Ind. Cas. 33.

——S. 72 (2)—Order against discharged insolvent—Legality of.

Order under S. 72 (2) can be made only at some time prior to the date of the discharge of the insolvent and during the insolvency. The Court has, therefore, no jurisdiction to pass an order under S. 72 (2) against a discharged insolvent who had obtained credit during his insolvency but before his discharge. A.I.R. 1934 Cal. 764=61 Cal. 605=59 C.L.J. 399=151 Ind. Cas. 1026.

——S. 72 — Prosecution after discharge—Legality.

After an insolvent has been discharged, no action can be taken against him under S. 72, in respect of an offence referred to in that section committed before the order of discharge. The remedy of the aggrieved party in such a case is to proceed against the insolvent in the ordinary course of law. A.I.R. 1932 Nag. 17=27 N.L.R. 304=134 Ind. Cas. 861.

——S. 73—Expression "undischarged insolvent" in S. 55, Madras Local Boards Act, 1920, is not controlled by S. 73, Provincial Insolvency Act. A.I.R. 1941 Mad. 22=52 L.W. 527=(1940) 2 M.L.J. 590=1940 M.W.N. 1011=193 Ind. Cas. 147.

——S. 73—Disqualification — Application by candidates for Municipal Election — Candidate obtaining certificate under S. 73 (2) (b) after election — Effect.

Where under S. 73, a candidate is not eligible for Municipal Elections, not having applied for a certificate that his insolvency was not due to any misconduct on his part, but was due to misfortune the fact that since the election he has obtained the necessary certificate and has got rid of his disqualification does not help him as the provisions of the law must be strictly followed.

The disqualification mentioned in S. 73, Provincial Insolvency Act, is a disqualification under S. 15, Bombay District Municipal Act, and applies to candidates for election to a Municipal Council. A.I.R. 1933 Sind 416=150 Ind. Cas. 246.

——S. 74—Duty of Court.

Where the Judge of the Insolvency Court passes an order that there should be a summary administration of the estate, it is incumbent upon him at the time when he makes the order of adjudication to determine by an order in writing the debts of the insolvent. A.I.R. 1942 All. 344=1942 A.L.J. 399=1942 A.W.R.H.C. 283=I.L.R. (1942) All. 848=203 Ind. Cas. 81.

——S. 74—Summary administration — Duty of Judge.

In case of summary administration, it is for the Judge to enquire into the debts and assets and to determine the same by an order in writing and to distribute the property in a single dividend and he cannot transfer the petition to an Official Receiver for disposal. 1937 M.W.N. 1160.

——S. 74 (ii)—Power of Court.

Insolvency Court has no jurisdiction to stay execution proceedings elsewhere. (1936) 63 Cal. 535=40 C.W.N. 336.

——S. 74 (ii)—Effect of vesting of property under—Property vests in Court—No interim receiver—Not subject to execution sale.

When summary administration has been ordered, the property of the debtor under S. 74 (ii) vests in the Court as a receiver on the date of admission of the insolvency petition. The appointment of an interim receiver is, therefore, not only superfluous in such a case but also misleading.

Under S. 74 (ii), when the property is vested in the Court, as receiver, it holds it, not as interim receiver; but as a full receiver in the sense in which the term is used in S. 28 (2). Such property cannot be the subject of execution sale but if a sale takes place, the purchaser in good faith is entitled to retain the property and the creditors of the insolvent are entitled only to the sale proceeds of that as assets for distribution among them, i.e., the sale would not be set aside, but

would prevail against the receiver, and the property can not be returned to the receiver. 106 Ind. Cas. 34=39 M.L.T. 369=A.I.R. 1927 Mad. 983.

——S. 75.

Synopsis.

1. Applicability of section.
2. Appeal from interlocutory orders.
3. Appeal to Privy Council.
4. Applicability of C. P. Code to appeals.
5. Forum of appeal.
6. Interpretation.
7. Leave of Court—Sub-S. (3).
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1. Applicability of section.

——S. 75—Receiver's action under old Act—Appeal lies under new Act.

Where the Receiver took action which gave rise to a question of title, whether certain property was still the property of the insolvent or had been the subject of valid alienation before the coming into operation of the Provincial Insolvency Act, 1920, but a decision on the question was pronounced by the District Court after the said Act.

Held, an appeal lay under the new Act at the instance of a creditor who was affected by the decision as a matter of right. 63 Ind. Cas. 601 =44 All. 71=19 A.L.J. 862=A.I.R. 1922 All. 196.

——S. 75—(1907) S. 46—Applicability — Appeal—Against order under old Act.

All orders passed after the Provincial Insolvency Act in the Insolvency proceedings are governed by this Act as far as the right of appeal or revision is concerned although the adjudication had been made before it came into force. 21 P. W.R. 1916=33 Ind. Cas. 995.

——S. 75—(1907) S. 46 — Applicability — Proceedings commenced before the Act—General Clauses Act S. 6 (c).

S. 46 of Provincial Insolvency Act does not apply where the insolvency proceedings commenced before the Act came into force. The right of appeal in such cases is regulated by S. 353 of the C. P. Code (1882). 21 M.L.J. 764 =10 M.L.T. 78=(1911) 2 M.W.N. 99=11 Ind. Cas. 653.

2. Appeal from interlocutory orders.

See also NOTE 6 (b).

——S. 75 (3)—Appeal from interlocutory orders.

The recording of a mere finding albeit in a formal manner, that the Court has jurisdiction to entertain an application cannot be deemed to be an order within the meaning of S. 75 (3)[1]. A decision upon jurisdiction has only the effect of regulating procedure and where it is not sufficient to dispose of the application, it hardly stands on a different footing from a ruling as to the admissibility of a document tendered or the relevancy of a question put and objected to in the course of the trial. Such decisions as to details of procedure and admissibility of evidence may, no doubt, be regarded as orders in a sense but such decisions are not by themselves open to appeal apart from the final decision disposing of the application or matter.

Hence, no appeal is maintainable from the decision of the Insolvency Court that it had jurisdiction to entertain the application to scale down the debt under the Madras Agricultural Relief Act. A.I.R. 1942 Mad. 305=(1942) 1 M.L.J. 113=55 L.W. 40 (2)=1942 M.W.N. 92=205 Ind. Cas. 389.

——S. 75 (1)—Final order of adjudication passed—Appeal against interlocutory decision on point of jurisdiction only—Competency of appeal.

Under S. 75 (1), a person aggrieved by the preliminary decision on the point of jurisdiction has a right to appeal against that decision even though the final order of adjudication may have been passed and is under no obligation to appeal only against the final order of adjudication. If he succeeds in his contention that the proceedings were without jurisdiction the order of adjudication must necessarily become nullity. A.I.R. 1940 Cal. 244=I.L.R. (1940) 1 Cal. 344=71 C.L.J. 316=44 C.W.N. 333=189 Ind. Cas. 667.

——S. 75—Order refusing to frame issues.

An order refusing to frame specific issues in insolvency proceedings is an interlocutory order and no appeal will lie therefrom. A.I.R. 1934 Lah. 194 (1)=35 P.L.R. 155=152 Ind. Cas. 222.

——S. 75—Appeal to Privy Council—Right to appeal discussed—Leave to appeal.

When S. 75 confers a right of appeal to the High Court a right of appeal to His Majesty in Council is not to excluded simply because under certain circumstances, the section declares an order of the District Judge to be final if a right of appeal to His Majesty in Council available under the provisions of C. P. Code, is to be excluded, it must be excluded by the statute. When an application for leave to appeal to His Majesty in Council from an order of the High Court passed under S. 75 has been filed, the High Court must consider it as an application to which the provisions of S. 109 or S. 110, C. P. Code, may apply, if the conditions prescribed by those sections are fulfiled. An order in revision whether it is under S. 75 or S. 115, C. P. Code, is not an order in appeal falling under S. 109 (a) C. P. Code, and must fall if it falls at all under S. 109 (c), C. P. Code.

(Their Lordships of the Chief Court refused leave in this case). A.I.R. 1944 Sind 220=I.L.R. (1944) Kar. 216=216 Ind. Cas. 319.

——S. 75—Appeal to Privy Council from District Judge's order.

A District Court sitting in appeal under S. 75 is not a Court of final appellate jurisdiction, as the High Court has revisional powers over it.

Section 75 is comprehensive and self-contained. The provision for revision is deliberate. There is further right of second appeal in matters coming within S. 4. No appeal, therefore, lies to Privy Council from the order of the District Judge, whatever be the value of the subject-matter. A.I.R. 1937 Mad. 930=46 L.W. 416 =1937 M.W.N. 762=177 Ind. Cas. 177.

4. Applicability of C. P. Code to appeals.

——S. 75 (1)—Insolvency case—Appeal is governed by S. 75.

In the matter of appeals in insolvency cases the Courts must be governed by S. 75 (1) of the Act which deals with the question of appeals and must not look to the provisions of the C. P. C., since no appeal lies unless one is expressly conferred by statute. A.I.R. 1946 Nag. 42=I.L.R. (1945) Nag. 719=1945 Nag. L. J. 447.

——S. 75—Appeal in Insolvency cases—Applicability of—C. P. Code.

In the matter of appeals in insolvency cases, the High Court must be governed by S. 75 (1) of the Provincial Insolvency Act. It must not look to the C. P. Code. A.I.R. 1946 Nag. 42 =1945 N.L.J. 447=I.L.R. (1945) Nag. 719.

——S. 75 and C. P. Code O. 47, R. 7—Right of appeal from an order rejecting review.

Section 5, Provincial Insolvency Act makes the C. P. Code applicable only subject to the provisions of the Provincial Insolvency Act that is to say, whenever any provision of the Civil Procedure Code is in conflict with an express provision in the Insolvency Act, the latter provision will prevail. Section 75 clearly provides for a right of appeal to the District Court from an order made in the exercise of insolvency jurisdiction by a Court subordinate to it, and this provision must be taken to override. O. 47, R. 7, C. P. Code in so far as it bars a right of appeal from an order rejecting an application for review. A.I.R. 1941 Mad. 588=(1941) 1 M.L. J. 537=53 L.W. 466=1941 M.W.N. 350=199 Ind. Cas. 480.

——S. 75—Application of O. 47, R. 7; C. P. Code.

The provisions of C. P. Code are made applicable to insolvency proceedings by S. 5, Provincial Insolvency Act but those provisions are subject to the provisions of the Insolvency Act. Consequently, when the right of appeal is expressly regulated by S. 75, it should not be taken to be governed by the provisions of O. 47, R. 7, C. P. Code. A.I.R. 1937 Lah. 568=174 Ind. Cas. 857.

——S. 75—In insolvency cases, the High Court has power to act under the C. P. Code, only subject to the provisions of Provincial Insolvency Act. Where, therefore, the Insolvency Act specifically provides for appeals and revisions in a particular manner, any action taken under the C. P. Code, will not be subject to the provisions of the Insolvency Act but will be in contravention of those provisions. The Provincial Insolvency Act is a special law and in the absence of any specific provision to the contrary, the C. P. Code. cannot limit or otherwise affect the provisions of the Insolvency Act. A.I.R. 1936 All. 80=1936 A.L.J. 9=1936 A.W.R. 61=58 All. 639=161 Ind. Cas. 311.

——S. 75—Court sale of properties of insolvent without impleading Official Receiver—Purchase by decree-holder — Suit by purchaser under O. 21, R. 103, C. P. Code against Official Receiver to set aside orders for delivery of possession that had been passed in favour of the Official Receiver—Decree partly in favour of plaintiff — Official Receiver not appealing — Appeal by one of the creditors who was no party to suit:

Held, that appeal was governed by C. P. Code and not by Provincial Insolvency Act and that the creditor had no right of appeal. No leave also could be granted. A.I.R. 1934 Mad. 360=39 L.W. 624=66 M.L.J. 532=57 Mad. 670=1934 M.W.N. 697=150 Ind. Cas. 538.

——S. 75—Appealability — Guide — C. P. Code.

In deciding the question as to whether an appeal should or should not be held maintainable even though the leave of the Court has been obtained under S. 75 (3) the provisions of the Code of Civil Procedure may be looked into as a guide. 34 C.W.N. 445=A.I.R. 1930 Cal. 590.

5. Forum of Appeal.

——S. 75—Forum of appeal.

The Subordinate Court whether of the First or the Second Class, is a subordinate Court to a District Court within the meaning of S. 3, Provincial Insolvency Act in relation to the investment of powers by the Local Government and though such Court exercises jurisdiction concurrent with the District Court, it does not cease to be Subordinate Court for the purpose of appeal under S. 75; an appeal, therefore, from an order made by such Subordinate Court would lie to the District Court and the High Court has no jurisdiction to entertain it. A.I.R. 1939 Sind 221= I.L.R. (1939) Kar. 527=183 Ind. Cas. 757.

——S. 75—Forum of appeal.

Appeal from an order of an Assistant District Court, passed in the exercise of its insolvency jurisdiction, lies to the District Court and not to the High Court. A.I.R. 1934 Rang. 155=12 Rang. 352=151 Ind. Cas. 790.

——S. 75—Forum.

An appeal from an order passed by the Senior Sub-Judge in the exercise of insolvency jurisdiction lies to the District Judge and not to the High Court. A.I.R. 1933 Lah. 307=34 P.L. R. 176=149 Ind. Cas. 24 (1).

——S. 75—Forum.

An appeal against a decision of a Subordinate Judge under S. 4 lies to the District Judge and a second appeal lies to the High Court under S. 75. 102 Ind. Cas. 115=31 C.W.N. 502=A.I. R. 1927 Cal. 474.

——S. 75—An appeal from the decision of Sub-Judge in insolvency jurisdiction lies to the District Judge and not to the High Court. An appointment as an Additional District Judge under S. 26 (1), Central Provinces Courts Act cannot be implied from an appointment as an Insolvency Judge under the Insolvency Act. 71 Ind. Cas. 37=A.I.R. 1923 Nag. 80.

——S. 75—Appeal — Forum—Order by Subordinate Judge.

An appeal lies to District Court and not to High Court against the orders of a Subordinate judge dismissing an insolvency petition under S. 353, C. P. Code though the properties of the petitioners were attached under a decree passed in a suit, the subject-matters of which or the schedule debts exceed Rs. 5,000. 19 M.L.J. 68=4 Ind. Cas. 617.

——S. 75—An appeal against an order of the Court of the Deputy Commissioner who was invested with the powers of the Subordinate Judge in the exercise of insolvency jurisdiction lies to the District Judge and not to the High Court. 80 Ind. Cas. 858=A.I.R. 1925 Cal. 335.

——S. 75 — (1907) S. 46—C. P. Code, Ss. 104 106, O. 43, R. 1—Forum of appeal.

An order of a Deputy Commissioner setting aside a transfer of an insolvent's house and shop is appealable to the District Judge and not to the High Court. 15 C.L.J. 239=13 Ind. Cas. 605.

——S. 75—No appeal lies to a High Court against an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court. Such appeal lies to the District Court. 63 Ind. Cas. 848 (Cal.).

——Ss. 75, 80—(1907), Ss. 46 and 52—Dismissal of Insolvency Petition by Official Receiver—Appeal—Revision.

On a construction of S. 52 (1) with Ss. 15 and 16 the Official Receiver who is invested by S. 52 (1) with the same powers as the Court referred to in the Act can dismiss an insolvency petition just as the court itself can do. No appeal lies to the High Court against an order of the Official Receiver as no provision is made in the Act for appeals to the High Court directly and as S. 22 provides for an appeal to the District Court against all the orders of the Receiver.

Quaere.—Whether the High Court would interfere in Revision? 38 Mad. 15=24 M.L.J. 73=16 Ind. Cas. 820.

——Ss. 75 (1), 69—(1907), Ss. 46 (1) and 43—Appeal — Forum — Additional Judge if subordinate to District Court—Appeal from order under S. 43—Where lies.

An Additional Judge is not subordinate to a District Court within section 46 (1) and an appeal from his order of conviction of a person under S. 43 lies only to the High Court. The Court subordinate to the District Court S. 46 (1) is the Subordinate Court mentioned in section 3 of the Act. An appeal from an order under S. 43 is a Civil appeal. 36 All. 576=12 A.L.J. 1105=15 Cr.L.J. 658=25 Ind. Cas. 986.

——S. 75 (1)—(1907), S. 46 (1)—Jurisdiction—Appeal—Divisional Court in Punjab deemed to be the District Court—Punjab Government Notification No. 889, dated 18th November, 1908.

Under Punjab Government Notification No. 889 dated 18th November, 1908 for the purposes of S. 46 of the Provincial Insolvency Act the Divisional Court in the Punjab is the District Court. Therefore, an order in the exercise of the insolvency jurisdiction by District Court is appealable to the Divisional Judge. The above notification wrongly refers only to S. 46 (1) but it is intended to refer to and cover the whole section. 3 P.R. 1911=29 P.L.R. 1911=24 P.W.R. 1911 =8 Ind. Cas. 485.

——S. 75 (1) (4)—(1907) S. 46 (1) (4)—Jurisdiction — District Court — Divisional Court—Punjab Courts Act, S. 23 (6)—Notification under—Effect of.

Under Government Notification No. 889 dated 18th November, 1908, made under S. 23 (b) of the Punjab Courts Act, 1884, the Divisional Court is deemed to be the District Court or the Principal Civil Court of original jurisdiction for the purposes of any proceedings under the Provincial Insolvency Act. 80 P.W.R. 1916 =33 Ind. Cas. 730.

6. Interpretation.

(a) "Person aggrieved"—Sub-S. (1).
(b) "Decision"—Sub-S. (1).
(c) "May appeal" and "Shall be final" — Sub-S. (1).
(d) "Any such person"—Sub-S. (2).
(e) "Such decision"—Sub-S. (2).

(a). "Person aggrieved."

——S. 75 (1)—The words "aggrieved by a decision" and so forth in S. 75 (1), must be read as qualifying all the persons who are entitled to appeal. A.I.R. 1942 Bom. 27=43 Bom.L.R. 964=43 Cr.L.J. 360=I.L.R. (1942) Bom. 67= 198 Ind. Cas. 424.

——S. 75 (1)—"A person aggrieved" means one who is wrongly deprived of or refused something or whose title is wrongfully affected.

The words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved,' must be a man who has suffered a legal grievance, or against whom a decision has been pronounced which was wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something. A.I.R. 1946 Nag. 24=I.L.R. (1945) Nag. 826=1945 Nag. L.J. 588.

——S. 75—Person aggrieved—Meaning of.

The expression 'aggrieved person' means a person who has got a legal grievance, i.e., a person who is wrongfully deprived of anything to which he is legally entitled and not merely a person who has suffered some sort of disappointment. A.I.R. 1935 Lah. 818=160 Ind. Cas. 509.

——S. 75—Person aggrieved.

An aggrieved person must be one who is affected by the order appealed against. (1880) 14 Ch. D. 458, Foll. 112 Ind. Cas. 623=A.I.R. 1928 Mad. 981.

(b). "Decision"—Sub-S. (1).

——S. 75—"Decision come to or order made"—Meaning. See PROVINCIAL INSOLVENCY ACT, SS. 5 AND 75. (1948) 1 M.L.J. 310= A.I.R. 1948 Mad. 520.

——S. 75 (1)—"Decision" meaning of—Decision that Court has jurisdiction under S. 4.

The "decision" in S. 75 (1) has no technical or artificial meaning. It is to be interpreted in its ordinary and natural meaning. It means decision whether it is final or otherwise.

A decision that the Court has jurisdiction to entertain application under S. 4 or that there is no legal obstacle to the application is a decision within the meaning of S. 75 (1), Proviso (2). A.I.R. 1946 Nag. 42=I.L.R. (1945) Nag. 719 =1945 N.L.J. 447.

——S. 75—Decision — Meaning of—Order impleading representative of deceased debtor in appeal—Revision.

The word 'decision' has an element of finality so far as a particular Court is concerned and an interlocutory order of a Court cannot be said to be a decision of that Court.

An order by the District Judge in appeal impleading the legal representative of the deceased debtor is an order of an interlocutory nature and is not open to appeal or revision. A.I.R. 1936 All. 80=1936 A.L.J. 9=1936 A.W.R. 61=58 A. 639=161 Ind. Cas. 311.

(c). "May appeal" and "Shall be final"—Sub-S. (1).

——S. 75 (1)—(1907) S. 46 (1) — Construction "May appeal" and "shall be final."

The words "may appeal" in S. 46 (1) means that a party aggrieved with an order may prefer an appeal to the High Court and is not bound to do so. The words "shall be final" in the same section do not signify that the decision of the Insolvency Court cannot be impeached in a regular suit but they simply emphasize that no second appeal lies against an appellate order of the District Judge. 35 .B 473; 13 Bom.L.R. 13; 14 M. I.A. 209 at 222, Foll. 22 P.R. 1917=14 P.W. R. 1917=40 Ind. Cas. 220.

(d). "Any such person"—Sub-S. (2).

——S. 75 (2)—"Any such person", meaning of.

The words "any such person" in sub-S. (2) of S. 75, include those persons in the first sub-section of the section. A.I.R. 1938 Pat. 471=17 Pat. 201=19 P.L.T. 821=5 B.R. 224=179 Ind. Cas. 426.

(e) "Such decision".

——S. 75 (2)—Such decision — Order under S. 4, if appealable.

The words "such decision" in S. 75 (2) clearly refer to such decision as is specified in Sch. I, and Sch. I, in its turn, means a decision under section 4 as decision which is appealable within the meaning of the section. The words "any such person aggrieved" mean any person aggrieved having regard to wording of S. 75, sub-S. (1). A.I.R. 1941 Rang. 24= 1940 Rang. L. R. 643=192 Ind. Cas. 583.

7. Leave of Court—Sub-S. (3).

——S. 75 (3)—Leave to appeal—Leave of the Judge and not by the administrative officer of Court—Appeal "admitted" as a matter of routine—If properly admitted.

In respect of orders not falling within Sch. I of the Provincial Insolvency Act, the party aggrieved has not an unqualified appeal; he has to obtain the leave either of the District Court or of this Court. The leave referred to in S. 75 (3) of the Act clearly leave granted by a Judge of the Court and not by any of its administrative officers. Where an appeal has been "admitted" as a matter of routine by the officer but there is no order of the Judge admitting the appeal, the appeal is not competent and leave cannot be granted on an oral application made at a very late stage. 63 L.W. 75=1950 M.W.N. 100=A.I.R. 1950 Mad. 630=(1950) 1 M.L.J. 89.

——S. 75 (3)—Grant by High Court at hearing.

In a case where an appeal to the High Court is competent with the leave of the Court, the High Court may grant leave in a fit case at the hearing. A.I.R. 1942 Cal. 241=74 C.L.J. 528=I.L.R. (1942) 1 Cal. 427=201 Ind. Cas. 568.

——S. 75 (3)—Leave whether may be granted at hearing.

Where the Official Receiver presented an application under S. 53 for annulment of a deed of gift made within two years of the adjudication on the ground that it was a fraudulent transfer, and on the dismissal of the application, he preferred an appeal to the High Court but did not obtain the leave of the District Court for filing the appeal under S. 75 (3):

Held, that the appeal was incompetent as no leave had been obtained and that after the appeal has been admitted, leave could not be granted at the stage of hearing especially when the failure of the Official Receiver to obtain leave of the District Court for the filing of the appeal was due to a **bona fide** mistake, that is, a mistake which occurred in spite of the exercise of due care and caution. A.I.R. 1937 Lah. 249=39 P.L.R. 510=164 Ind. Cas. 664.

——S. 75 (3)—Appeal admitted without leave—Leave granted at hearing.

Where in spite of want of leave under S. 75 (3) the appeal is admitted, the irregularity can be cured in a case in which leave ought to be granted by granting such leave at the time of hearing the appeal. A.I.R. 1937 Pat. 665=18 P.L.T. 839 =4 B.R. 161=16 Pat. 724=172 Ind. Cas. 737.

——S. 75 (3)—Procedure.

Leave to appeal under S. 75 (3) can be granted at any stage of the proceedings. It can be granted even on an oral application made in the course of hearing of appeal before the High Court A.I.R. 1936 Rang. 413=164 Ind. Cas. 893.

——S. 75 (3)—No appeal lies under S. 75, if leave to appeal has not been applied for under S. 75 (3). 100 Ind. Cas. 137=A.I.R. 1927 Lah. 914.

——S. 75 (3)—Not condition precedent.

Under S. 75 (3), it is not necessary that the appellant must apply for leave prior to filing the appeal in the High Court. 105 Ind. Cas. 138= 50 Mad. 815=26 M.L.W. 248=1928 M.W.N. 9=A.I.R. 1927 Mad. 869=53 M.L.J. 742.

——S. 75 (3)—Grant of leave—At late stage.

Though leave was required under the Act and was not applied for until a late stage of the proceedings, as the case had been argued as one of principle and required careful consideration in view of certain existing decisions, High Court granted the necessary leave. 73 Ind. Cas. 413 =21 A.L.J. 216=45 All. 364=4 L.R.A. Civ. 149=A.I.R. 1923 All. 466.

——S. 75 (3)—Implied leave.

The admission of an appeal against the rejection of an application of the creditor for substitution under S. 16 is tantamount to the grant of leave contemplated by S. 75 (3). The absence of application for leave is no bar, the only real question in such a case being whether there is a substantial point for consideration. A.I.R. 1938 Oudh 101=1938 O.W.N. 230=13 Luck. 757= 173 Ind. Cas. 631.

——S. 75 (3)—Grant of leave by implication.

Sub-S (3) of S. 75 is very wide in its terms and makes appealable to the High Court (with the leave of the District Court or High Court) orders passed by the District Court other than those specified in Sch. I. Where a prayer for leave was made in the memo. of appeal though no order granting the appeal is passed, the Motion Bench must be taken to have done so by the order admitting the appeal. A.I.R. 1937 Lah. 895= 171 Ind. Cas. 31.

——S. 75 (3)—Grant of leave by implication.

Where, along with the memorandum of appeal, an application for leave to appeal is presented and the appeal is admitted by the Motion Bench, the admission of the appeal amounts to grant of leave to appeal. A.I.R. 1937 Lah. 87=171 Ind. Cas. 610=17 Lah. 775.

——S. 75 (3)—Leave by implication.

Where the appeal has been admitted and allowed to be proceeded with, it is tantamount to the granting of leave as contemplated by the Provincial Insolvency Act. A.I.R. 1933 Cal. 151=56 C.L.J. 440=142 Ind. Cas. 484.

——S. 75 (3)—Implied grant—Granting leave at hearing.

Where no application for leave to appeal from an order under S. 61, has been made, it cannot be inferred that leave was granted because the appeal was admitted. Leave can be granted at hearing and time granted under S. 5, Limitation Act. A I.R. 1934 Lah. 33=149 Ind. Cas. 935 (1).

——S. 75 (3)—Implied grant of leave.

The mere fact that an appeal has been admitted by a Motion Bench does not necessarily imply that leave for the purpose of the appeal was granted. But the grant of leave is discretionary and leave may be granted even after admission at the hearing of the appeal. (1931) 132 Ind. Cas. 223.

——S. 75—Leave to appeal—Admission of appeal.

Where along with memorandum of appeal a petition is presented by the appellant under S. 75 praying for grant of permission and the Motion Bench admits the appeal, it must be assumed that the petition for permission has been granted. 119 Ind. Cas. 753=A.I.R. 1929 Lah. 636.

——S. 75—Admission of appeal.

Where in the memorandum of appeal a prayer for leave to appeal was made but the Motion Bench admitted the appeal without specifically stating that they granted leave to appeal it was substantial compliance with the provisions of S. 75 and the appeal must be held to have been instituted with the leave of the Court. 119 Ind. Cas. 427=30 P.L.R. 320=11 L.L.J. 198=A.I.R. 1929 Lah. 622.

——S. 75—Order admitting appeal.

Order of High Court admitting appeal should be construed as virtually granting leave. 107 Ind. Cas. 830=7 Pat. 375=9 P.L.T. 329=A.I.R. 1928 Pat. 338 (F.B.).

——S. 75—Mere admission of appeal.

Sanction cannot be deemed to have been granted by mere admitting an appeal to a hearing. 103 Ind. Cas. 623=9 L.L.J. 257=A.I.R. 1927 Lah. 424.

——S. 75 (3)—(1907) S. 46 (3)—Leave to appeal—Procedure.

Where leave for appealing is necessary it must be expressly sought, and without leave an appeal is incompetent. 33 Ind. Cas. 773 (All.)

——S. 75 (3)—Grant of leave beyond limitation—Effect.

An appeal was filed without obtaining leave to appeal, which was, however, obtained after the period of limitation:

Held, that the period of limitation was to be reckoned up to the date of filing the memorandum of appeal; but in any case, the delay could be excused under S. 78. A.I.R. 1934 Rang. 117= 151 Ind. Cas. 625.

——S. 75 (3)—Leave, how and when granted.

Leave to appeal may be granted even after the expiry of limitation and even if there is no prayer for it in the memorandum of appeal. A.I.R. 1932 Lah. 248=33 P.L.R. 5=136 Ind. Cas. 258.

——S. 75 (3)—Leave, when to be granted.

Leave to appeal from an order refusing to annul transfer should not be given to a creditor unless the District Court or the High Court is satisfied that the Receiver has been requested and has refused to appeal. A.I.R. 1931 Lah. 651=33 P.L.R. 65=132 Ind. Cas. 589.

——S. 75 (3)—(1907) S. 46 (3)—Leave to appeal—Chief Court.

The Chief Court is competent under S. 46 (3) of the Provincial Insolvency Act to grant leave to appeal notwithstanding the District Court refused to grant it. 63 P.R. 1919=51 Ind. Cas. 695.

——S. 75—(1907) S. 46—Leave to appeal—Concurrent jurisdiction.

The High Court and the District Judge have concurrent jurisdiction to grant leave to appeal under S. 46. Though the District Judge has refused leave to appeal, the High Court can grant that leave. 19 C.W.N. 760=29 Ind. Cas. 406.

——S. 75—Facts justifying grant of leave.

Court directed an insolvent, who applied for discharge, to renew his application for discharge, "six months hence", but as no application was made within that period the adjudication was annulled under S. 43. The insolvent applied under S. 10 (2) on the ground that he misunderstood the meaning of the Court's order. The Court, however, did not think the excuse as reasonable

and rejected the application. The insolvent appealed to the High Court.

Held, that leave to appeal ought, in the circumstances, to be granted under S. 75 (3).

Held, further that the order of the Court was obscure and misleading and offered reasonable excuse so as to enable insolvent to file fresh petition of insolvency. 118 Ind. Cas. 332=A. I.R. 1929 Pat. 184.

——S. 75—Discretion — Order under S. 10 (2).

To grant leave to appeal on an order passed by the District Judge under S. 10, para. 2 is in the discretion of the District Court. The statute does not provide that leave may be granted on questions of fact; nor does it provide that the District Court should not grant leave on questions of fact. 104 Ind. Cas. 613=A.I.R. 1928 Pat 23.

——S. 75 (3)—Appeal from order refusing leave.

The law does not recognize a right of appeal from a refusal to grant leave where leave is necessary. No appeal, therefore, lies against an order refusing to grant leave to appeal from an order which falls within S. 75 (3). A.I.R. 1939 Mad. 800=1939 M.W.N. 734=50 L.W. 292=(1939) 2 M.L.J. 414=186 Ind. Cas. 634.

——S. 75 (3)—(1907) S. 46 (3)—Leave to appeal —Order refusing — Appeal.

No appeal lies against a discretionary order of a court refusing leave to appeal under the section. No litigant can claim a right of appeal against an order which a Court has discretion to pass. 5 L.W. 168=21 M.L.T. 77=38 Ind. Cas. 818.

8. Limitation.

——S. 75 (4)—(1907), S. 46 (4)—Limitation—Computation — General Clauses Act (10 of 1896-97) Ss. 9 and 10.

The principle of S. 9 of the General Clauses Act must be applied to appeals under the Provincial Insolvency Act and the day on which the act appealed against is done is to be excluded. In appeals under the Provincial Insolvency Act the last day must be excluded under S. 10 of the General Clauses Act. 42 Mad. 13=35 M.L.J. 531=48 Ind. Cas. 952.

——S. 75—(1907) S. 46—Limitation—Limitation Act—Applicability of.

The Provincial Insolvency Act though a special law within the meaning of S. 29 of the Limitation Act is not a complete code in itself, and there is nothing to prevent the application thereto of the general provisions of the Limitation Act. 88 P.W.R. 1918=89 P.R. 1918=87 P.L.R. 1918=46 Ind. Cas. 588.

——Ss. 75, 5—(1907) Ss. 46 and 47—Limitation—Limitation Act—Applicability of.

Recourse should not be had to the general provisions of the Limitation Act in dealing with the admission of petitions and appeal presented after the time prescribed under the provisions of the Provincial Insolvency Act. 41 Mad. 169=33 M.L.J. 566=7 L.W. 443=44 Ind. Cas. 805 (F.B.).

——S. 75 (4)—(1907) S. 46 (4)—Limitation—Exclusion of time for obtaining copies—Ss. 12 (3) and 5 of the Limitation Act—Revision—Government of India Act, S. 107.

S. 12 (3) of the Limitation Act which provides for the exclusion of time occupied in obtaining the copies of the judgment and decree appealed against from the period allowed for filing the appeal does not apply to appeals under S. 46 of the Provincial Insolvency Act. In the exceptional circumstances of the case the High Court treated the appeal as a revision petition and dealt with it as such under S. 15 of the Charter Act. 34 Mad. 505, Foll. 34 All. 496, not Foll.

Per **Sadasiva Iyer, J.**—The Court has power to excuse the delay in filing this appeal under S. 5 of the Limitation Act. 8 C. 910; 12 Mad. 210; 12 Mad. 1, Foll. 18 M. 99; 20 M. 249, Diss. The Court below acted with material irregularity in passing the order directing the Official Receiver to execute the deed without making him a party. 18 A. 4, Foll. 39 Mad. 593=18 M.L.T. 200=30 Ind. Cas. 703.

——Ss. 75 (4), 5—(1907) Ss. 46 (4) and 47—Limitation—Limitation Act, Ss. 5, 12.

Ss. 5 and 12 (2) of the Limitation Act apply to the computation of the periods of limitation provided in the Provincial Insolvency Act. 9 N.L.R. 91=20 Ind. Cas. 258.

——S. 75—(1907) S. 46—Limitation — Limitation Act (9 of 1908), S. 12—Applicability of.

S. 12 of the Limitation Act does not apply to cases arising under the Provincial Insolvency Act and consequently the time requisite for obtaining a copy of the order against which an appeal is preferred to the High Court, is not excluded in computing the period of limitation as given in S. 46. 33 All. 738=8 A.L.J. 833=11 Ind. Cas. 197.

9. Notice of appeal.

——S. 75—Appeal from adjudication—Service of notice—Irregularity—Effect.

Where, in an appeal from an order declaring a person insolvent, one of the creditors contends that no notice was served on a certain creditor, but it is admitted that a notice was issued to him and also published in the Gazette, but it is stated that the creditor was dead on the date he is said to have received the notice, this is a mere irregularity and does not affect the case between the insolvent and the appellant creditor. A.I.R. 1937 Pat. 671 =4 B.R. 170=172 Ind. Cas. 798 (D.B.).

——S. 75—(1907) S. 46—Notice of Appeal—To substantial number of creditors.

When an appeal is preferred by a debtor against the dismissal of his application for adjudication, notice of such appeal should be served on a substantial number of creditors. 37 Ind. Cas. 391 (All.).

——S. 75—(1907) S. 46—Notice of appeal in insolvency proceedings.

In an appeal against an order passed in insolvency, only the parties affected by the order are entitled to notice. 39 Mad. 74=29 M.L.J. 451 =27 Ind. Cas. 144.

——S. 75—Notice to heir of creditor—Absence—Not fatal.

The fact that notice upon the heir of a deceased schedule creditor has not been given, would not by itself render the proceedings before the Appellate Court incompetent. 97 Ind. Cas. 1013=44 C.L.J. 108=A.I.R. 1926 Cal. 1210.

10. Parties to appeal.

——S. 75—Death of insolvent—Heir's right to be brought on record.

The adjudication of a person as an insolvent is not a matter purely personal to him. It affects, not only his person but also his property which, but for the adjudication, would, on his death, have devolved on his heirs. They have a material interest in the proceedings which have a very far-reaching effect on their rights. The right to resist the creditor's application for adjudication is, therefore, not a mere personal right which lapses on the death of the insolvent; it is a right which survives. Hence, where during the pendency of an appeal by an insolvent against his adjudication as insolvent on the petition of a creditor the insolvent dies, the appeal does not abate, the right survives in favour of his heirs who are entitled to be brought on the record and to continue the appeal. The same consideration will apply equally, if the debtor had been adjudicated insolvent on his own application and the creditors had appealed making him a respondent but he had died. In such a case also, the heirs have material interest in the decision of the appeal and are entitled to be brought on the record. A.I.R. 1942 Lah. 211=44 P.L.R. 347=I.L.R. (1942) Lah. 746=202 Ind. Cas. 140 (F.B.).

[Overrules A. I. R. 1928 Lah. 119=107 Ind. Cas. 281 and 69 P.R. 1888].

——S. 75—Parties—Receiver—Appeal from order under S. 4.

In an appeal from an order under S. 4, the petitioning creditor is not a necessary party as he is sufficiently represented by the Receiver. A.I.R. 1937 Cal. 517=41 C.W.N. 1079=I.L.R. (1937) 2 Cal. 675=66 C.L.J. 315=172 Ind. Cas. 914.

——S. 75—Appeal from order annulling mortgage —Necessary parties.

Where, on the application of two creditors, a person is adjudged insolvent and the Official Receiver declines to apply for the annulment of a mortgage made by the insolvent and the creditors apply to the Court to get the mortgage annulled, the Official Receiver and the creditors are necessary parties to an appeal against the order annulling the mortgage. If they are not impleaded as parties, the appeal is incompetent. This is not a case of mistake but of gross negligence and amendment should not be allowed at the stage of appeal so as to add new parties. A.I.R. 1934 Lah. 36=148 Ind. Cas. 329 (1).

——S. 75—Appeal against order granting conditional discharge — Official Receiver—If necessary party.

Official Receiver is a necessary party in an appeal by the creditors against an order granting conditional discharge to the insolvent. A.I.R. 1931 Lah. 647=132 Ind. Cas. 526.

——S. 75—Parties to appeal—Appeal against adjudication—Receiver is not necessary party.

A Receiver is not a necessary party to an appeal in which the very order of adjudication (as a consequence of which the Receiver was appointed) is in question. The uniform practice of the Punjab Chief Court and on the Lahore High Court has been that a Receiver is not considered a necessary party to appeals against orders of adjudication. 105 Ind. Cas. 569=9 L. L. J. 550=28 P.L.R. 468=A.I.R. 1928 Lah. 202.

——S. 75—(1907) S. 46—Parties—Appeal by one creditor—Other creditors, if necessary parties.

In an appeal by one of the creditors against an order overruling his contention that he was a secured creditor the Appellant joined as party respondent the Receiver. Two of the creditors appeared by leave to support the order appealed against but other creditors were not made parties to the appeal.

Held, that the appeal was competent and it was not necessary to make the other creditors parties to it. 24 C.W.N. 401=58 Ind. Cas. 10.

——S. 75—(1907) S. 46—Parties — Sale of property of insolvent—Purchaser.

The auction-purchasers are necessary parties to an appeal by an insolvent against an order confirming an auction sale of the property and if they are impleaded as parties after the time prescribed for filing an appeal, the appeal is incompetent. 51 Ind. Cas. 935 (Lah.).

——S. 75 (3)—(1907) S. 46 (3)—Parties—Auction-purchaser — Order confirming sale—Appeal.

Where property is sold in insolvency proceedings and the sale is confirmed the auction-purchasers are not necessary parties to an appeal against the order confirming the sale. 63 P.R. 1919=51 Ind. Cas. 695.

11. Orders appealable—Sub-Ss. (1) and (2)

——S. 75—Order dismissing creditor's application for adjudication.

An order under S. 25 dismissing a creditor's application is appealable under S. 75. (1938) 40 P.L.R. 433.

——S. 75 (2)—A having B and C as partners in certain contract—Separate suits by *B* and *C* for settlement of accounts—Decree obtained—Meanwhile, *A* adjudicated insolvent—Application by unsecured creditor under S. 4 for determination, whether money recovered under contract should be paid to *C* solely—*B* made party—Decision in favour of *B*—In appeal, *B* not made party—*B* applying to be made party—Application rejected—Appeal by *B* under S. 75 (2)—Appeal, held premature and incompetent. A.I.R. 1939 Sind 45=179 Ind. Cas. 991.

——S. 75—Sale by Receiver—District Judge accepting objection that property belonged to objector—Appeal.

An objection that the objector was the owner of the property sold by Receiver was raised under S. 68. The objection was upheld by the District Judge:

Held, that though the District Judge was moved under S. 68 which was not one of the sections mentioned in Sch. I, the investigation, which he was expected to make in a case like the present should be under S. 4, and any order passed by him under S. 4 was appealable as of right to the High Court. A.I.R. 1937 Lah. 2=169 Ind. Cas. 809=39 P.L.R. 214.

——S. 75—No appeal to High Court from order of District Judge granting leave to appeal to Privy Council.

A fortiori no appeal would lie against an order granting permission to appeal to the Privy Council, for undoubtedly, the right of a party to appeal to the

Privy Council is something that is beyond the scope of the Provincial Insolvency Act, and not governed by it. Where, therefore, after deciding an appeal under S. 75, the District Judge grants permission to appeal to the Privy Council no appeal lies to High Court from such order as no appeal is provided from such an order passed under O. 45, R. 3, C. P. Code. A.I.R. 1937 Mad. 930=46 L.W. 416=1937 M. W.N. 762=177 Ind. Cas. 177.

——S. 75—Order under S. 70 filing complaint—Appeal lies.

S. 75 covers an order passed by the Insolvency Judge under S. 70, recording the finding that there are *prima facie* grounds for an inquiry into the offence referred to under S. 69 and appearing to have been committed by the insolvent, and making a complaint of the offence in writing to a Magistrate of competent jurisdiction. The order is appealable. A.I.R. 1936 Lah. 871=38 P.L.R. 1160=167 Ind. Cas. 279.

——S. 75—Prosecution under S. 70—Right to appeal, when arises.

Court may record a finding under S. 70 and make a complaint—Right to appeal arises when the finding is completed by the forwarding of the complaint. 1939 N.L.J. 495.

——S. 75—Adjudication of father as insolvent—

Ex parte orders for delivery of property of insolvent and minor sons—Order appealable under S. 75. A. I.R. 1933 Mad. 345=1933 M.W.N. 75=37 L.W. 720=143 Ind. Cas. 613.

——S. 75—Order striking off petition.

An order refusing permission to verify the petition and striking off the petition after notice has been issued amounts to an order dismissing the petition for insolvency and is appealable. A.I.R. 1932 Lah. 28=133 Ind. Cas. 626.

——S. 75 (1) and (3)—Order refusing to restore appeal dismissed for default.

An appeal lies under the proviso to S. 75 (1), from an order of the District Court refusing to restore an appeal dismissed for default. At any rate, even if such an order be regarded as one passed otherwise than on appeal, the appellant can appeal with the leave of the High Court or of the District Court, under S. 75 (3). A.I.R. 1932 Lah. 248=33 P.L.R. 5=136 Ind. Cas. 258.

——S. 75—Order under S. 68.

An order of the District Judge under S. 68, dismissing the application of the aggrieved party on the ground that it was made beyond 21 days after the Receiver had taken possession of the property is appealable. 107 Ind. Cas. 467=A.I.R. 1928 Cal. 263.

——S. 75—Order under S. 68—Leave — Unnecessary.

Where property is seized by a Receiver as belonging to an insolvent and a claim is preferred under S. 68 by a third party to such property and the claim is allowed an appeal lies under S. 75 without leave of the Court. 108 Ind. Cas. 602=A.I. R. 1928 Lah. 556.

——Ss. 75 (2) 69—(1907) Ss. 46 (2) and 43 (2)—Applicability — Order to show cause why order under S. 43 should not be taken.

An order requiring a person who has already been adjudicated to show cause why an order under S. 43 (2) should not be made against him is not appealable under S. 46 (2) but it is doubtful whether it can be appealed against by obtaining permission under S. 46 (3). 24 C.L.J. 553=34 Ind. Cas. 777.

12. Orders appealable with leave of Court—Sub-S. (3).

——S. 75 (3)—Order refusing to modify annulment.

An order of the District Judge refusing to modify an order annulling the adjudication passed by his predecessor nearly three years ago by vesting the estate in Official Receiver is appealable under S. 75 (3) with the leave of the District Judge or of the High Court. A. I. R. 1938 Mad. 461=1938 M.W.N. 18 (1)=176 Ind. Cas. 48.

——Ss. 75 (3)—Order refusing to set aside ex parte order of adjudication.

An order refusing to set aside *ex parte* decree in appeal is not a proceeding in appeal itself and hence an order refusing to set aside an *ex parte* order of adjudication made in appeal is appealable under section 75 (3) read with O. 9, R. 13, C. P. Code. A.I.R. 1936 Mad. 660=1936 M.W.N. 465=44 L. W. 97=71 M.L.J. 333=59 Mad. 1049=164 Ind. Cas. 959.

——S. 75 (3)—Petition to include certain persons as debtors—Dismissal of—Appealability.

Though an order dismissing a creditor's petition to include certain persons as debtors on the ground that the properties mentioned in the schedule were joint family properties and as such other members of the family should be included, may not be appealable under S. 75 and Sch. I, it is appealable under S. 75, Cl. (3) with the leave of the Court. A.I.R. 1933 Cal. 151=56 C.L.J. 440=142 Ind. Cas. 484.

——S. 75 (3)—Under the first schedule to the Provincial Insolvency Act only an order amounting to a transfer under S. 54 is made appealable as of right.

An order refusing to annul a transfer for any reason whatsoever would be covered by S. 75 (3) and can be appealed only with the leave of the Court. A.I.R. 1933 Lah. 242=33 P.L.R. 971=141 Ind. Cas. 36.

——S. 75 — (1907), S. 46—Leave to appeal—Leave must be obtained first.

A third person objected to the seizure of certain moveable property by the receiver of the property of an insolvent and the objection was dismised:

Held, that an appeal would lie against such order by special leave of the District Court or the High Court. 36 All. 8=11 A.L.J. 979=21 Ind. Cas. 702.

——S. 75—When an order of the District Court deals partly with the question of discharge of insolvent under S. 41 and partly with the annulment of adjudication under S. 43, leave for appeal is necessary. 107 Ind. Cas. 830=7 Pat. 375=9 P. L.T. 329=A.I.R. 1928 Pat. 338 (F.B.).

——S. 75—Order for bringing heirs of debtor on record — Doubtful if appealable.

Quaere.—Where a creditor makes an application for a debtor being declared insolvent and the debtor dies before the adjudication and the Judge orders the proceedings to be continued in presence of the

heirs of the deceased who are to be brought on record for the purpose of realization and distribution of the debtor's assets, it is a question whether an appeal lies from such interlocutory order, after leave has been obtained under S. 75 (3). 34 C.W.N. 445=129 Ind. Cas. 822=A.I.R. 1930 Cal. 590.

——S. 75 (2) and (3)—(1907) S. 46 (2) and 36—Appeal — Order refusing to take action under S. 36.

It is doubtful whether an order refusing to take action under S. 36 is an order under the section within S. 46 (2). But such an order is appealable under S. 46 (3) though not under S. 46 (2). 6 N.L.R. 146=8 Ind. Cas. 1115.

13. Persons entitled to appeal.

——S. 75 (1)—Persons entitled to appeal.

The wording of S. 75 (1), first paragraph admits of but one construction, namely that the clause "aggrieved", etc., qualifies all the four categories of persons mentioned there. I.L.R. (1942) Bom. 67; A.I.R. 1937 Rang. 472; I.L.R. (1942) 1 Cal. 427; A.I.R. 1940 Cal. 244; I.L.R. (1941) Lah. 779; A.I.R. 1935 Mad. 107; 28 N.L.R. 286; I.L.R. (1945) Nag. 826; and 49 M. 461 (F. B.), Foll. I. L. R. (1950) Nag. 347=1950 N.L.J. 100=A.I.R. 1951 Nag. 281.

——S. 75 (1)—S. 75 (1) confers the right of appeal only on persons aggrieved by the order of the Subordinate Court. A. I. R. 1942 Bom. 27 =43 Bom. L.R. 964=43 Cr. L.J. 360=I.L.R. (1942) Bom. 67=198 Ind. Cas. 424.

——Ss. 75 (2), 53 and 28—Debtor's right of appeal.

S. 75 expressly mentions the 'debtor' as a person competent to appeal, but he can appeal only if he is aggrieved by the order of the District Judge and not otherwise. A.I.R. 1942 Cal. 241 =74 C.L.J. 528=I.L.R. (1942) 1 Cal. 427=201 Ind. Cas. 568.

——S. 75—Appeal by insolvent.

The insolvent has right of appeal under Act 5 of 1920. 41 All. 243; A.I.R. 1926 Mad. 556 (F.B.), Not Appl. 119 Ind. Cas. 427=30 P.L.R. 320=11 L.L.J. 198=A.I.R. 1929 Lah. 622.

——Ss. 75 (1), 33 (3), 50 and 67—Order including creditor in list of scheduled creditors—Insolvent's right of appeal.

Under S. 75 of the Provincial Insolvency Act, the insolvent has no right of appeal against an order including a creditor in the list of scheduled creditors. On the passing of the vesting order in insolvency, the insolvent loses all right, title or interest in his property. He is, therefore, represented for all puposes (except for purposes of compositions and schemes of arrangement) by the receiver. The right of a creditor to prove his debt remains till the discharge of the insolvent. *Pari passu* with this right, the receiver can apply to have any creditor excluded. These two follow respectively from S. 33 (3) and S. 50 of the Act. Indeed S. 50 of the Act clearly shows that the insolvent only has *locus standi* when there is in existence a composition or a scheme but not till then. Now if the insolvent does not possess the right to challenge the creditor in the insolvency Court, it is anomalous to allow him to do so by an appeal. Although an insolvent is entitled under S. 67 of the Act to the surplus that remains after the sale of his properties, yet it is not a legal right but a mere hope or expectation. When S. 75 (1) speaks of "aggrieved by a decision" and so forth, it contemplates an immediate injury and not a contingent injury which may never materialise. 47 M. 120, Not foll.; I.L.R. (1942) 1 Cal. 427, Foll. I.L.R. (1950) Nag. 347=1950 N.L.J. 100=A.I.R. 1951 Nag. 211.

——S. 75—Insolvent, when party aggrieved.

A person aggrieved must be a person who had suffered a legal grievance; the act or decision complained of must have deprived him of something to which he was lawfully entitled or he must be refused something which he had a right to demand. The words do not mean a man who is disappointed of a benefit, which he might have received if some other order had been passed. A person who had a right to receive monthly maintenance allowance which was provided by his father in a will mortgaged that right. Later on, he was adjudicated an insolvent. Proceedings under S. 53 were started by the Official Receiver for declaration that the mortgages were illegal. The Court decided the point in favour of the mortgagee. The debtor sought to appeal from that order:

Held, that a question was raised which was of vital importance to the insolvent, *viz.*, to what extent the monthly allowances to which he is entitled under his father's will would vest in the Receiver under S. 28. In these circumstances, the insolvent could be said to be a party aggrieved by the order of the District Judge and his appeal could not be thrown out on the preliminary point. In any event, an appeal would lie with the leave of the High Court; and it would be prepared to grant such leave if it was necessary. A.I.R. 1942 Cal. 241=74 C.L.J. 528=I.L.R. (1942) 1 Cal. 427=201 Ind. Cas. 568.

——S. 75—Right of appeal—Order directing prosecution.

An insolvent has a right of appeal similar to that provided by S. 476-B, Criminal P.C., against the order of the Court directing his prosecution. A. I.R. 1941 Mad. 285=52 L.W. 604=1940 M.W. N. 1069=(1940) 2 M.L.J. 672=194 Ind. Cas. 33.

——S. 75—Certain debt declared proved by District Court—Debtor may appeal to High Court.

Right of appeal under S. 75 is not limited only to those persons who have *locus standi* under S. 50 because it would give the debtor a right of appeal if the matter came before a Court subordinate to the District Court but would give him no right of appeal if the matter in the first instance came before the District Court. An appeal, therefore, by the debtor, lies to the High Court on an order of the District Court declaring a debt to have been proved. A.I.R. 1938 Pat. 471=17 Pat. 201=5 B.R. 224=19 P.L.T. 821=179 Ind. Cas. 426.

——S. 75—Person aggrieved — Admission of creditor's claim — Appeal by Insolvent.

Where the claim of a creditor was wrongly admitted and the insolvent appealed against the order.

Held, that the insolvent is a "person aggrieved" within the meaning of S. 46 (2) of the Act. For under S. 41 he will eventually be entitled to any surplus remaining after the creditors, who have proved, have been satisfied and will be deprived of

such surplus if the proof of another creditor, whose claim may diminish or exhaust it, is wrongly admitted. 75 Ind. Cas. 572=18 M.L.W. 636=1923 M.W.N. 895=47 Mad. 20=A.I.R. 1924 Mad. 163 =45 M.L.J. 166.

——S. 75—Right of insolvent to appeal against order rejecting objection to sale.

An insolvent whose estate have vested in the Official Receiver is not entitled to appeal as an aggrieved person against an order of the Insolvency Court rejecting his opposition to a sale of his estate by the Receiver.

An insolvent has no legal interest in any surplus which may be left over as a result of his insolvency but has merely a hope or expectation. A.I.R. 1935 Mad. 107=40 L.W. 864=67 M.L.J. 942= 154 Ind. Cas. 96.

——Ss. 75, 68—(1907), Ss. 46 and 22—Insolvent if has right of appeal.

A person aggrieved within Ss. 22 and 46 of the Prov. Insolvency Act, must be a person who has suffered a real grievance, a person aginst whom a decision has been pronounced which has wrongfully deprived him of something, and wrongfully refused him something. The words do not mean a person who was disappointed of a benefit which he might have received it if some other order has been made. During the administration of an insolvent's estate an insolvent has no legal interest in the property vested in the trustee and no *locus standi* in the administration of the estate. He is therefore, not a person aggrieved by the sale of property in which he has no interest and no right of appeal against an order of the Dt. Judge confirming a sale of the property which is under the direction of the Receiver. 41 All. 243=17 A. L.J. 229=49 Ind. Cas. 816.

——S. 75—Family members of insolvent whether such persons.

S. 75 gives a right of appeal to any person aggrieved by the decision come to by the Insolvency Court but the person aggrieved must have an independent right to the relief sought for. It is entirely a matter of discretion with the insolvent to give such support as he thinks fit to the members of the family. The members of the family of the insolvent have therefore, no right of appeal under S. 75. A.I.R. 1935 Lah. 952=37 P.L.R. 517 =160 Ind. Cas. 794.

——S. 75—"Person aggrieved" — Meaning of—Son or legal representatives of insolvent.

Where a Receiver was appointed and the property of the deceased debtor was made to vest in him for purposes of realisation and distribution amongst the creditors of the deceased debtor under S. 17, the sons or the legal representatives cannot be regarded as "persons aggrieved" so far as the order is concerned. The only injury suffered by the sons by the order of the District Judge is that a stigma would attach to them by the property of their father being handed over to a Receiver. This fact, however, does not make them an aggrieved party. A.I.R. 1935 Lah. 818=160 Ind. Cas. 509.

——S. 75—Creditor's right.

S. 75 is sufficiently wide to enable a creditor who is aggrieved by an order passed by the Insolvency Judge, to lodge an appeal. A.I.R. 1937 Lah. 2 =39 P.L.R. 214=169 Ind. Cas. 809.

——S. 75—Unless a creditor is aggrieved by the order of the Insolvency Judge, there is no appeal under S. 75. A person aggrieved must be a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand. A.I.R. 1937 Rang. 472=1937 Rang. L.R. 264=173 Ind. Cas. 302.

——S. 75—Creditor's right to appeal.

A creditor can appeal from an order made in the exercise of insolvency jurisdiction under S. 75 only if he is an aggrieved person. A.I.R. 1933 Nag. 9=28 N.L.R. 286=141 Ind. Cas. 350.

——S. 75—Persons aggrieved, meaning of.

A creditor who is allowed to intervene in an insolvency proceeding, even if his debts have not been proved before the Court is a person aggrieved and has a right of appeal. A.I.R. 1933 Cal. 151 =56 C.L.J. 440=142 Ind. Cas. 484.

——S. 75—Appeal by creditor.

A creditor is a person aggrieved and is entitled to appeal. 88 Ind. Cas. 944=47 All. 849=23 A. L.J. 503=6 L.R.A. (Civ.) 463=A.I.R. 1925 All. 549.

——S. 75—Right of individual creditor to appeal.

One creditor is entitled to appeal against an order which affects him along with other creditors and under S. 75, it is not necessary that such a creditor alone should be affected by the order appealed against and not jointly with other creditors. A.I.R. 1937 Lah. 757=40 P.L.R. 465= 175 Ind. Cas. 853.

——S. 75—Appeal by individual creditor—Does lie — Interests if common with others, it must be on behalf of all.

In original proceedings in the Insolvency Court in which an individual creditor's individual interests are concerned, and are opposed to the interests of other creditors so that the Official Receiver cannot represent the individual creditor's individual claims, a motion may be made by the individual creditor and an appeal may be made by him also; but when in the original proceedings the individual creditor's interests are homogeneous with those of the rest so that the Official Receiver can represent all, the proper person to move is the Official Receiver and the individual creditor cannot move unless there is a decision of the Official Receiver against him under which he can come up under S. 68. But in the matter of appeals an individual creditor can always appeal whether or not the Official Receiver does; but if in the matter of appeal his interests are homogeneous with those of the rest of the creditors, then in such a case he must make his petition a representative petition on behalf of all the creditors.

The fact that the appellant was not, in his individual capacity, a party to the original petition, does not preclude him from appealing, as he should then be deemed as represented by the Official Receiver. 96 Ind. Cas. 944=49 Mad. 794=A.I.R. 1926 Mad. 801=50 M.L.J. 602.

——S. 75—Person aggrieved—Mortgage as an act of insolvency—Mortgagee not impleaded—Adjudication — Setting aside with directions for mortgagee being impleaded—Order of adjudication and declaration that the mortgage was void —Mortgagee and his representatives if persons aggrieved—Appeal by them against order of adjudication—Maintainability.

An insolvency petition was filed by a creditor for the adjudication of two brothers on the ground that they committed an act of insolvency in executing a mortgage of their properties. Though the mortgagee was not impleaded, the adjudication was ordered and the Official Receiver in whom the properties vested applied to the Court for setting aside the mortgage. The application was dismissed, but on appeal it was remanded for further inquiry, giving the mortgagee an opportunity to appeal against the adjudication. Meanwhile, the mortgagee's interest passed into the hands of the Official Trustee and he filed an appeal against the order of adjudication of the mortgagors, which was allowed and the insolvency petition was also remanded for disposal after allowing Official Trustee as the representative of the mortgagee to add himself as a respondent in the insolvency petition. Both the insolvency petition and the application for setting aside the mortgage were enquired into and the order of the adjudication was maintained and the mortgage was declared to be void. The order of adjudication alone was appealed against but it was held that no appeal was maintainable as the mortgagee was neither a creditor nor a person aggrieved within the meaning of S. 75 of the Provincial Insolvency Act. In revision,

Held, (*i*) that the mortgagee was a person aggrieved within the meaning of S. 75 of the Act and that the Official Trustee representing him had sufficient *locus standi* to maintain the appeal.

(*ii*) The fact that no appeal was filed against the order setting aside the mortgage would not preclude the filing of an appeal against the order of adjudication. I.L.R. (1949) Mad. 323=A.I.R. 1949 Mad. 131=1948 M. W. N. 841=61 L.W. 614=(1948) 2 M.L.J. 194.

——Ss. 75 and 69 (c)—Refusal to prosecute insolvent under S. 69 (c)—Creditor or Receiver, whether can appeal.

The word "aggrieved" in S. 75 qualifies all the classes of persons previously mentioned in the sentence and therefore, neither a creditor nor the Receiver has any right of appeal under S. 75 unless aggrieved and inasmuch as neither the creditor nor the Receiver has any right to demand the prosecution of the insolvent, they cannot be said to be aggrieved by an order refusing to prosecute the insolvent under S. 69 (*c*). Hence they have no right of appeal against that order under S. 75. A.I.R. 1941 Lah. 243=43 P.L.R. 217=I.L.R. (1941) Lah. 779=195 Ind. Cas. 398.

——S. 75—Creditor's right to appeal against order refusing prosecution of insolvent.

A creditor has not the right to demand that an insolvent shall be prosecuted under S. 69. He may call the attention of the Court to the facts, but it is for the Court to decide whether it shall itself institute proceedings. It is a matter which lies entirely within the discretion of the Court. A.I.R. 1937 Rang. 472=173 Ind. Cas. 302=1937 Rang. L.R. 264.

——S. 75—Refusal to sanction prosecution—Creditor cannot appeal.

Although a creditor, as such, is indirectly interested in seeing the person, who is believed to have committed an offence under S. 69, brought to justice, he does not come within the definition of a person against whom a decision had been pronounced; a decision that has wrongfully refused him something which he had a right to demand. An order, therefore, refusing to sanction prosecution is not one which can be appealed against by creditor. 118 Ind. Cas. 198=A.I.R. 1930 Sind 2.

——Ss. 75 and 69—(1907) Ss. 46 and 43—Person aggrieved—Creditors.

To entitle a creditor to appeal against an order passed in a proceeding under S. 43 of the Provincial Insolvency Act, he must show that he is a "person aggrieved" by the order within S. 46 of the Act. He is not so aggrieved if the order merely holds that there is no *prima facie* case against the insolvent. 40 Mad. 630; 39 All. 171, Foll. 55 Ind. Cas. 717 (Nag.).

——Ss. 75, 69—(1907), Ss. 46 and 43—Person aggrieved — Creditor — Order under S. 43—Appeal.

No appeal lies from an order dismissing the application of a creditor under S. 43 to take action against the insolvent. The creditor is not an aggrieved person. 95 P. L. R. 1917=152 P.W.R. 1917=42 Ind. Cas. 287.

——Ss. 75, 69 — (1907) Ss. 46 and 43—Aggrieved person — Creditor — Order refusing action against insolvent, if appealable.

A creditor is not a person aggrieved under S. 46 (1) of the Provincial Insolvency Act, by an order refusing to take action against an insolvent under S. 43 (2) (*b*) and he has therefore no right of appeal. 17 C. 209, Foll. 40 Mad. 630 =27 Ind. Cas. 241.

——S. 75—Creditor's right to appeal from order under S. 53.

The person aggrieved includes a creditor who is aggrieved by an order of the District Judge passed on an application made by him to annul a transfer under S. 53 and may, consequently, appeal with leave of the High Court without first moving the Receiver to file appeal. A. I. R. 1938 Mad. 370.

——S. 75—Creditor's right to appeal from order of discharge.

The first sub-section of S. 75 refers alike to the debtor, any creditor, the Receiver or any other person aggrieved, and there is no reason for holding that a creditor is not entitled to bring an appeal from an order of discharge under S. 41. A. I.R. 1937 Oudh 450=1937 O.W.N. 923=170 Ind. Cas. 540.

——S. 75—Order of annulment — Creditor can appeal.

Creditors who have tendered their proof are persons aggrieved by the order of the Court annulling adjudication and thus entitled to appeal as persons aggrieved. 94 Ind. Cas. 351=23 M. L. W. 644=1926 M.W.N. 256=A.I.R. 1927 Mad. 175 =51 M.L.J. 60.

——S. 75—Adjudication at creditor's instance—Creditor can appeal.

Where a person is adjudicated an insolvent at the instance of the creditors, they are obviously the aggrieved parties and have a right of appeal. 92 Ind. Cas. 235=7 L.L.J. 553=26 P.L.R. 837= A.I.R. 1926 Lah. 24.

——S. 75—Refusal to set aside sale—Creditor can appeal.

Where the Court passed an order in an application under S. 37 and by the same order discharged the Receiver.

Held, it was competent for one creditor to appeal against the order making the other creditors respondents. 69 Ind. Cas. 556=A.I.R. 1922 Nag. 260.

——S. 75—Order refusing annulment of transfer—Receiver only can appeal.

Where the Court refuses to annul a transfer by the insolvent of his property, the creditors are not "persons aggrieved". It is the Receiver who is aggrieved and he alone has the right to appeal against the order. 39 All. 152, Appl. 62 Ind. Cas. 924=A.I.R. 1921 Lah. 81.

——Ss. 75, 53 (1907) Ss. 46 and 36—Appeal—Right to—Order under Ss. 36 and 37—Creditor, if can appeal against.

An appeal against an order passed under Ss. 37 and 36 of the Provincial Insolvency Act need not be necessarily presented by the Official Receiver but may be presented by a crditor of the insolvent. But the creditor will not be entitled to conduct proceedings in pursuance of an order of remand by the appellate Court. 52 Ind. Cas. 761 (Mad.).

——S. 75 — (1907), S. 46—Creditors' interest and rights.

Creditors can have no legal interest in or right to represent an insolvent's estate, though they can supply the Receiver with information regarding the insolvent's claim on others, and bring the Receiver's conduct to the notice of the Court. A creditor can intervene only through the Receiver and where he is not a proper party to an application, he has no right to appeal except for costs which ought not to be ordered against him. He is not a person aggrieved under S. 46 of the Act. An aggrieved person is one with a grievance in law. 39 All. 152=15 A.L.J. 1=37 Ind. Cas. 76.

——S. 75—Appeal by receiver — Does lie.

It is clear from S. 75 that the Official Receiver is one of the persons who has a right of appeal if he is aggrieved by order of a Court acting in its insolvency jurisdiction. 72 Ind. Cas. 225=46 Mad. 405=1923 M.W.N. 212=A.I.R. 1923 Mad. 355 =44 M.L.J. 251.

——S. 75—Lease of property by public auction—'Prior lessee', whether 'aggrieved person'.

The expression "aggrieved person" means a person who has got a legal grievance, that is, a person who is wrongfully deprived of anything to which he is legally entitled and not merely a person who has suffered some sort of disappointment. Where the Judge of the Insolvency Court granted a lease of a hotel to the highest bidder at an auction and the prior lessee of the hotel appealed against the order granting the lease:

Held, that the appellant was not an aggrieved person within the meaning of S. 75 and that the appeal was incompetent. A.I.R. 1931 Lah. 586 =32 P.L.R. 438=133 Ind. Cas. 436.

——S. 75—Application by creditor to set aside alienation—Expiry of time to apply for discharge —Annulment of adjudication and ordering vesting of alienated property in creditor—Appeal by alienee is competent, he being party aggrieved. A. I. R. 1931 Mad. 10=32 L.W. 446=1930 M.W.N. 678=59 M.L.J. 710=129 Ind. Cas. 36.

——S. 75—Order admitting proof of debt—Alienee cannot appeal.

An alienee of the insolvent's property is not a person aggrieved by the order admitting proof in creditor's favour. The fact that the appellant was allowed by the lower Court to cross-examine the witnesses of the creditor would not give him a *locus standi* in the proceedings so as to enable him to present an appeal against the order in favour of the creditor. 112 Ind. Cas. 623=A.I. R. 1928 Mad. 981.

——S. 75 (2)—(1907) S. 46 (2)—Aggrieved person—Transferee of property.

A person claiming to be transferee of a property for valuable consideration and setting up good faith is an aggrieved person if the transfer in his favour is set aside by Court under S. 36, Provincial Insolvency Act. He can appeal from this order. 12 C.L.J. 452=15 C.W.N. 253=7 Ind. Cas. 765.

——S. 75 (1) — (1907) S. 46 (1)—Aggrieved person — Auction-purchaser — Order cancelling sale of outstandings — Auction-purchaser whether can appeal.

Where a sale of the outstanding of insolvent fetched a very low price and the Court cancelled the sale, the auction-purchasers had a right of appeal from that order. 21 P.W.R. 1916=33 Ind. Cas. 995.

14. Powers of High Court.

——S. 75 (1), Proviso — Order of the District Court in appeal under the Insolvency Act—High Court can set it aside in revision.

A High Court is in a position to decide in a revision whether an order passed by the District Court in appeal under the Insolvency Act is according to law and if it is satisfied that it is not so it has the power to set it aside and to pass such order as it thinks fit. A.I.R. 1946 Nag. 24=I.L.R. (1945) Nag. 826=1945 Nag. L.J. 588.

——S. 75—Power to act suo motu.

Under S. 75, the High Court is entitled to act *suo motu* on the facts being brought to its notice. A.I.R. 1937 Nag. 31=I.L.R. (1937) Nag. 512 =168 Ind. Cas. 895.

——S. 75—The jurisdiction conferred by S. 75 is one and indivisible. The tribunal in both cases is the "High Court" not a revisional Court, nor yet an Appellate Court, but the High Court. Its powers are different in the two cases but its jurisdiction is one. Consequently once that jurisdiction is invoked, its order cannot be impeached unless they travel beyond the powers conferred in respect of the particular matter with which it is dealing; if they do, then they are without jurisdiction for jurisdiction is circumscribed by powers. The manner in which the jurisdiction is invoked is a matter of procedure, and the fact that the application is labelled an appeal instead of a revision would at the most be an irregularity. But irregularities which do not affect the merits, or result in prejudice or injustice, are curable in civil no

less than in criminal proceedings. A.I.R. 1935 Nag. 33=31 N.L.R. 212=157 Ind. Cas. 242.

——S. 75—Where the law leaves a matter within the discretion of a Court and the Court, after proper enquiry and due consideration, has exercised the discretion in a sound and reasonable manner, the High Court will not interfere with the conclusion arrived at. A.I.R. 1932 Bom. 228=34 Bom. L. R. 382=139 Ind. Cas. 44.

——Ss. 75, 5—(1907), Ss. 46 and 47—Jurisdiction — High Court, inherent powers of—Protection order.

The High Court as a Court of appeal, can in the exercise of its inherent powers, make an *ad interim* order to protect the appellant and to appoint a Receiver of his assets during the pendency of appeal. 11 C.L.J. 435=14 C.W.N. 586=6 Ind. Cas. 95.

15. Revision.

——S. 75 (1)—Powers of High Court.

Where the orders passed by the District Judge in an appeal in an insolvency case are not in accordance with law, the High Court has, under proviso to S. 75 (1), ample powers to set it aside and pass such orders with respect thereto as it thinks fit. The considerations which are relevant for not interfering in revision with a decision of a Small Cause Court are not applicable to an order passed by the District Court in an appeal under Insolvency Act. A.I.R. 1946 Nag. 24=1945 N. L.J. 588=I.L.R. (1945) Nag. 826.

——S. 75—The High Court can exercise its powers of revision in respect of orders passed by the District Court on appeal. A.I.R. 1932 Oudh 61=8 O.W.N. 1318.

——S. 75 — Revision — Order for additional evidence.

An order for additional evidence passed by the District Judge on appeal is not final within S. 75 (1), and no revision lies under the proviso to S. 75 (1), from such order. But under S. 5 (2) there being no provision in the Act which says that interlocutory order is final and the High Court having power to set aside an interlocutory order passed in a Civil Suit, it has power to set aside the order for additional evidence. 61 Ind. Cas. 589 =A.I.R. 1921 Nag. 159.

——S. 75—Implied order of discharge — Appeal —Revision.

An insolvent applied to the Insolvent Estates Courts, Delhi, for an order to the Receiver to pay him the surplus in the hands. The application was rejected and the order was confirmed on appeal:

Held, that it must be assumed that the Court did pass an order of discharge under S. 355 of the C. P. Code, 1882, as soon as the conditions laid down in that section had been complied with, that S. 358 would, therefore, apply and under S. 356, the petitioner was entitled to receive the surplus in the hands of the Receiver. No appeal lay to Divisional Judge from the order of Insolvent Estates Court. The order can be set aside on revision. 26 P.L. R. 1910=8 Ind. Cas. 222.

——S. 75—Powers of High Court.

In exercising the revisional jurisdiction under the Insolvency Act, the High Court has got wider powers than the powers vested in it by S. 115, C. P. Code. A.I.R. 1938 All. 59=1937 A. L.J. 1221 =1937 A.W.R. 1111=I.L.R. (1938) All. 84= 173 Ind. Cas. 875.

——S. 75—Scope of revision.

The scope of a revision under S. 75 is much wider than that under S. 115, C. P. Code. A.I. R. 1936 All. 489=1936 A.L.J. 698=1936 A.W. R. 585=163 Ind. Cas. 831.

——S. 75—Extent of powers.

The powers of revision of the High Court under S. 75, Provincial Insolvency Act are wider than those under S. 115, C. P. Code. Interference is proper when the order of the lower Court is not according to law. A.I.R. 1933 Nag. 39=28 N. L.R. 295=141 Ind. Cas. 48.

——S. 75—In revision under S. 75, it is only necessary to ascertain whether the decision of the District Judge is in accordance with law. A.I. R. 1933 Mad. 653=38 L.W. 494=65 M.L.J. 298 =145 Ind. Cas. 876.

——S. 75—Application in revision — When appeal is competent.

No application in revision lies against an order of a Small Cause Court Judge exercising insolvency jurisdiction refusing to take proceedings against the insolvent under S. 69, as an appeal lies to the District Court under S. 75 (1). A.I.R. 1937 Oudh 247=1937 O.W.N. 236=166 Ind. Cas. 858.

——S. 75—Exercise of powers of revision— Appeal time-barred.

It would not be proper to utilize the power of the Court in revision in order to entertain an appeal where an appeal is expressly prohibited by the C. P. Code or where an appeal has long been barred by the application of the law of limitation. A.I.R. 1935 Pat. 177=2 B.R. 455=17 P.L.T. 475=162 Ind. Cas. 490.

——S. 75—Interference.

The High Court will not interfere in revision at the instance of the creditor with an order of conditional discharge where the Official Receiver had not appealed against that order and the creditor had opportunity to be heard in the lower appellate Court. A. I. R. 1921 Lah. 647=132 Ind. Cas. 526.

——S. 75—Interference — Order of absolute discharge under S. 42 (1)—Discretion — Interference in revision.

A revisional Court should be very slow to interfere with the exercise by a Judge, in a matter of insolvency, of his discretion in granting an absolute order of discharge under S. 42 (1). I.L. R. (1946) Kar. 265=224 Ind. Cas. 536=A.I.R. 1946 Sind 156.

——S. 75—Grounds for interference — Error of law.

Though a revision under S. 75, Provincial Insolvency Act is wider in its scope than revision under S. 115, C. P. Code, the High Court will not interfere in revision under S. 75 simply because the Court below has committed an error of law. Hence, High Court will not interfere merely because the Court below where there is conflict of judicial authority has preferred one line of rulings to another. But the High Court will interfere if the Court below treats an award which is really an

award under C. P. Code, as one under the Arbitration Act and on a misunderstanding of rulings on which it relies, refuses to hear the award as decree for payment. A.I.R. 1944 Sind 217.

——S. 75—Receiver's sale set aside in appeal on agreement between Advocates of parties — Revision competent.

Where the District Judge, in an appeal from an order passed on an application under Ss. 4 and 68, sets aside a sale held by the Official Receiver in pursuance of an agreement between the Advocates of the parties, a revision is competent under S. 75 on the ground that the District Judge had acted illegally in passing an order on an agreement between the Advocates of the parties. A.I.R. 1943 Mad. 672=(1943) 2 M.L.J. 168=1943 M.W.N. 544=56 L.W. 582=213 Ind. Cas. 218.

——S. 75—Interference by High Court.

No doubt the High Court has power in a proper case to interfere with appellate orders of the District Court in revision but where the judgment of the District Judge shows the issues in the case which are substantially issues of facts, the High Court should not interfere in revision in the absence of sufficient reasons for the same, particularly as no second appeal lies from such judgment of the District Judge. A.I.R. 1942 Bom. 159 =I.L.R. (1942) Bom. 175=44 Bom. L.R. 132 =201 Ind. Cas. 188.

——S. 75—Interference.

Where the debtor accepts in the insolvency proceedings the contention that he was personally liable and had committed acts of insolvency and is adjudicated insolvent and has acquiesced in the adjudication and in the administration of the estate by the Official Receiver, the order of adjudication cannot be challenged in revision if there was no appeal from that order or from the order of vesting the property in the Official Receiver. A. I. R. 1940 Mad. 30=50 L.W. 581=1939 M.W.N. 1094 =(1939) 2 M.L.J. 728=I.L.R. (1940) Mad. 191 =186 Ind. Cas. 125.

——S. 75—Where the orders of the lower Courts are vitiated by mistaken notion as regards the law relating to the onus of proof, the High Court has jurisdiction to interfere in revision under S. 75 (1) of the Act. 1932 M.W.N. 59.

——S. 75—New plea as to jurisdiction, competency of.

Where the plea of want of jurisdiction to hear appeal is not taken before the Appellate Court, it cannot be taken up in revision. A. I. R. 1944 Mad. 49=56 L.W. 654=(1943) 2 M.L.J. 494= 1943 M.W.N. 701=216 Ind. Cas. 75 (D.B.).

——S. 75—New point, when not allowed.

In a proper case, the High Court may allows a point of law not taken below to be raised under S. 75, but where the petition in a revision before the High Court has raised a certain point in the trial Court and in the memorandum of appeal but has dropped it in the Appellate Court, and such point affects his minor son who is not a party to the petition, the High Court will not allow such point to be raised, more specially where the petitioner has been a party to a conspiracy to defraud his son. A.I.R. 1942 Mad. 294=(1941) 2 M.L.J 212=54 L.W. 173=1941 M.W.N. 818=200 Ind. Cas. 808.

——S. 75—New point of law.

An objection which goes to the root of the case may be allowed to be raised in revision even though it is not mentioned in the revision petition nor was it raised in the Courts below. (1938) 40 P. L.R. 433.

——S. 75—Interference — Grounds not raised in lower courts.

When the ground of the petition being defective, has not been raised by the debtors in the lower Courts or in revision, the High Court in revision will not exercise the discretionary powers in regard to a matter which they themselves did not raise A. I. R. 1937 Rang. 189=170 Ind. Cas. 942.

——S. 75—Questions of fact cannot be reconsidered in revision. A.I.R. 1945 Mad. 253=1945 M.W.N. 276=58 L.W. 260=(1945) 1 M.L.J. 469.

——S. 75—Finding of fact—Intererference.

The first proviso to S. 75 (1) confers a right of interference upon the High Court only in cases where the Court is satisfied that the decision of the Appellate Court is not according to law. A finding of fact arrived at on a consideration of the evidence and the circumstances of the case, and involving no question of law will not be interferred with when the Judge committed no error of law in coming to this finding. A.I.R. 1942 Oudh 80 =1941 O.W.N. 1218=1941 A. W. R. 347=196 Ind. Cas. 881.

——S. 75—Finding of fact.

A finding as to the absence of fraudulent intention is a finding of fact which cannot be disturbed. (1939) 41 P.L.R. 655.

——S. 75—Powers of High Court—Findings of facts—Interference.

The powers of the High Court in revision are discretionary and although the High Court under the Proviso to S. 75, has wider powers than under S. 115, C. P. Code, those powers extends no further than those given by the corresponding provisions in the Provincial Small Cause Courts Act. It is now a well-established practice not to interfere even under the last-mentioned Act on questions of fact unless there has been a patent misarriage of justice. A.I.R. 1937 Mad. 930=1937 M.W.N. 762 =46 L.W. 416=177 Ind. Cas. 177.

——S. 75—Interference with findings.

S. 75 clearly contemplates that the High Court should be very reluctant to interfere in revision with the findings arrived at by the District Judge unless the order is perverse or palpably wrong. A. I. R. 1935 Oudh 406=1935 O.W.N. 374=11 Luck. 61=154 Ind. Cas. 908.

——S. 75—Treating second appeal as revision.

Where the point involved is of some importance, the High Court may treat a second appeal as revision. A.I.R. 1943 Sind 176=I.L.R. (1943) Kar. 203=208 Ind. Cas. 604.

——S. 75—The High Court may treat a second appeal as a petition for revision. (1937) 170 Ind. Cas. 488=1937 O.W.N. 807.

——S. 75—Conversion of second appeal into revision.

Where the order is based on points not taken in the grounds of appeal nor supported by evidence, the High Court may interfere treating the appeal

as a petition for revision. A.I.R. 1934 Lah. 198=35 P.L.R. 114=150 Ind. Cas. 180.

——Ss. 75 (3), 5—(1907), Ss. 46 (3) and 47—Treatment of appeal as revision.

Where the leave required under S. 46 (3) is not obtained from the District Court the appellate Court may treat the appeal as revision under S. 47 (2). 8 Bur. L.T. 282=30 Ind. Cas. 943

16. Second Appeal.

(a) When competent.
(b) When not competent.

16. (a) Second Appeal—When competent.

——Ss. 75 (1), 53 and 4—Annulment of transfer—Insolvency Court treatng matter as one under S. 4—Second appeal.

Where in annulling a transfer made by an insolvent the insolvency Court treats the matter as one under S. 4 of the Provincial Insolvency Act, for the purpose of deciding the question whether an appeal lies, the matter must be regarded as one under S. 4 of the Act whatever the view of the lower appellate Court, and a second appeal is therefore competent in such a case. I.L.R. (1950) Nag. 331=1950 N.L.J. 105=A.I.R. 1951 Nag. 268.

——S. 75 (1) (2) — Order disposing of questions arising in insolvency—Second appeal.

Where the questions disposed of by an order of the Insolvency Judge are questions "arising in insolvency" the order is one under S. 4 of the Provincial Insolvency Act, and a second appeal lies from that order. A.I.R. 1949 All. 464.

——Ss. 75, 4 and 28—Question, whether earnings of insolvent vest in Receiver.

The question whether the earnings of an insolvent would or would not vest in the Receiver under S. 28, cl. (5), has to be decided by the Insolvency Court under the provisions of S. 4 of the Act which expressly provides for a second appeal. A.I.R. 1942 Bom. 191=44 Bom. L.R. 264=I.L.R. (1942) Bom. 287=202 Ind. Cas. 157.

——S. 75 (1)—Order adjudicating karta of family as insolvent and appointing Receiver.

The order of a District Judge adjudicating *karta* of a joint Hindu family as insolvent and appointing a Receiver falls under S. 4 and is, therefore, open to second appeal without leave. A.I.R. 1937 Cal. 617=41 C.W.N. 1079=I.L.R. (1937) 2 Cal. 675=66 C.L.J. 315=172 Ind. Cas. 914.

——Ss. 75 (3), 4, 68—Attachment before judgment—Compromise decree — Purchase of house by decree-holder — Judgment-debtor adjudicated insolvent—Sale by Receiver of house—Validity—Objection by decree-holder — Rejection of —Appeal, if competent.

The appellant filed a suit for recovery of money and attached the defendant *N's* property before judgment. A compromise decree was passed providing that till payment of the decretal amount, the house should remain in attachment. Subsequently, the defendant *N* mortgaged the house to one *B*. Later on, the appellant got the house sold in execution and purchased it himself. Soon after, *N* applied to the adjudicated an insolvent and on his adjudication, the Receiver took possession of the house and sold it to *B*. Appellant's objection was rejected and his appeal dismissed. He filed a second appeal:

Held, that the investigation of the appellant's objection must be deemed to be under S. 4, Provincial Insolvency Act, though the Court was moved under S. 68 of the Act, and appeal was competent. A.I.R. 1937 Lah. 297=174 Ind. Cas. 668.

——S. 75 (1), Second proviso.

Where the Official Receiver takes possession of the property as one belonging to insolvent and a certain person takes objection under S. 68 on the ground that the property belongs to him and not to the insolvent and the Insolvency Court frames issues, records evidence and then disposes of the objection in favour of the person objecting and releases the property, an appeal lies against the order releasing the property under second proviso to sub-S. (1) of S. 75, as the Insolvency Court must be deemed to have investigated the claim of the objector under S. 4 of the Act, he not having merely heard an appeal from the action of the Official Receiver. A.I.R. 1937 Lah. 757=40 P.L.R. 465=175 Ind. Cas. 853.

——S. 75—Second appeal, when lies.

Under S. 75, a second appeal lies to the High Court from the decision of the District Court on appeal if the Insolvency Court has decided any of the matters referred to in S. 4 but where no question of title or priority arises, no second appeal lies to the High Court. A.I.R. 1934 Lah. 807=36 P.L.R. 5=150 Ind. Cas. 305.

——S. 75—Declaratory suit—Second appeal.

A suit for declaration that certain property of insolvent is liable to attachment and sale in execution of decree against him, is a matter within S. 4 of the Act and a second appeal from a decision therein is competent. 78 Ind. Cas. 140=A.I.R. 1924 Nag. 361.

——S. 75—Finding — Vitiated by an error of law—What is—Interference in appeal.

The consideration for a mortgage consisted of two main items, the second item being of Rs. 3,000, kept in deposit for payment to a previous mortgagee. The previous mortgage-deed was in possession of the second mortgagee; and the discharge of the previous mortgage was admitted by the first mortgagee. The lower appellate Court upheld the annulment of the mortgage under S. 55 remarking that there was an initial presumption of collusion and hence the proof was insufficient overlooking the mortgagee's own evidence:

Held, that the finding was vitiated by an error of law. A.I.R. 1930 Lah. 122.

16. (b) Second Appeal—When not competent.

——S. 75—The right of appeal is strictly limited by the provisions of S. 75 of the Act and there can be no appeal from a decision of the District Judge passed in an appeal from a decision of a Subordinate Court unless the latter is one under S. 4 of the Act. A.I.R. 1935 Mad. 432=158 Ind. Cas. 59 (2).

——S. 75—No appeal lies under S. 75, Provincial Insolvency Act from the order of the District Judge passed in appeal. A.I.R. 1943 Sind 190=I.L.R. (1943) Kar. 238=210 Ind. Cas. 25.

——S. 75—Under S. 75, the order of the District Judge on appeal is final. No second appeal is, therefore, competent. A.I.R. 1939 Lah. 300=42 P.L.R. 243=184 Ind. Cas. 472.

——S. 75—Quaere.—It is doubtful whether second appeals are competent in cases where no question falling under S. 4 has been decided. A.I.R. 1939 Lah. 346=I.L.R. (1940) Lah. 40=41 P.L.R. 816=187 Ind. Cas. 839.

——S. 75—S. 75 allows only one appeal against an order passed by a Subordinate Court in the exercise of insolvency jurisdiction. A.I.R. 1932 Oudh 61=8 O.W.N. 1318=135 Ind. Cas. 893.

——S. 75 (2)—Sub-S. (2) of S. 75 is limited to appeals against decisions or orders made otherwise than in appeal, and hence no appeal lies from the decision of the District Judge on appeal.

[The appeal was treated as revision under S. 75 (1), as the point raised was of some important]. A.I.R. 1943 Sind 176=I.L.R. (1943) Kar. 203=208 Ind. Cas. 604.

——Ss. 75, 53 and 4—Relief under S. 4 linked with one under S. 53—Order only under S. 53—Second appeal, if lies.

The Official Receiver filed an application under S. 53 to set aside a partition decree on the ground that it was fraudulent and collusive, under S. 4 of the Act; he also asked in the alternative that the partition might be re-opened. The application was dismissed. In appeal, the District Judge set aside the petition under S. 53:

Held, that a second appeal was not competent even though a relief under S. 4 had been linked with the relief under S. 53, because the order was only under S. 53 and not under S. 4. A.I.R. 1943 Mad. 369 =(1943) 1 M.L.J. 39=56 L.W. 130=1943 M.W. N. 37=209 Ind. Cas. 290.

——S. 75—No second appeal lies from an order made by the Subordinate Judge under Ss. 53 and 54. A.I.R. 1940 Bom. 51=I.L.R. (1940) Bom. 1=41 Bom. L.R. 1258=187 Ind. Cas. 508.

——S. 75—Where an Insolvency Court acting under the power conferred by S. 53, annuls a transfer of property and the District Court confirms this order, no second appeal lies to the High Court. A.I.R. 1931 Nag. 153=27 N.L.R. 179=134 Ind. Cas. 687 (F.B.).

——S. 75—Scope—Cases decided under S. 53.

S. 75 is confined to cases falling under S. 4 only and a case decided under S. 53 does not properly fall under S. 4. A.I.R. 1930 Lah. 122.

——S. 75—Order granting conditional discharge Competency of second appeal—Revision.

Only one right of appeal is provided by the Insolvency Act under S. 75 so far as decision other than decisions under S. 4 of the Act are concerned. The finality of the appellate order of the District Court can be challenged only by way of revision to the High Court as provided by the proviso to sub-Cl. (1) of S. 75. An order by the trial Court granting conditional discharge to the insolvent does not come within S. 4 and consequently, no appeal lies from the appellate order of the District Judge passed thereon. The appellate order can be challenged only by way of revision to the High Court. A.I.R. 1942 All. 219 =1942 A.W.R. 178=1942 A.L.J. 325=I. L. R. (1942) All. 756=201 Ind. Cas. 386 (F.B.).

——S. 75—The decision of the question whether the debtor has a right to present the petition for insolvency comes under S. 25 and is subject to only an appeal and a second appeal against that decision is incompetent. A.I.R. 1942 Oudh 80=1941 A.W.R. 347=1941 O.W.N. 1218=196 Ind. Cas. 881.

——S. 75—Interest allowed at rate higher than permissible.

Where, in the scheme, a higher rate of interest is allowed by the Official Receiver on the debts, than is permissible under the provisions of the Provincial Insolvency Act and the scheme is approved by the District Judge in appeal, the question is not one in respect of which an appeal lies from the District Court to the High Court. A.I.R. 1938 All. 28=1937 A.L.J. 1071=1937 A.W.R. 1068=I.L.R. (1938) All. 50=172 Ind. Cas. 997.

——Ss. 75 (1), 4 and 9—Decision of first Court under S. 9 and not under S. 4—Second appeal, if lies—Held, on facts that applicants were rightly declared insolvents.

Where the decision of the first Court was one under S. 9, and not under S. 4, as no question of title or priority was decided, no appeal lies to the High Court from the appellate order of the District Court. [Appeal, however, was treated as revision application.] (1937) 170 Ind. Cas. 488=1937 O.W.N. 807.

——S. 75—Order refusing discharge.

No second appeal is competent under S. 75 from an order refusing to grant an absolute discharge. A.I.R. 1934 Lah. 198=35 P.L.R. 114=150 Ind. Cas. 80.

——S. 75—Order appointing interim Receiver.

Under S. 75, a second appeal does not lie from an order passed by the District Judge on appeal from a Subordinate Judge's order appointing an *interim* Receiver. A.I.R. 1932 Bom. 228=34 Bom. L.R. 382 =139 Ind. Cas. 44.

——S. 75—Extension of time for discharge—No second appeal.

Order under S. 27 extending time during which to apply for discharge is not one that can be taken to be under S. 4. Proviso of S. 75 (1) will not apply to such an order and second appeal will not therefore lie. 114 Ind. Cas. 847=52 Mad. 337=29 M.L.W. 60=A.I.R. 1929 Mad. 43=55 M.L.J. 837.

17. Miscellaneous.

——S. 75—Abatement — Insolvency of firm of partners—Appeal by creditors from order in insolvency proceedings — Death of some debtors—Non-substitution of heirs—Effect.

Where in an appeal by creditors under S. 75 of the Provincial Insolvency Act, some of the debtors (respondents) die, but their heirs are not brought on record, the appeal does not abate; the non-substitution of the heirs of some of the debtors does not affect the appeal. The receiver represents the estate and a decision binding the receiver will bind the estate of the debtors. No question of conflicting decisions can arise in the case. Further when the debtors were members of a firm and it is the firm that has been adjudicated insolvent, the law of abatement will not strictly apply. 26 Pat. 648=A.I.R. 1949 Pat. 63=(1948) P.W.N. 15.

——S. 75—Death of party to appeal—No abatement.

Where in an appeal against an order of District

Judge a creditor died and no legal representatives are brought on the record within the time fixed by law, the appeal does not abate as the real person who is interested in the appeal is the Official Receiver. 103 Ind. Cas. 623=9 L.L.J. 257=A.I.R. 1927 Lah. 424.

——S. 75—Preparation of decree.

Where the appeal in the District Court is a miscellaneous appeal against an order under S. 25, the judgment of the District Judge should not be followed by decree but should be followed by a formal order adjudicating the appellants. A.I.R. 1936 Rang. 26=13 Rang. 717=160 Ind. Cas. 109.

——S. 75—Variation of an order in an appeal under S. 75 is not a variation of a decree within the terms of S. 144, C. P. Code. A.I.R. 1935 Mad. 783=69 M.L.J. 84=1935 M.W.N. 875=42 L.W. 444=160 Ind. Cas. 381.

——S. 75—Powers of Appellate Court—Annul adjudication.

When an appeal against an order of adjudication has been made under S. 75 (1) the Court has authority to annul or set aside an order of adjudication. 1939 M.W.N. 651.

——S. 75—Scope of enquiry in appeal.

Where there are circumstances tending to show that there has been fraud or collusion, or miscarriage of justice, the Insolvency Court has power to go behind the judgment and to enquire into the validity of the debt. (1874) 10 Ch. A. 373; (1889) 22 Q.B.D. 83; (1895) 1 Q.B. 404, Foll. 62 Ind. Cas. 441=15 S.L.R. 28=A.I.R. 1921 Sind 36.

——S. 75 (1), (4) (1907), S. 46 (1) (4)—Petition of insolvency — Subsequent composition — Cannot be adjudicated afterwards.

When a person after petitioning for insolvency effects a composition in full discharge of all his liabilities, he can no longer be regarded as an insolvent and his petition should be dismissed. 80 P.W. R. 1916=33 Ind. Cas. 730.

——S. 76—Costs against Receiver.

When the Official Assignee or the Official Receiver files a suit in a Court other than the Insolvency Court of which he is the insolvency officer, the Court trying the suit or the application may dismiss the suit or the application with costs. In such a case, the plaintiff or the applicant, that is, the Official Assignee or the Official Receiver is always personally liable for costs. But where the Official Assignee of the Official Receiver is a defendant or a respondent, the position is different. In such a case he has to defend the action or at least to put the plaintiff or the applicant to proof of his claim and to watch the proceedings to see that the claim is properly proved. In such a case, there is no justification whatever for the Court to make the Official Assignee or the Official Receiver personally liable to the plaintiff. Even if he had remained *ex parte*, some costs would have to be paid to the plaintiff or the applicant and that can only be out of the estate. So where the Official Assignee or the Official Receiver appears and is not guilty of gross misconduct in his defence, the usual rule ought to be that the costs should come out of the estate. In any case, the Court before which the suit or the application comes on, has no jurisdiction to say whether the Official Assignee or the Official Receiver should or should not debit it as against the estate which he represents. That is a matter for the Insolvency Court of which he is the officer. It is open to the Official Receiver to reimburse himself out of the estate even without an order of the Insolvency Court and as between himself and the estate, he shall not be liable for costs unless the Insolvency Court, by a specific order, so directs. A.I.R. 1941 Mad. 632=1941 M.W. N. 341=53 L.W. 680 (2)=(1941) 2 M.L.J. 110 =198 Ind. Cas. 573.

——Ss. 76 and 5—Discretion of Insolvency Court.

There is no prohibition to a Court exercising its discretion in the matter of costs and in the exercise of that discretion, applying the provisions of S. 35-A, C. P. Code to such cases as it deems fit for that application. A.I.R. 1935 Nag. 207=31 Nag. L.R. 365=158 Ind. Cas. 394.

——S. 76—Costs — Personal liability of Receiver.

Where the Receiver of an insolvent's estate brings an action against a third person and he is ordered to pay the costs of the latter, in the absence of an express direction in the decree to the contrary, the Receiver is, in the first instance, personally liable for the costs, though he may have a right to be reimbursed out of the insolvent's estate. If he wants to safeguard his personal interest, he should obtain an indemnity from the creditor or other person in whose interest he is conducting the litigation. A. I.R. 1932 All. 288=1932 A.L.J. 226=54 A. 444 =137 Ind. Cas. 70.

——S. 77—Adjudication by Rangoon High Court —That Court sending a letter to the District Court at Ramnad in Madras Presidency requesting it to direct the Official Receiver of that place to render help to Official Assignee of Rangoon——District Court, Ramnad, acting in aid of administration of insolvent's estate from 1937, *i.e.*, before separation of Burma—Application made to District Court, Ramnad, for possession by purchaser of insolvent's property after separation of Burma:

Held, that District Court at Ramnad had power to deal with application although made after separation of Burma. A.I.R. 1944 Mad. 481=57 L.W. 451=(1944) 2 M.L.J. 52=I.L.R. (1945) Mad. 10 =1944 M.W.N. 492 (F.B.).

——S. 77—Powers of auxiliary Court.

Under S. 77, a letter of request shall be deemed sufficient to enable the auxiliary Court to exercise in regard to matters directed by the order, such jurisdiction as either of such Courts could exercise in regard to similar matters within their respective jurisdiction. Hence, where the Receiver of the auxiliary Court has been directed to take possession of the property, sell it, and transmit the net sale proceeds, his jurisdiction is subject to the control of the auxiliary Court in matters relating to taking possession, and transmission of the sale proceeds to the Court issuing the letter of request. But the auxiliary Court has no power to conduct enquiries subsequent to the sale and subsequent to delivery of possession into claims by third parties. A.I.R. 1941 Mad. 75=1940 M.W.N. 905=52 L.W. 377.

——S. 77—(1907), S. 50—Jurisdiction.

The Court wherein the proceedings are initiated and the Court invited to assist it must both have

jurisdiction in insolvency matters. 12 C.L.J. 452 =15 C.W.N. 253=7 Ind. Cas. 765.

——S. 77—Official Assignee, if represents creditors for all purposes.

The Official Assignee does not represent the creditor for all purposes in insolvency proceedings. In many respects, his interest and that of a creditor may be in conflict. A.I.R. 1940 Cal. 225= 190 Ind. Cas. 537.

——S. 78.

Synopsis.

1. Sub-S. (1)—Applicability.
2. Sub-S. (2)—Applicability and scope.
3. Sub-S. (2)—Exclusion of time.
4. Sub-S. (2)—Who can invoke.
5. Sub-S. (2), Proviso—Debt provable but not proved.
6. Retrospective operation of section.
7. Suit filed after limitation but before annulment of adjudication—Procedure.

1. Sub-S. (1)—Applicability.

——S. 78 (1)—Applicability — Creditor's petition under S. 9.

The power to excuse delay in respect of "applications" given under S. 78 by reference to S. 5, Limitation Act, is not applicable to excuse delay in filing a "creditors' petition" under S. 9.

Applications and petitions distinguished and difference pointed out. A. I. R. 1932 Mad. 352= 1932 M. W. N. 204=35 L. W. 544=63 M.L.J. 152=55 M. 766=137 Ind. Cas. 740.

——S. 78—Delay in application for leave.

Delay in application for leave to appeal may be excused under S. 78 and the fact that no appeal was necessary under the old Act is a sufficient reason for doing so. 80 Ind. Cas. 376=18 M. L.W. 808=1923 M.W.N. 746=A. I. R. 1924 Mad. 400 =45 M.L.J. 844.

——S. 78—Court can excuse delay under S. 78 in the presentation of an appeal or application and in a proper case High Court will excuse the delay in asking for leave to appeal under S. 75 (3). 79 Ind. Cas. 395=47 Mad. 673=18 M.L. W. 857=33 M.L.T. 196=A.I.R. 1924 Mad. 345.

——S. 78—"Application"—Petition for insolvency.

Quaere.—The question whether the term "application" as ceased in S. 78, Provincial Insolvency Act includes a petition for insolvency is not free from difficulty, there being opposite views on the point. A.I.R. 1930 Lah. 417.

——S. 78 (1)—"Applications"—Petitions for insolvency.

Although it is true that S. 78, Provincial Insolvency Act, makes S. 5, Limitation Act, applicable to appeals and applications under the Provincial Insolvency Act, yet it does not extend the application of S. 5, Limitation Act, to petitions to adjudicate a person insolvent. Such petitions are not included in the word "applications" as used in S. 78, Provincial Insolvency Act. Delay in presenting petitions beyond three months will not therefore be excused in any case. 112 Ind. Cas. 646=A.I.R. 1928 Sind 177.

——S. 78—Old and new Act.

Section 5 of the Limitation Act did not apply to petition made under Act 3 of 1907. But under the new Insolvency Act, S. 5 has been specifically declared to be applicable. 90 Ind. Cas. 254=26 P.L.R. 501=7 L.L.J. 201=A. I. R. 1925 Lah. 436.

——S. 78—Applicability — Application under old Act.

An application by a creditor to adjudicate the debtor an insolvent made statedly under the Act of 1907 which could be made only under that Act on its date, cannot be considered to be an application under the new Act of 1920, merely because it was pending disposal when the new Act came into force. Nor can the discretion given to the Court by the Legislature statedly in respect of application under the New Act be extended to applications made under the old Act. 64 Ind Cas. 270=1921 M.W.N. 381=A.I.R. 1921 Mad. 272 =41 M.L.J. 126.

2. Sub-S. (2)—Applicability and scope.

——S. 78 (2)—Applicability—Adjudication as insolvent under old Act — Creditors, if can obtain annulment or exemption under new Act.

The provisions of the Provincial Insolvency Act of 1920 have no retrospective effect. Consequently the right conferred upon a debtor who had filed an insolvency petition under the Act of 1907 and secured an adjudication order, cannot be divested under the Act of 1920. The Act of 1907 governs the case and creditors cannot get that order annulled under the new Act; nor can they claim exemption under S. 78 (2), Provincial Insolvency Act, 1920. A.I.R. 1932 Sind 71=26 S.L.R. 204=139 Ind. Cas. 589.

——S. 78 (2)—Applicability.

When a debt, though provable under the insolvency is not admittedly proved, S. 78 (2) can have no application. A debt is provable unless it falls under S. 34 (1). A.I.R. 1944 Nag. 313=1944 N.L.J. 391=I.L.R. (1945) Nag. 427.

——S. 78 (2)—Applicability—Setting aside of adjudication by Appellate Court.

The opening words of S. 35 "where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent" are wide enough to include an annulment resulting from the setting aside of adjudication by the Appellate Court, the words "annulled under this Act" in S. 78 (2) would include an annulment resulting from the setting aside of the adjudication by the Appellate Court. A. I.R. 1943 P.C. 98=56 M.L.W. 444=47 C.W.N. 715=1943 A.W.R. 11=(1943) 2 M.L.J. 121= 1943 A.L.J. 323 (2)=10 B.R. 49=1943 M.W. N. 565=1943 Nag. L.J. 587=I.L.R. (1943) Nag. 669=70 I.A. 83=46 Bom. L.R. 306=I. L. R. (1943) Kar. (P.C.) 109 (Sup.)=208 Ind. Cas. 102 (P.C.).

——S. 78 (2)—Appeal from order of adjudication —Decree-holder's application for execution whether can exclude period between adjudication and its setting aside by High Court in appeal.

The Provincial Insolvency Act gives right of appeal to the High Court against the order of adjudication. If the High Court sets aside the order of adjudication by virtue of the power conferred on

it under the provisions of the Act, it certainly does so under the Act. So long as the order of adjudication remains in force, a creditor cannot proceed in execution without the leave of the Court. There is no difference in principle between the setting aside of the order of adjudication in appeal against an order of adjudication and the annulment of the order of adjudication under Ss. 35, 36, 39 and 43 so for as limitation is concerned. The disability of the creditor during the period from the date of the order of adjudication to the date, when the order is rendered void in law, is the same in both cases.

On the adjudication of the judgment-debtor as insolvent, the decree-holder can, in an application for execution under S. 78 (2), exclude the period between order of adjudication and the order of the High Court setting it aside. A. I. R. 1937 Cal. 158=I.L.R. (1937) 1 Cal. 628=171 Ind. Cas. 280.

——S. 78 (2)—Adjudication of defendant set aside on appeal — Intervening period — Exclusion for computing limitation for suit against defendant—Legality of—'Annulled', significance of.

The defendant was adjudicated insolvent in 1926 and the debts were proved before the Official Receiver in 1927. The order adjudicating him as insolvent was set aside by the High Court in 1928 with a direction to the lower Court to proceed with the application in accordance with law. The lower Court refused the application in April, 1930, and an appeal from order was dismissed in July, 1930. The plaintiff instituted his suit for money against the defendant and contended that the period between the date of adjudication and the date of annulment should be excluded under S. 78 (2), Provincial Insolvency Act in computing the period of limitation for the suit:

Held, that inasmuch as there was a valid order which had been annulled on appeal, S. 78 (2), Provincial Insolvency Act, applied, although the order of the High Court used the words 'set aside' and not the word 'annulled' and that the period between the date of adjudication and the date of annulment must be excluded:

Held, also that no distinction should be drawn between the effect of the annulment of an order under S. 35 and the effect of the discharge of an order by a Court of Appeal. A.I.R. 1933 Lah. 953=34 P.L.R. 812=14 L. 426=146 Ind. Cas. 686.

——S. 78 (2)—Applicability.

The plaintiff brought a suit in 1942 upon a promissory note executed by the defendant in 1935 in renewal of an earlier promissory note of 1932. When the note of 1935 was executed, the defendant had been adjudicated an insolvent. This adjudication was in July, 1934, and the insolvency continued until it was annulled in September, 1941. The defendant contended that although the pro-note of 1932 evidenced a debt provable in insolvency, that debt ceased to exist when it was renewed in 1935 and a new debt arose and that new debt having been incurred after the adjudication was not provable in insolvency and S. 78 (2), had therefore no application:

Held, that in essence, a pro-note was not itself a debt but only evidence of a debt. As the debt evidenced by the pro-note of 1935 had been in existence since 1932, it was provable in insolvency and hence S. 78 (2) applied to the suit on the pro-note of 1935. A.I.R. 1943 Mad. 658=(1943) 2 M.L.J. 157=1943 M.W.N. 521=56 L.W. 414 (1)=211 Ind. Cas. 96.

——S. 78 (2)—Applicability—Absolute discharge granted to insolvent.

S. 78 (2) excludes time only in the case of annulment of an order of adjudication; and it cannot be applied even by analogy to a case where adjudication was not annulled but an absolute discharge was granted to the insolvent. A.I.R. 1941 Nag. 60=1940 N.L.J. 605=1942 N.L.J. 294=I.L.R. (1942) Nag. 306=191 Ind. Cas. 554.

——S. 78 (2)—Applicability.

Quaere.—Whether S. 78 (2) will or will not apply when the adjudication has not been annulled but leave is merely granted to a particular person to proceed with his remedy in the ordinary Court. A.I.R. 1934 Mad. 392=39 L.W. 639=67 M.L.J. 762=57 M. 808=150 Ind. Cas. 113.

——S. 78 (2)—Applicability—Withdrawal of petition for adjudication.

S. 78 has no application to a case in which the decree-holder and not the judgment-debtor is the insolvent. Further S. 78 has no application to a case where before the order of adjudication the petition for adjudication is withdrawn and no order of adjudication is actually made. A.I.R. 1931 Mad. 784=1931 M.W.N. 1014=135 Ind. Cas. 315.

——S. 78 (2)—Scope — Suit on promissory note against son pending insolvency of father—Limitation.

S. 78 which provides for the exclusion of the period between the date of adjudication and the date of the annulment necessarily involves the conclusion that the cause of action cannot be said to have been barred during the interval. The provision is not that on the happening of the latter event, a new right is created but the provision is one providing for the exclusion of the period between the two events. Hence, it follows that in case of a joint Hindu family a claim against the sons can be enforced even during the insolvency of the father. A.I.R. 1945 Mad. 73=(1944) 2 M.L.J. 158=1944 M.W.N. 576.

——Ss. 78 (2) and 28 (7)—Scope—Limitation for suit — Only period between date of adjudication and date of annulment can be excluded.

S. 78 (2) is not governed by S. 28 (7). All that S. 28 (2) says is that after the order of adjudication has been pased, if a creditor wants to maintain an action he can do so only with the leave of the Court. In the absence of a bar to institute a suit on the basis of the cause of action afforded to a creditor before the date of the adjudication, there is no reason to import the doctrine of relation back contained in S. 28 (7), for saving limitation, particularly when S. 78 (2) is quite clear. Consequently, while computing limitation for a suit against a person who was adjudicated insolvent and the adjudication was subsequently annulled, only the period between the date of adjudication and the date of annulment can be excluded and not also the period between the date of application and the date of adjudication. A.I.R. 1943 Nag. 156=1943 N.L.J. 169=I. L. R. (1943) Nag. 326=206 Ind. Cas. 226.

——S. 78 (2)—Suit after annulment of adjudication on pro-note executed before petition in insolvency—Period plaintiff is entitled to deduct.

The statute of limitation for the maintenance of an action at law once it has commenced to run, will continue to run in spite of the presentation of the petition in insolvency. If the order of adjudication is made, the operation of the statute of limitation is suspended till the date of the annulment and if the adjudication is annulled, the period between the date of the adjudication and that of annulment is excluded and the statute begins to run immediately on annulment. If no order of adjudication is made, the insolvency does not save the claim from being barred by limitation. So, under the law as it stands, a prudent creditor in order to keep his debt alive, will be obliged to file a suit to save it from the bar of limitation in spite of insolvency. Where, therefore, a plaintiff brings a suit after the adjudication is annulled upon a promissory note executed by the insolvent before the petition in insolvency was presented, he is entitled to deduct from the period of limitation only the period from the order of adjudication to the order of annulment and not from the date of presentation of the petition in insolvency to order of annulment. A.I.R. 1938 Mad. 19=1937 M. W. N. 929=46 L.W. 559=(1937) 2 M.L.J. 703=I. L.R. (1938) Mad. 439=176 Ind. Cas. 321.

——S. 78 (2)—Annulment of adjudication — Suit against insolvent—Limitation—Period deductible.

In computing the period of limitation for a claim against a person who has been adjudged insolvent but whose adjudication has been annulled, the period to be excluded under S. 78 is only the period of time between the date of the adjudication and the date of the annulment. The plaintiff is not entitled to exclude the whole of the period between the presentation of the petition and the annulment of the adjudication on the legal fiction that the adjudication relates back to the date of the presentation of the petition. A. I. R. 1936 Mad. 290=1936 M. W. N. 49=43 L. W. 520=161 Ind. Cas. 186.

——S. 78 (2)—Scope.

S. 78 (2) was intended to incorporate the principle of S. 14, Limitation Act, so as to meet the situation which is likely to arise frequently in insolvencies. That principle operates to enable a person who was prosecuting with due diligence another proceeding founded upon the same cause of action in another Court, to exclude the time during which he was so prosecuting that proceeding. Want of diligence, and failure to do what could be done to recover the debt in spite of the insolvency, that is to say, a failure to prove for the debt, would deprive a party of the benefit of the section. A.I.R. 1940 Mad. 716=1940 M.W.N. 566=51 L.W. 697=(1940) 2 M.L.J. 17=I.L.R. (1941) Mad. 136=193 Ind. Cas. 705.

——S. 78 (2)—Scope — Execution application — Extent of benefit.

The language of S. 78 (2) is comprehensive enough to affect and control the computation of the period of time limited, whether by S. 48, C. P. Code, the Limitation Act, or any other statute. The time during which the insolvency was pending must be excluded in computing the period of limitation for execution of a decree by whatever statute that period might have been fixed. Within the enlarged time so obtained, it is open to the decree-holder to make any number of applications each one of which again has to be tested by reference to Art. 182, Limitation Act. A.I.R. 1939 Mad. 270=I.L.R. (1939) Mad. 611=48 L.W. 881=1938 M.W.N. 1255=183 Ind. Cas. 337.

——S. 78 (2)—Limitation, meaning of — C. P. Code, S. 48.

If the law fixes a period of time after which a suit or other proceeding is not to be entertained by the Court, the period so limited is etymologically a period of limitation and as such, S. 48, C. P. Code does not enact a rule of limitation and it is in the sence that this expression has been used in S. 78 (2), Provincial Insolveny Act. A. I. R. 1939 Mad. 270=48 L.W. 881=1938 M.W.N. 1255 =I.L.R. (1939) Mad. 611=183 Ind. Cas. 337.

——S. 78 (2)—Scope—C. P. Code, S. 48.

The words "the period of limitation prescribed for any suit or application for execution of a decree" in S. 78 (2) are general and comprehensive and include the period of time prescribed in S. 48, C. P. Code. A.I.R. 1932 Oudh 69=8 O.W.N. 1186=134 Ind. Cas. 878=7 Luck. 397.

——S. 78 (2)—Adjudication of creditor.

Time cannot be excluded under S. 78 (2) in cases in which it is the creditors or decree-holders who were insolvent and who after the orders of annulment institute a suit or file application for execution. 121 Ind. Cas. 485=1929 M.W.N. 369=30 M.L.W. 327=A.I.R. 1929 Mad. 715.

3. Sub-S. (2)—Exclusion of time.

——S. 78—Period between the adjudication of a Hindu father and its annulment—If can be excluded for purposes of execution against his sons, of a decree against the father and sons. *See* HINDU LAW—FATHER. (1947) 1 M.L.J. 85.

——S. 78—Debt alive against father is alive against son in absence of special circumstances.

In a joint Hindu family, when the debt is alive against the father, it is alive against the son in the absence of special circumstances, such as when created by a renewal after the partition between the father and son, or perhaps the position when the father and son were both defendants and the father alone was an insolvent against whom limitation is saved under S. 78. A.I.R. 1943 Mad. 94=1942 M.W.N. 470=207 Ind. Cas. 124.

——S. 78 (2)—Exclusion of time under, for suit or application for execution of decree by creditor—Limits—Annulment of adjudication and order under S. 37 vesting the insolvent's estate in the Official Receiver for administration for the benefit of the creditors—Formal order closing proceedings passed nine years thereafter—Period between date of the closing of the proceedings, if can be excluded—Limitation Act (9 of 1908), S. 15—Applicability.

After the passing of a decree on 25th February, 1933, for a particular amount and costs, the judgment-debtor was by an order of adjudication passed on 4th July, 1933, adjudged insolvent. As the insolvent filed to apply for his discharge within the time allowed, on a creditor's application the Court, on 21st November, 1934 annulled the order of adjudication and under S. 37 of the Provincial Insolvency Act passed an order vesting the insol-

vent's property in the Official Receiver for administration for the benefit of the creditors. The decree-holder tendered proof of his debt on 12th April, 1935, which was accepted by the Official Receiver. The Official Receiver realised some of the assets of the insolvent and on 10th May, 1940, paid to the creditors a dividend. On 12th February, 1943, the Subordinate Judge passed an order closing the proceedings. The Official Receiver, however, still had in his possession some amount belonging to the insolvent and on 9th December, 1943, the decree-holder applied for execution of his decree by the attachment of this amount. On an objection that the decree was barred by limitation, the decree-holder contended that he was entitled to exclude the entire period between the date of the order of adjudication and the final order closing the proceedings:

Held, that the order of the 21st November, 1934, was an order annulling the adjudication under the Act and as it was the date of that order which was material, the application for execution was hopelessly time-barred. The fact that an order had been passed under S. 37 of the Act vesting the insolvent's property in the Official Receiver had no bearing on the point. It could not preclude the decree-holder from applying for execution and even assuming that he would require the leave of the Insolvency Court to proceed against the assets in the hands of the Official Receiver, that would not affect the position. Nor could S. 15 of the Limitation Act help the decree-holder inasmuch as there was no specific stay of the execution of the decree. I.L.R. (1947) Mad. 661=60 L.W. 15=1947 M.W.N. 38=A.I.R. 1947 Mad. 238=(1947) 1 M.L.J. 4.

——S. 78 (2)—Suit against insolvent filed without leave of Court after the date of filing of the petition for adjudication—Suit decreed after adjudication without any objection on the part of the insolvent—Subsequent annulment of adjudication—Application by decree-holder to execute his decree—Plea that decree was nullity and that time between adjudication and its annulment cannot be excluded—Sustainability.

A person was adjudicated an insolvent on 2nd October, 1931, on a petition filed on 23rd January, 1931. A creditor had filed a suit against the insolvent on 24th February, 1931 without leave of the Insolvency Court and it was decreed on 12th December, 1931. The adjudication was annulled on 15th July, 1940. The decree-holder filed a petition to execute his decree on 9th December, 1943. On the contentions by the debtor that the decree was a nullity as no leave was obtained and that the petition was barred by time as the benefit of S. 78 (2) of the Provincial Insolvency Act would not be available inasmuch as the decree was obtained after adjudication:

Held, that when once the adjudication was annulled unconditionally, it is as if there was no adjudication at all at any time and therefore the decree obtained in the suit filed without leave was quite valid.

As the debt was incurred prior to the filing of the petition in insolvency, the mere fact that the decree was passed after the adjudication would not make it a debt incurred after the adjudication. As it was a provable debt and was in fact proved there is no reason for not giving the decree-holder the benefit of S. 78 (2) of the Provincial Insolvency Act. 1947 M.W.N. 756=60 L.W. 812=(1947) 2 M.L.J. 572.

——S. 78 (2)—Acknowledgment during insolvency—Period from date of acknowledgment to date of order of annulment to be excluded.

Under S. 78 (2), where an order of adjudication has been annulled under the Act for computing the period of limitation prescribed or any suit which might have been brought but for the order of adjudication, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded. Where, therefore, there is an acknowledgment of a debt during the insolvency proceedings, the plaintiff creditor is entitled to exclude the period from the date of acknowledgment to the date of the order of annulment in computing the period for limitation for a suit based upon the acknowledgment. A. I. R. 1945 Mad. 215=(1945) 1 M.L.J. 298=1945 M.W.N. 209 (2)=58 L.W. 169.

——S. 78 (2)—Execution — Limitation — Exclusion of time during which judgment-debtor was adjudicated insolvent.

An application for execution of a decree was made on February 20, 1922. The judgment-debtor applied for being adjudged an insolvent on July 3, 1922. He was adjudicated but the order of adjudication was annulled on December 7, 1927. A fresh application for execution was made on April 5, 1930:

Held, that the applicant was entitled to the exclusion of the period between February 20, 1922, and December 7, 1927, under S. 78 (2), and the application was not time-barred. 131 Ind. Cas. 252.

——S. 78—Right to exclusion of time—For execution against—Property and person.

No doubt the period from the date of the adjudication to the date of annulment cannot be excluded under S. 78 in case of an execution of a decree unless the debt to which the decree related was proved in insolvency. Where, however, the application for execution is directed against the person of the judgment-debtor and not against his property movable or immovable the decree-holder will, if he applies promptly after the cessation of the protection order, be entitled to the exclusion of the period during which the protection order was in force. 1931 A.L.J. 39=126 Ind. Cas. 16=A.I.R. 1930 All. 580.

——S. 78 (2)—Failure to act under S. 28 (2).

Where the permission to execute under S. 28 (2) was one that was not only not acted upon but on which it was in the circumstances impossible to act.

Held, that such permission was ineffectual to exclude the unfettered operation of S. 78 and that the period between the adjudicaton and annulment should be deducted from the period allowed for limitation. 88 Ind Cas. 544=23 A.L.J. 975=6 L.R.A. (Civ.) 585=A.I.R. 1925 All. 735.

4. Sub-S. (2)—Who can invoke.

——S. 78 (2)—Suit brought by insolvent.

S. 78 (2) applies only to a suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-S. (2) of S. 28, which might have been brought or made but for the making of an order of adjudication. This section is not intended to extend the period of limitation for a suit or application brought by the insol-

vent himself, and it is inserted purely for the benefit of creditors who are prevented from proceeding against him by the order of adjudication. A.I.R. 1936 Nag. 117=I.L.R. (1936) Nag. 41=163 Ind. Cas. 127.

——S. 78 (2)—A person, who brings a suit against an insolvent before the adjudication is annulled, is not entitled to exclude time under S. 78. A.I.R. 1928 Mad. 977, Foll. 121 Ind. Cas. 485=1929 M.W.N. 369=30 M.L.W. 327=A.I.R. 1929 Mad. 715.

——S. 78 (2)—Who can invoke.

The benefit of S. 78 can only be invoked by a party who wants to proceed against an insolvent after the adjudication has been annulled. So long as the insolvency proceedings are pending the period of limitation is suspended, provided the claim was not barred on the day of adjudication, and if the order of adjudication is annulled, the right to proceed against the insolvent would revive and the period during which the insolvency proceedings were pending would be excluded if the person wishes to proceed against the insolvent or his property. (1914) 2 Ch. 68, Foll. 114 Ind. Cas. 227=28 M.L.W. 352=1928 M.W.N. 536=51 Mad. 862=A.I.R. 1928 Mad. 977=55 M.L.J. 661.

5. Sub-S. (2), Proviso—Debt provable but not proved.

——S. 78 (2)—Mortgagee not proving his debt in insolvency—Suit for money claim against debtor after annulment of adjudication — Limitation — Right of mortgagee to exclusion of period from date of order of adjudication to the date of the order of annulment.

A mortgage executed on 8th June, 1931, was repayable on 13th July, 1932. The mortgagor was adjudged insolvent on 3rd January, 1933, but the adjudication was annulled on 27th August, 1943. A legatee of the mortgagee filed a suit on 13th July; 1944, for a money decree, having given up his security. On a question of limitation:

Held: Except where a secured creditor realises his security or relinquishes it or values it, he is not bound to prove his debt in the insolvency of his debtor. The mortgage debt is not provable in insolvency and the plaintiff is entitled to have an exclusion of the period from the date of the order of adjudication to the date of the order of annulment in computing the period of limitation for the suit. 61 L.W. 574 =1948 M.W.N. 613=A. I. R. 1949 Mad. 273= (1948) 2 M.L.J. 256.

——Ss. 78 (2) and 49—Operation of S. 78 (2), if confined only to cases of debts proved according to S. 49—Statement filed in Court by debtor under S. 13 of the Act, if can amount to proof of the amount actually owing under a decree.

The operation of S. 78 (2) of the Provincial Insolvency Act is not confined to the narrow limits of S. 49 of the Act, but can be applied where there exists on the record of the Insolvency Court sufficient evidence to establish the debt due which the Insolvency Court was bound to accept. It must, of course, be proof before the Insolvency Court. In execution of a money decree of September, 1927, the judgment-debtor was arrested in December, 1935; and liberated on his undertaking to apply for adjudication in insolvency. He was on his own application, eventually adjudicated in September, 1936, but the adjudication was annulled in September, 1940, as the insolvent had failed to apply for his discharge within the stipulated period. The decree-holder, who though he had not tendered proof of his debt to the Official Receiver, applied in December, 1942, for the execution of his decree claiming to be entitled to the benefit of S. 78 (2) of the Provincial Insolvency Act. It was pleaded in bar of execution that the case fell within the proviso to sub-S. (2) of S. 78 as the decree-holder had not proved his debt in insolvency.

Held, that in the circumstances, as there was no proof of the insolvent's debt to the decree-holder in the insolvency proceedings, the latter was not entitled to the benefit of S. 78 (2). Even if the insolvent had in his statement filed under S. 13 of the Act given the particulars of the decree that would not in itself amount to proof of the amount actually owing under the decree. If the Official Receiver, whose duty it is to settle the list of creditors, had included the decree-holder in such list and shown the amount due to him, the Court would be justified in holding that the debt had been proved, but that was certainly not so in the present case. I.L.R. (1947) Mad. 665=1947 M.W.N. 85=60 L.W. 53=A.I.R. 1947 Mad. 331=(1947) 1 M.L.J. 50.

——S. 78, Proviso—Construction — "Not proved" —Meaning of.

The words "not proved" in the proviso to S. 78 of the Provincial Insolvency Act cannot be read as meaning "not proved for any reason and in any circumstances whatever"; the words must be limited to cases of debts failing to be proved either (*a*) because the decree-holder has not availed himself of the directions given in Ss. 49 and 33 of the Act, or has in some other way not done what he ought to do by way of proving his debt, or (*b*) because the Court has passed orders rejecting a debt put forward by creditor or has definitely held such debt not to be proved. 49 Bom. L.R. 671=A.I.R. 1948 Bom. 112.

——Ss. 78 (2), Proviso and 37—Debts to which the Proviso to S. 78 will apply—Vesting in Official Receiver under S. 37—If continues the insolvency proceedings — Exclusion of time between date of adjudication and annulment—When allowed —Proof of debt after annulment when property was vested in Official Receiver under S. 37—Proof of debts before him—Saving of time.

The proviso to S. 78 of the Provincial Insolvency Act refers only to the debts proved during the pendency of the insolvency proceedings, *i.e.*, from the date of the order of adjudication to the date of the order of annulment and the Act contemplates proof of debts only during such period. The insolvency proceedings come to an end with the annulment and the subsequent vesting in the Official Receiver under S. 37 of the Act has not the effect of continuing the insolvency proceedings. A final decree was passed against a debtor on 19th December, 1929. The debtor was adjudged insolvent on 30th March, 1930. The adjudication was annulled under S. 43 of the Provincial Insolvency Act on 7th December, 1942, and subsequently on 26th March, 1943, an affidavit was filed on behalf of *X* the legal representative of the decree-holder in the Subordinate Judge's Court alleging in the application for bringing *X*

on record as the legal representative that an amount of Rs. 1,600 was due to him by the insolvent under the decree of 1927. In an appeal by *X* against the order of annulment of adjudication of the debtor, the order of annulment was confirmed but the property of the debtor was directed to vest in the Official Receiver for one year from 9th December, 1942, under S. 37 of the Provincial Insolvency Act. On 11th October, 1943, *X* for the first time filed an affidavit before the Official Receiver proving his claim and the Official Receiver admitted the same on the 25th November, 1943. On 16th April, 1943, *X* filed an execution petition more than 13 years after the final decree in favour of his father. The petition was dismissed as not pressed on 4th October, 1943. Then another execution was filed on 6th December, 1944. On a question of limitation,

Held, the affidavit filed on behalf of *X* on 26th March, 1943, cannot be considered to be proof of the debt as it was filed after the date annulment. The vesting under S. 37 not having the effect of making the insolvency proceedings pending during such period, *X's* debt cannot be said to be proved before the annulment. The appointee under S. 37 had no right to accept proof of the debt and as there was no proof of *X's* debt during pendency of the insolvency proceedings, the proviso to S. 78 of the Provincial Insolvency Act will not apply to save execution of the decree. 1949 M.W.N. 155 =A.I.R. 1949 Mad. 683=(1949) 1 M.L.J. 209.

——S. 78 (2), Proviso—"Proved"—Affidavit filed after annulment of adjudication—If proof of debt for purposes of S. 78 (2).

The filing of an affidavit of proof after the annulment of adjudication is not a proof of the debt within the meaning of the proviso to S. 78 (2) of the Provincial Insolvency Act. 12 Cut.L.T. 62 =13 B.R. 481=231 Ind. Cas. 17=A.I.R. 1947 Pat. 199.

——S. 78 (2), Proviso—"Proved"—Certified copy of decree—If proof of decree-debt—Mode of proof in S. 49—If exhaustive.

A certified copy of a decree which is legally acceptable in evidence is proof of a decree-debt; and when such a copy is tendered to the Receiver in insolvency, the decree-debt is "proved" within the meaning of the proviso to S. 78 (2) of the Provincial Insolvency Act. S. 49 of the Act provides only one of the modes in which a debt may be proved. It is open to the creditor to prove his debt in any other mode. 25 Pat. 447=12 Cut.L. T. 53=13 B.R. 479=231 Ind. Cas. 14=A.I.R. 1947 Pat. 161.

——S. 78 (2), Proviso—Affidavit filed subsequent to the annulment of adjudication if proves a debt under S. 78 (2).

Affidavit filed subsequent to the date of the annulment of adjudication under S. 43 does not prove a debt under proviso to S. 78 (2). (1946) 12 Cut.L.T. 62.

——Ss. 78 (2), Proviso, 33, 49—Proof of debt—S. 49 provides only one mode of proof of debt—Judgment-debtor adjudicated insolvent—Receiver appointed—Decree-holder forwarding to him certified copy of decree accepted as proof of debt by receiver—Decree-holder accepted as scheduled creditor—No schedule contemplated by S. 33 prepared as proceedings were annulled—Certified copy of decree held was proof within Section—S. 33 held was sufficiently complied with and debt was proved within proviso. (1946) 12 Cut.L.T. 53.

——S. 78 (2), Proviso—Word "proved", meaning explained.

The word "proved" in the proviso to S. 78 is used, not in its ordinary sense under the Evidence Act but in its technical insolvency sense and for the purpose of this proviso, a debt is "proved" when those steps in respect of it which are prescribed by S. 49 (1) have been taken. The word "proved" in the proviso is in relation to a provable debt, satisfied when, to use the words of S. 49, a proper "affidavit verifying" it has been delivered or sent by post in a registered letter to the Court. A.I.R. 1940 All. 494=1940 A.W.R. 454=191 Ind. Cas. 799.

——S. 78 (2), Proviso—Proof of debt— Meaning and nature of.

Before a party can claim the benefit of the exclusion enacted by S. 78, two conditions have to be satisfied. The suit or application in which limitation is pleaded must be in respect of a debt provable under the Act and it must also have been proved under the Act. Proof of debt in insolvency means that kind of proof only which entitles a creditor to have his name entered in the schedule and none other. Evidence given to make out that a petitioning creditor is qualified to apply to have the debtor adjudicated insolvent is not proof in insolvency, and unless he tenders proof of his debt in the manner indicated by S. 49, his name cannot entered in the schedule; and, however true his debt may be he cannot be allowed to come in for a dividend. Nor can he be permitted to claim in a suit for the recovery of the debt after annulment of the insolvency an exclusion of the time during which the insolvency remained pending if he had not proved the debt in the sense explained above. A.I.R. 1940 Mad. 716=1940 M.W.N. 566=51 L. W. 697= (1940) 2 M.L.J. 17=I.L.R. (1941) Mad. 136= 193 Ind. Cas. 705.

——S. 78 (2)—'Proved debt', meaning of—Debt included in schedule in petition for insolvency.

The debt is not proved under the Provincial Insolvency Act by its mere inclusion in the schedule of debts filed by the insolvent along with his insolvency petition. Such a debt as this is at the most debt "provable" in the insolvency. A.I.R. 1938 Mad. 142=(1937) 2 M.L.J. 883=174 Ind. Cas. 480.

——S. 78 (2)—Debt due on bond—Mere statement in insolvency petition, whether amounts to proof.

The proof of debts referred to in the proviso to S. 78 refers to proof under S. 33 and a mere statement of a debt under S. 13 (*d*) in an insolvency petition, even though not denied by a creditor, will not amount to proof under the Act and hence, will not save limitation under S. 78 (2). Debts may be proved other than by the method allowed by S. 49, *i.e.*, they may be proved in the ordinary way, and deeds and documents may be produced as well as oral testimony to prove a debt if the creditor does not wish to avail himself of the summary method allowed by S. 49; but, whether the method allowed by S. 49 is followed or not, there must be some proof of a debt after the order of adjudication as required by S. 33. A.I.

R. 1934 Nag. 282=31 Nag.L.R. 101=153 Ind. Cas. 533.

——S. 78 (2)—Judgment-creditor sending proof of debt—Annulment of adjudication before entry of debt in schedule — Exclusion of intervening period in computing limitation to execute decree.

A decree for money was granted against the appellant on 29th January, 1925, and an application to execute the same was made in June, 1925 but it was not prosecuted because the judgment-debtor had been adjudicated an insolvent. The application for execution, however, remained pending and was dismissed on 28th May, 1930. In the meantime, the order of adjudication was annulled on 13th May, 1927, and another application for execution of the decree was made on 16th October, 1928. It was found that all that was necessary, therefore, for the respondent to prove his debt was done by him but it appeared that the Official Receiver did not formally include the debt in the schedule of debts prepared by him:

Held, that it must be held that the respondent had proved his debt as that term is used in S. 78 (2) by having done all that was necessary to prove it and in the absence of a decision refusing to admit his debt, it must be assumed that the debt was proved and, therefore, the respondent was entitled to the exclusion of the period between the date of adjudication and its annulment and the last application was not time-barred. A.I.R. 1933 Lah. 101=142 Ind. Cas. 644.

——S. 78 (2)—Condition necessary for deducting time.

In order that a creditor may be entitled to exemption of the period between the order of adjudication and the order of annulment, it is necessary that the debt must have been proved, that is to say, there must have been either a formal order proving the debt or any proceedings which, by necessary implication, are tantamount to such order. A. I. R. 1932 Lah. 173=32 P. L. R. 905=135 Ind. Cas. 194.

——S. 78 (2), Proviso—Proof of debt by other modes.

Where a decree that the creditor seeks to execute is obtained subsequent to the insolvent's adjudication and it is obtained not only against the insolvent but also against the Official Receiver who was impleaded as a party, although the Act provides a formal mode of proving a debt which has not been adopted by the creditor, yet the debt is proved and the proviso to S. 78 does not apply. 122 Ind. Cas. 341=33 Mad. 243=31 M.L.W. 75 =1930 M.W.N. 408=A.I.R. 1930 Mad. 356=58 M.L.J. 170.

——S. 78 (2), Proviso—Proof of debt by acknowledgment.

S. 49 only specifies a simple mode of proof of the debt but does not exclude any other mode of proof, and where, therefore, the debt to the decreeholder was proved in the insolvency proceedings, according to the statement of the insolvent that a decre had been obtained against him, the debt must be taken to have been proved within the proviso to S. 78. 114 Ind. Cas. 415=48 C.L.J. 574=A.I.R. 1929 Cal. 159.

6. Retrospective operation of section.

——S. 78—Retrospective operation.

Retrospective effect may be given to S. 78 as it relates merely to procedure and not any substantive right. 80 Ind. Cas. 376=18 M.L.W. 808= 1923 M.W.N. 746=A.I.R. 1924 Mad. 400=45 M.L.J. 844.

7. Suit filed after limitation and before annulment of adjudication—Procedure.

——S. 78—Limitation for proving debts — Whether ceases to run during pendency of insolvency proceedings—Suit to recover debt after limitation but before annulment of adjudication—Procedure.

For proving debts, limitation ceases to run during the pendency of insolvency proceedings.

Where a creditor of an insolvent instituted a suit after the period of limitation but before annulment of the adjudication order, the Court should not dismiss the suit but permit the creditor to withdraw the suit with liberty to sue again if so advised. A.I.R. 1933 Rang. 75=146 Ind. Cas. 124.

——S. 79—Failure to frame rules—Effect.

The failure of the Court to frame rules as required by S. 79 cannot override the provision of the law which exempts an insolvent from liability for his debts prior to the date of his insolvency on his obtaining a discharge. In the absence of such rules, the provisions of the C. P. Code apply to insolvency proceedings in view of S. 5, Provincial Insolvency Act. A.I.R. 1932 Sind 39=25 S.L. R. 422=136 Ind. Cas. 815.

——S. 79—Rules framed by Lahore High Court under S. 79, R. 3 — Joint Hindu family firm as such, if can be adjudged insolvent.

R. 3 of the rules framed by the Lahore High Court under S. 79, Provincial Insolvency Act merely prescribes the procedure which is to be followed in proceedings under the Provincial Insolvency Act. It does not lay down any rule of substantive law. The question whether a joint Hindu family or the business carried on by it, can or cannot be adjudicated insolvent is not a question of mere procedure but is one of substantive law. It is, therefor, not covered by R. 3, and that rule cannot have the effect of impliedly providing for the adjudication of a joint Hindu family as such or of its trading business as insolvent. A.I.R. 1940 Lah. 462=I.L.R. (1941) Lah. 55=43 P. L.R. 363=192 Ind. Cas. 532.

——S. 79—Adjudication against firm—Object of legislature.

It is clear from S. 79 (2) (*c*), Act 5 of 1920, that the Legislature contemplated orders of adjudication being passed against firms. Moreover, a firm is not a separate legal entity; nor it is a distinct person. It is merely a shorthand form for collectively designating all the partners in a firm, and an order of adjudication passed against the firm is an order against individual partners who constitute it. 119 Ind. Cas. 735=A.I.R. 1929 Lah. 447.

——S. 79—Rules under R. 5—Publication of order fixing date of hearing of petition under S. 19 (2), only in Government Gazette, if enough.

R. 5 framed under S. 79 nowhere provides that

mere publication of the notice of order fixing date of hearing of petition under S. 19 (2) in the *Official Gazette* will be enough. It distinctly provides th t a copy of the notice should also be forwarded by registered letter to each creditor. Where the creditor has received no notice of either the application or the date of the hearing, the Court must allow his petition for setting aside the insolvency order passed *ex parte* and re-hear the matter. Mere publication in the *Government Gazette* of the notice is not enough. In such a case, the question of prejudice is irrelevant. A. I.R. 1940 Pat. 623=6 B.R. 567=187 Ind. Cas. 794.

——S. 79—Rules framed by Allahabad High Court —Necessity for modification.

It is desirable to modify R. 34 framed by the Allahabad High Court under S. 79 to the extent that at least some advertisement might appear in a local newspaper and that some steps might be taken to proclaim the insolvency proceedings by beat of drum in the locality in which the insolvent resides. A. I. R. 1933 All. 600=1933 A.L.J. 1340=55 A. 636=146 Ind. Cas. 765.

——S. 79—Bom.H.C. Rules—Rule 27 (4).

An application not accompanied by deposit required under the rules cannot be dismissed but deposit should be ordered to be made in a certain time. 80 Ind. Cas. 482=26 Bom.L.R. 432=A.I.R. 1924 Bom. 472.

——S. 79—Application for adjudication by partner of firm—Effect—Scope of.

Where an application for adjudication is made by one of the partners of the firm on behalf of the firm and the application complies with the provisions of O. 30, C. P. Code, the order of adjudication against the applicant is an order against the firm and against each and every partner in that firm. 107 Ind. Cas. 442=23 S.L.R. 63=A.I.R. 1928 Sind 114.

——S. 79—(1907), S. 51—Notice to agent is notice to the principal—Waiver of irregularity when implied.

Where an agent was under a power of attorney from principal authorised" to defend all suits, appeals and acting and generally to act for him and to do all things and acts that may be necessary for the discharge of agent's duties" it was *held* that service of notice of insolvency proceedings on him is as effectual as it was on the principal. If therefore the agent appeared and filed a counter-petition without objecting to the manner or time of service he is deemed to have waived any irregularities in the giving of notice. A debtor who gets notice of hearing served on his authorised agent cannot complain that he did not also receive a similar notice. 39 Mad. 693=29 M.L.J. 788=3 L.W. 13=(1916) M.W. N. 12=31 Ind. Cas. 583.

——Ss. 80, 75 (1)—(1907), Ss. 52, 46 (1) and 23—Official Receiver, if a Court subordinated to Dt. Court.

An Official Receiver is not a Court subordinate to the District Court within the meaning of S. 46 (1) Prov. Insol. Act. 40 Mad. 752=32 M.L.J. 449=39 Ind. Cas. 429.

——S. 82 (b)—Order under—Appealability.

The assignee of a decree, during pendency of his *darkhast*, also filed an application in insolvency against the judgment-debtor who was an agriculturist. On judgment-debtor's contentions that the application was barred under S. 82 (*b*) of the Prov. Insol. Act, the Subordinate Judge dismissed the application for want of jurisdiction. On appeal to the District Court, the Assistant Judge held that the Subordinate Judge had jurisdiction and remanded the case. In a revision application the judgment-debtor contended that no appeal to the District Court lay under S. 33:

Held, that although under S. 33 no appeal was competent, under S. 53 a revision was competent on a question of legality or propriety of any order passed by Subordinate Judge in any matter falling under Chap. IV of Dekkhan Agri. Relief Act. The question before Assistant Judge was a question of jurisdiction of the trial Court and could, therefore, form the subject-matter of a revision. The order of the Assistant Judge could, therefore, be regarded an order in revision and dealt with by the High Court. A.I.R. 1945 Bom. 374=47 Bom.L.R. 352 =I.L.R. (1945) Bom. 518.

——S. 83. See PROVINCIAL INSOLVENCY ACT, S. 9.

——S. 83—Agra Tenancy Act, rights under—Not affected.

By S. 193 of the Agra Tenancy Act, Ch. 20 of C. P. Code of 1882 is made inapplicable to proceedings under the Tenancy Act. By S. 56 of the Provincial Insolvency Act, 1907, Ch. 20 of Civil P. C., 1882, was repealed and it was enacted that references to Ch. 20 should be construed as applying to Prov. Insolvency Act of 1907 Hence Prov. Insolvency Act of 1907 does not apply to proceedings under Agra Tenancy Act of 1901. Hence S. 16 (2) of Act III of 1907 does not not bar a suit for arrears of rent against a tenant of occupancy holding, although the tenant is an undischarged bankrupt. 34 All. 121, overruled. 62 Ind. Cas. 897=43 All. 510 =19 A.L.J. 439=A.I.R. 1921 All. 13 (F.B.).

PROVINCIAL SMALL CAUSE COURTS ACT (9 OF 1887)—C. P. Code, S. 95—Compensation under, if Court can award.

An order under S. 95 of the C. P. C. passed by a Small Cause Court dismissing an interim attachment issued by itself is valid and such an order cannot be questioned on appeal. 26 Ind. Cas. 359 (Mad).

——Immovable property.

For the purposes of the Provincial Small Cause Court Act the definition in the General Clauses Act of immovable property will apply. So standing crops are immoveable property. 25 A. 564 and 14 A. 30, foll. 9 Ind. Cas. 133 (Cal.).

——S. 4—No distinction exists between a Small Cause Court Judge and a Court which has Small Cause Court powers. A.I.R. 1935 All. 690=1935 A.L.J. 511=1935 A.W.R. 433=157 Ind. Cas. 122.

——S. 8 (2)—In matters assigned to him Additional Judge has got same powers as those of Judge—Complaint by him held good—Cr. P. Code (1898), S. 165.

A warrant was issued by the Judge, Small Cause Court, and it was handed over to the bailiff under his orders. The alleged obstruction by the petitioners then took place and was reported to the Judge of the Court. He ordered the usual notice to issue to the persons who caused the obstruction to show cause why they should not be prosecuted under S. 186, Penal Code. When this had been done, the proceedings were made over by the Judge to the Additional Judge for disposal. The latter Judge after due

enquiry decided to prosecute the accused and at his instance they were prosecuted and ultimately convicted under S. 186, Penal Code. It was urged that the bailiff of the Court to whom the alleged obstruction was caused being subordinate to the Judge of Small Cause Court and not the Additional Judge, the latter could not, under S. 195, Criminal P. C., order his prosecution:

Held, that the Additional Judge had the same powers as the Judge in the matter which had been assigned to him by the Judge and therefore a complaint by the Additional Judge was a good compiaint and conviction thereunder should stand. A I.R. 1931 Lah 530=32 Cr.L.J. 964=33 P.L.R. 401=13 Lah. 16 =132 Ind. Cas 842.

——S. 11—Reference to High Court.

A Single Judge of Small Cause Court can make a reference to the High Court; S. 11, Provincial Small Cause Courts Act extends rather than restricts the power of a Provincial Court of Small Causes to to make a reference under S. 113 and O. 46, R. 1, Civil P. C. A.I.R. 1937 Sind 318=172 Ind. Cas. 805

——S. 15.

See also (1) C. P. CODE, S. 7.
(2) PROV. SMALL CAUSE COURTS ACT, S. 16 AND SCH. II.

1. Suits Cognizable.
2. Suits not cognizable.
3. What determines jurisdiction.
4. Miscellaneous.

1. Suits cognizable.

——S. 15 and Sch. II, Art. 13—Suit by Municipality to recover arrears of taxes—Jurisdiction of Small Cause Court—Bengal Municipal Act, S. 167.

Under S. 15 of the Provincial Small Cause Courts Act, the Small Cause Court has jurisdiction to entertain and decide a suit by a Municipality to recover arrears of taxes whose value does not exceed Rs. 500, where as the plaint stands it is a simple money claim and the Municipality does not intend in the suit to enforce the charge which is given to it by S. 167, Bengal Municipal Act.

Art. 13 of the Second Schedule of the Act does not bar the jurisdiction of the Small Cause Court in such matters. In order that that article may apply the p'aintiff must be claiming certain dues which are payable to him by reason of his interest in immovable property. The taxes claimed by the Municipality are not claimed by reason of any interest of the Municipality in the immovable property. The tax is due to the Municipality by force of a statute and not by reason of any interest of the Municipality in the immovable property. A.I.R. 1932 Pat. 220, approved.

The question of the jurisdiction of the Court as to execution of a decree has no relevance whatsoever as to the question whether the Court has jurisdiction to try the suit. A.I.R. 1950 Cal. 415 =54 C.W.N. 416.

——S. 15, Sch. II, Art. 13—Suit for recovery of arrears of Municipal taxes.

A suit for the recovery of arrears of certain Municipal taxes such as the house and latrine tax does not fall within Art. 23 or any other article subject to which S. 15 is to be read, and hence such a suit is cognizable by a Court of Small Causes. A.I.R. 1932 Pat. 220=13 P.L.T. 277 =139 Ind. Cas. 104.

——S. 15—Suit against agent for value of tickets received and not accounted for is cognizable by Small Cause Court.

The essential nature of a suit for accounts is that therein the plaintiff does not pray for a decree for a fixed sum of money, but only wants rendition of accounts by the defendant followed by a decree for the amount found due. Such suits are excluded from the purview of Small Cause Courts Act. But a suit which is essentially of small cause nature does not change its character merely because the defendant has chosen to raise a plea of account which might some time give rise to the necessity of settlement of account.

The plaintiff had given to the defendant a number of admission tickets in connection with a wresting match to be sold on commission. The defendant sold these tickets to the public and pocketed all the money realised thereby. Thus, the plaintiff neither got any unsold tickets back from the defendant nor any money on account of such tickets as were disposed of. The price of the tickets was fixed and their number was in dispute. The plaintiff brought a suit in Small Cause Court to recover full face value of the total number of tickets:

Held, that the suit was cognizable by the Court of Small Causes. (1940) 187 Ind. Cas. 480 (Bhopal).

——S. 15, Sch. II, Art. 8—Suit by landlord for produce for period subsequent to 1929 was affected by amended S. 3 (17) of Bengal Tenancy Act and the defendants not being tenants, the suit was triable by Small Cause Court. A.I.R. 1938 Cal. 707=179 Ind. Cas. 263.

——S. 15, Sch. II, Arts. 4, 8—Suit for ground-rent of site situated in town.

A suit for ground rent of a site situated in a town which is neither revenue paying nor agricultural land is cognizable in the Small Cause Court. Even when there is no contract, the Small Cause Court has jurisdiction to award damages for use and occupation of such land. A.I.R. 1933 Nag. 382=147 Ind. Cas. 839 (1).

——S. 15, Sch. II—Suit for damages for use and occupation.

A suit for damages for use and occupation is cognisable by a Small Cause Court. A.I.R. 1931 Lah. 501=32 P.L.R. 361=134 Ind. Cas. 289.

——S. 15, Sch. II—Suit for recovery of share in ornaments.

A suit for the recovery of a sum of money representing the price of the plaintiff's share in certain ornaments is cognizable by a Court of Small Causes. A.I.R. 1933 Pat. 31=11 Pat. 690=14 P.L.T. 269 =141 Ind. Cas. 130.

——S. 15—Compensation for deficiency in land.

A suit for compensation for a part of the land lost by purchaser from the vendor is cognizable by Small Cause Court. 100 Ind. Cas. 327=5 Bur. L.J. 206= A.I.R. 1927 Rang. 90.

——S. 15—Recovery of rent collected by another—Is cognizable.

Plaintiff, a muafidar, granted a lease to defendant to recover rent for a certain period. The defendant continued to recover rent even after the termination of lease. Plaintiff brought a suit for the recovery of the sum realized by defendant for the period beyond the lease.

Held, that the suit was cognizable by Small Cause Court. 35 P. R. 1902, Foll. 96 Ind. Cas. 822.

——S. 15—Suit for damages—Cognizability.

Where in a suit for damages the question of title to immovable property arises only incidentally the suit is cognizable by a Court of Small Causes. 64 Ind. Cas. 496=2 P.L.T. 739=A.I.R. 1922 Pat. 368.

——S. 15, Sch. II, Cl. 31—Suit for specific sum of money—Suit for accounts—Essence of jurisdiction.

Suit for a specific sum of money on account of salary and house-rent with an incidental prayer that accounts may be gone into if necessary is a suit for recovery of money and not for accounts and is cognizable by a Small Cause Court. Merely because in the determination of the suit, accounts may have to be examined the suit does not become one for accounts. A suit for accounts implies that the defendant is under a liability to render accounts to the plaintiff. 21 C.W.N. 784=27 C.L.J. 96=41 Ind. Cas. 929.

——S. 15 (2), C. P. Code, S. 102—Jurisdiction.

A suit to recover *Katihari* regarding a tax for homestead paid by the followers of certain trades is a small causes suit and a second appeal therefore is barred under S. 102, C.P.C. 1 Pat. L.W. 541=(1917) P.H.C.C. 250=39 Ind. Cas. 949.

——S. 15—Small Cause suit—Suit for money—Question of title involved.

Where a suit is, in form, one for the payment of a sum of money it is entertainable by a small cause court though the principal purpose of the suit is to determine a right to immoveable property. 37 Bom. 675=15 Bom. L.R. 773=20 Ind. Cas. 974.

——Ss. 15, 27, 32 and Sch. II, Cls. 4 and 31—A suit to recover share of produce of immoveable property lawfully collected by defendants does not fall either under Cl. (4) or (31) of Sch. II of the Acts. It is a suit for money had and received to the plaintiff's use and is cognizable by a court of small causes. 34 Bom. 171=11 Bom. L.R. 1330=4 Ind. Cas. 830.

——S. 15—Vendee's suit for possession against third parties—Failure of vendor to get possession—Suit against vendor for possession or for damages—Futile prayer.

Where a purchaser of some land sued third parties for possession of the land and failed ultimately and afterwards brought a suit against his vendor for being placed in possession or for damages:

Held, (1) that the prayer for possession was a futile one and could not be given effect to; (2) that the suit must be regarded as one for damages merely; (4) that such suit was congnizable by a Small Cause Court and that, therefore, no second appeal lay. (1902) 13 M.L.J. 299.

——S. 15, Art. 31—Suit by landlord for breach of covenant in lease is suit of a small cause nature. (1902) 12 M.L.J. 264=26 M. 176.

See also. (1902) 25 B. 417.

——S. 15—Suit by assignee of the rights of an evicted tenant for the compensation for crops—How far cognisable by Small Cause Court:—*See* U. P. RENT ACT, SS. 42, 95 AND 206. 1902 A.W.N. 150=24 A. 517.

——S. 15, Sch. II, Art. 8—A suit for rent with a prayer that the value of the improvements due to the defendants might be made liable for the claim is cognisable by a Court of Small Causes. (1901) 24 M. 356.

2. Suits not cognizable.

——S. 15, Sch. II, Art. 8—Suit to recover rent of Cinema Hall.

The test to be applied in determining whether a building is a house is the character of the building and the purposes to which it is or can be adopted; not the name by which it is called. Though every house is a building by no means every building can rightly be described as a house. A building designed exclusively for public worship and not for residence does not become a house merely because some people call it a house of prayer.

A Cinema Hall is not a house within the meaning of S. 15 and a second appeal is maintainable in a suit to recover its rent. A.I.R. 1941 Rang. 36=1940 Rang. L.R. 820=192 Ind. Cas. 127.

——S. 15—Suit for damages based on rent.

Small Cause Court cannot take cognizance of a suit by purchaser at revenue-sale against under-tenure-holder for damages based on rent. A.I.R. 1939 Cal. 468=69 C.L.J. 220=43 C.W.N. 469.

——S. 15, Sch. II—The suit to recover tax levied under Madras Local Boards Act and for a declaration that it was illegally levied and for an injunction restraining the Board from levying it in future are not of small cause nature. A.I.R. 1938 Mad. 941=1938 M.W.N. 931=48 L.W. 512=(1938) 2 M.L.J. 589=182 Ind. Cas. 908.

——S. 15, Sch. II, Art. 8—Suit for rent of agricultural land.

A suit to recover the rent of agricultural land is not a suit of the nature cognizable by Courts of Small Causes and a second appeal lies even if the amount is less than Rs. 500. A.I.R. 1935 Rang. 386=13 Rang. 633=158 Ind. Cas. 804 (F.B.).

[Overrules. A.I.R. 1926 Rang. 19=3 Rang. 390=91 Ind. Cas. 639.]

——S. 15—Rent suit—No jurisdiction.

Both under the Madras Estates Land Act which definitely excludes the jurisdiction of all Civil Courts and on the true construction of S. 15 of the Provincial Small Cause Courts Act, a Small Cause Court has no jurisdiction over a suit for rent by a land-holder against his ryot. 63 Ind. Cas. 8=1921 M.W.N. 565=44 Mad. 697=15 M.L.W. 150=A. I. R. 1922 Mad. 119=40 M.L.J. 466.

——S. 15—Loan on condition of marriage—Suit to recover—Jurisdiction.

A suit to recover money advanced as a loan, on condition that the debtor would marry his daughter to the creditor's nephew and on failure to do so, would pay back the money, falls under Art. 35 (g) of the Act. 4 O.L.J. 171=40 Ind. Cas. 67.

——S. 15—Suit for damages for not restoring crops attachment of which was objected to—Costs.

A suit for damages for not restoring crops, the attachment of which was successfully objected to, lies only on the regular side, not on the small cause side. A small cause court dismissing a suit as not cognizable by it should not order payment of costs

by the plaintiff, who presented his plaint on its being returned by a regular court to be presented to the Small cause court. 3 O.L.J. 578=19 O.C. 236=37 Ind. Cas. 169.

——S. 15—Sch. II, Cl. (8)—C. P. Code, S. 102—Second appeal—Suit for arrears of rent of a holding.

S. 102, C.P.C. does not bar a second appeal in the case of a suit for arrears of rent of a holding; such a suit not being within the cognisance of a small cause court. (1917) P. H. (C.C.) 287=3 Pat. L. W. 270=37 Ind. Cas. 980.

——S. 15—Suit for rent.

Where the plaint alleges that the defendant's tenants agreed to cultivate lands and afterwards did not raise crops and that the plaintiffs were deprived of crops, *held* that the suit was for rent and was not cognizable by the small cause Court. 16 C. W. N. 89=13 Ind. Cas. 29.

——S. 15, Sch. II, Cl. 35 (j)—Compensation for illegal distress.

The plaintiff alleging that the defendant, though all the rent due to him had been paid, had taken unlawful possession of paddy under the pretext that he had distrained them, sued for the same, valuing it at Rs. 250. The distraint was made on the 25th January, 1898, and the suit was instituted on 26th July, 1898. *Held*, the suit was in substance one for compensation for illegal distress or attachment and not for the recovery of specific property and so was not a suit of the nature cognisable by a Court of Small Causes, and a second appeal lay. (1901) 25 M. 540.

3. What determines jurisdiction.

——S. 15, Sch. II—Unclassed suit.

In the case of an unclassed suit the mere fact that it arises out of a suit which was of a small cause nature does not make it a small cause suit. A.I.R. 1937 Lah. 454=38 P.L.R. 1154=170 Ind. Cas. 422.

——S. 15—What determines jurisdiction.

The question in order to exclude the jurisdiction of the Court must be a direct question for determination and not merely incidental for the purpose of deciding whether the plaintiff is entitled to relief or not. 126 Ind. Cas. 857=A.I.R. 1930 Pat. 335.

——S. 15—Nature of suit as presented in the trial Court.

In deciding the question whether a suit is of a Small Cause nature or not, attention has to be paid to the nature of the suit, as it was presented to the first Court and not to the subsequent shape that it may have taken as a result of the findings of the lower Courts.

Where the suit was for the specific performance of a contract or in the alternative for damages.

Held, that such a suit is not of a Small Cause nature. 82 Ind. Cas. 123=20 M.L.W. 321=1924 M.W.N. 691=A.I.R. 1924 Mad. 844.

4. Miscellaneous.

——S. 15, Sch. II—Jurisdiction, if can be ousted by adopting dodge capable of being discovered.

The jurisdiction of a Court of Small Causes or any other Court cannot be ousted by adopting a dodge which is capable of being discovered. A.I.R. 1933 Sind 296=149 Ind. Cas. 626.

——Ss. 15, 16—Recording of evidence and delivery of judgment.

There is no provision of law which prevents the Judge of a Small Cause Court from recording the evidence given at any trial before him at full length, or from delivering a full and considered judgment such as is ordinarily passed in a regular suit. A. I. R. 1938 Rang. 35=1937 Rang. L.R. 234=175 Ind. Cas. 726.

——S. 15, Sch. II, Arts. 29, 30—Suit for accounts.

A suit for accounts is a suit for an indeterminate amount which can only be arrived at by taking the regular account between the parties. Where the plaintiff sues for a definite sum and shows clearly how it is to be ascertained, it is not a suit for accounts. The nature of a suit is to be determined according to the claim made by the plaintiff and not by the contentions of the defendant. The latter procedure would give rise to the greatest confusion and eliminate from the jurisdiction of the Court of Small Causes many cases which would fall within that jurisdiction. A.I.R. 1933 Nag. 82=29 N. L. R. 115=147 Ind. Cas. 1103.

——S. 16.

Synopsis.

1. Applicability of section.
2. Interpretation.
3. Small cause suit tried as regular suit.
4. Transfer of small cause suit.
5. Miscellaneous.

1. Applicability of section.

——S. 16—Applicability.

Section 16 does not apply to a suit already instituted in another Court at a time when the latter Court had jurisdiction to entertain it. The suit, though of the kind cognizable by a Court of Small Causes, is not itself so cognizable after another Court has lawfully taken cognizance of it. A.I.R. 1934 Pat. 504=15 P.L.T. 619=151 Ind. Cas. 938.

——S. 16—Addition of claim based on another cause of action not triable by Small Cause Court Section, if can be evaded.

The provisions of S. 16 of the Provincial Small Cause Courts Act cannot be allowed to be evaded by the plaintiff adding to his plaint a claim based on another cause of action which cannot be entertained by the Court of Small Causes. A.I.R. 1947 Cal. 407.

2. Interpretation.

(a) "Any other enactment".
(b) "Suit".

2. (a) Interpretation—"Any other enactment".

——S. 16—Words "any other enactment"—If include Provincial Act.

The words "any other enactment" in S. 16 of the Provincial Small Cause Courts Act refer not only to Acts of the Central Legislature but also to Acts of the Provincial Legislature like the Punjab Panchayat Act. Therefore the Court of Small Causes has no jurisdiction to try a suit triable by the tribunal appointed under the latter Act. A.I.R. 1947 Lah. 308.

2. (b) Interpretations—"Suit".

——S. 16—"Suit"—Application to file award.

The expression "suit" in S. 16, Provincial Small Cause Courts Act is wide enough to include within its ambit an application under para. 20, Sch. 2, Civil P. C., which is not a suit but is required to be registered as a suit. Consequently, an application to file an award under para. 20, Sch. 2, is a suit within the meaning of S. 16, Provincial Small Cause Courts Act. A.I.R. 1935 Sind 203=158 Ind. Cas. 1102=30 Sind L.R. 12.

3. Small cause suit tried as regular suit.

(a) Appeal.
(b) Nature of suit not changed.
(c) Validity.

3. (a) Small cause suit tried as regular suit—Appeal.

——S. 16—Suit of a small cause nature tried as an original suit—Decree—Appeal—Maintainability—Jurisdiction of appellate Court to set aside decree and direct return of plaint for presentation to proper Court.

A suit which was really of a small cause nature was filed before the District Munsif as an original suit but with a court-fee on the basis that it was of a small cause nature and was tried as an original suit and decreed. In an appeal against the decree, on an objection as to the insufficiency of the court-fee paid, the Subordinate Judge found that the suit was really of a small cause nature and instead of dismissing the appeal on that finding, he set aside the decree and directed the District Munsif to return the plaint to the plaintiff for presentation to the proper Court (*i.e.*), to itself on the small cause side. In an appeal against that order,

Held, that once the Subordinate judge found that the suit was of a small nature, he should have rejected the appeal on the ground that no appeal lay. But what he had done was in effect to entertain the appeal and interfere with the decree passed in a suit of a small cause nature which is not permitted by law and hence the order passed by him should be set aside and the appeal before him dismissed. 1947 M.W.N. 238=60 L.W. 237=A.I.R. 1947 Mad. 382=(1947) 1 M.L.J. 303.

——S. 16—Suit filed on original side of Court having no jurisdiction to try small cause suit.

A suit filed on the original side of a Court which has no jurisdiction to try it as a small cause suit cannot be considered to be a small cause suit. All that can be said is that the suit is of a small cause nature. There is nothing in the Prov. Small Cause Courts Act or in the Civil P. C., which prohibits a first appeal in such cases. A.I.R. 1941 Mad. 635 =(1941) 1 M.L.J. 635=53 L.W. 690=1941 M.W.N. 535=196 Ind. Cas. 259.

——Ss. 16, 27—Small cause suit tried as regular suit by mistake.

A Court which has small cause jurisdiction cannot try a suit of a small cause nature which it has jurisdiction to try as a small cause, otherwise than as a small cause suit.

Where a Munisif having jurisdiction to try a suit as a Small Cause suit tried it as a regular suit by mistake:

Held, that the decree was a decree in a small cause suit and was not appealable. A.I.R. 1937 Mad. 227=(1937) 1 M.L.J. 14=44 L.W. 874=1937 M.W.N. 261=168 Ind. Cas. 691.

——S. 16—Trial of Small Cause suit as ordinary suit—Parties not raising objections—Appeal.

A suit cognizable by a Small Cause Court which has been tried against the provisions of S. 16, Prov. Small Cause Courts Act as an ordinary suit by a Judge who is not invesetd with Small Cause Court powers, the parties to the suit having raised no objection to the trial, cannot be considered as a small cause suit and the decision is appealable. A.I.R. 1934 Nag. 121=30 N.L.R. 252=149 Ind. Cas. 886.

——S. 16—Small cause case, tried as regular suit.

A decision in a small cause suit tried by the Munsiff as a regular suit is not appealable, but when actually reversed on appeal, the appellate decree should be set aside by the High Court in Revision. 39 All. 101=14 A.L.J. 984=37 Ind. Cas. 92.

——S. 16—Munsiff's decree reversed.

In a Small Cause suit which is tried by the Munsiff in original side, if there is an appeal and the Subordinate Judge reverses the decree of the Munsiff the High Court must interfere and set aside the decree on appeal as passed without jurisdiction. 33 Mad. 323=20 M.L.J. 718=6 M.L.J. 121=1 Ind. Cas. 543.

——S. 16—Trial in regular form—Does not give a right of appeal.

A plaintiff brought a suit for damages for the loss of a cow which had been grazed under a contract by the opposite party. The claim was for Rs. 100. The suit was filed before a Munsiff with powers of a Small Cause Court Judge. The suit was tried in the regular form and the plaintiff was successful but he lost on appeal before the Subordinate Judge. Plaintiff filed a revision application.

Held, that no appeal lay to the Subordinate Judge. As this was a suit of a Small Cause nature, it must be taken to have been tried as a Small Cause though plaintiff did not raise the question in lower appellate Court. 109 Ind. Cas. 46=9 P.L.T. 499=A.I.R. 1928 Pat. 451.

——S. 16—Small causes suit tried as original suit wrongly—Appeal to sub-Court—Revision by High Court—Practice—Procedure.

Where a Small Cause suit is tried by the Munsiff on the Original side and his decision is reversed on appeal, by the Subordinate Court the High Court is bound to set aside the decree of the lower appellate Court, as one passed without jurisdiction. 27 M. 478, overru'ed: 26 M. 176, approved. (1910) 20 M.L.J. 718=6 M.L.T. 121=1 Ind. Cas. 543=33 M. 323 (F.B.).

3. (b) Small cause suit tried as regular suit—Nature of suit not changed.

——S. 16—Nature of suit not changed.

Where a Subordinate Judge as Judge of a Court of Small Causes has under S. 16 of the Act of 1887 exclusive jurisdiction to try a suit, the fact that he tries it as an ordinary suit does not make it so or make the provisions of the Act inapplicable to it, 33 Mad. 323 (F.B.), Foll. 101 Ind. Cas. 53=38

M.L.T. 152=25 M.L.W. 397=A.I.R. 1927 Mad. 1093=52 M.L.J. 316.

3. (c) Small cause suit tried as regular suit—Validity.

——S. 16—Regular Court trying suit of small cause nature by error—Validity.

The effect of the provisions of S. 16 is not to deprive the Regular Court altogether of jurisdiction in suits cognizable by a Court of Small Causes but merely to prevent the exercise of that jurisdiction by the Regular Court so long as there is a Court of Small Causes having jurisdiction within the same local limits.

Consequently, if a Court by error, tries a suit which is of a Small Cause nature and is cognizable by a Small Cause Court exercising jurisdiction within the same local limits, then the proceedings of such Court are not entirely without jurisdiction and therefore, are not a nullity. The character of the suit is not altered by the mode in which it is tried. A.I.R. 1938 Rang. 35=1937 Rang.L.R. 234=175 Ind. Cas. 726.

——S. 16—Failure to comply—Merely a defect in procedure.

Failure to comply with S. 16 is merely a defect in procedure in proceeding in a Court other than the Small Cause Court having jurisdiction to try the case. But this does not mean that the Court has no jurisdiction to try the suit. 31 Bom.L.R. 1307=A.I.R. 1930 Bom. 80.

4. Transfer of small cause suit.

——S. 16—Scope.

Section 16, Prov. Small Cause Courts Act only provides that a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction. It does not take away the jurisdiction of that Court. Section 24, Civil P. C., provides that a Court to which a suit is transferred from a Court of Small Causes shall be deemed to be a Court of Small Causes. The District Judge, can, therefore, transfer a case pending in a Court of Small Causes to any other Court having jurisdiction even though a Small Cause Court having jurisdiction to try the suit is in existence and the decree passed by such Court is not without jurisdiction. A.I.R. 1943 Oudh 449=1943 O.W.N. 205=1943 A.W.R. 48 =208 Ind. Cas. 144.

——S. 16—Suit in Small Cause Court—Transfer of, to Sub-Judge not having small cause powers.

Where a suit is filed in a Small Cause Court and the District Judge transfers it under S. 24, Civil P. C., to a Sub-Judge, it is not necessary that the transfer must be made to a Court having Small Cause Court powers. A.I.R. 1935 All. 690=1935 A.W.R. 433=1935 A.L.J. 511=157 Ind. Cas. 122.

——S. 16—Transfer under S. 24, Civil P. C.

Section 16, Prov. Small Cause Courts Act is no bar to the exercise of powers of transfer of the District Judge under S. 24, Civil P. C. Under this section, the District Judge is entitled to transfer any suit for trial to any Court subordinate to him competent to try or dispose of the same.

A suit was filed by the plaintiff in a Small Cause Court for Rs. 1,000 and the opposite party also filed a suit in the Court of the Munsif on the regular side for Rs. 1,400. Both the suits arose out of a contract between the parties. On application the District Judge transferred the former case to the Court of the Subordinate Judge who had Small Cause powers up to Rs. 250 and who tried these suits on the regular side:

Held, that the Subordinate Judge had jurisdiction to try the suits and the order of the District Judge was valid. A.I.R. 1934 All. 530=151 Ind. Cas. 385 (2).

——S. 16—Transfer of suit.

Section 16, Prov. Small Cause Courts Act is no bar to the exercise of powers of transfer of the District Judge under S. 24, Civil P. C. A.I.R. 1934 Lah. 901=37 P.L.R. 177=154 Ind. Cas. 112.

——S. 16—S. 24 (4), Civil P. C.—Effect of.

Section 24 (4), Civil P. C., is intended to enable the transfer of a suit from a Small Cause Court to one which is not such a Court. It is intended to remove the bar laid down by S. 16. A.I.R. 1932 Bom. 486=34 Bom.L.R. 931=56 Bom. 387=139 Ind. Cas. 194.

——S. 16—Court without small cause powers—Prejudice—Retrial.

A tenant sued to recover the excess of rent recovered from him by his landlord together with certain sums for penalty and damages by way of interest. The suit was filed in the Court of the Subordinate Judge who was invested with Small Cause Court powers. He decided to hear the suit as an ordinary suit and transferred it to the joint Subordinate Judge who had no Small Cause Court powers. The latter Judge passed a decree in tenant's favour.

Held, that the suit should be retried in a proper Court as the trial of the suit as an ordinary suit had prejudiced the parties. 31 Bom.L.R. 1307=A.I.R. 1930 Bom. 80.

5. Miscellaneous.

——S. 16—Jurisdiction—Small cause suit not triable by Chief Court—C. P. Code, O. 37.

A chief Court has no jurisdiction to entertain a suit cognisable by a Court of Small Causes. O. 37 of the C. P. Code lays down certain rules of procedure applicable only after the plaint had been admitted by the Chief Cout.. 9 L.B.R. 69=10 Bur.L.T. 165= 42 Ind. Cas. 839.

——S. 16—Sanction under S. 195, Cr. P. Code.

The section bars the jurisdiction of the District Court in cases of a nature cognizable by Small Cause Court; the Small Cause Court is itself the principal Court of original jurisdiction with regard to suits cognizable only by such Court. The District Court has no power even to grant sanction under S. 195, Cr. P. C., in respect of cases instituted in Small Cause Court, and where the Small Cause Judge has refused sanction. 2 Pat.L.J. 1=18 Cr. L.J. 370=38 Ind. Cas. 754.

——S. 16—C. P. Code, O. 37 and S. 15—Karachi Small Cause Suit, jurisdiction.

Karachi Small Cause Court has exclusive jurisdiction to try suits on Negotiable Instruments up to the value of Rs. 1,000. S. 16 of the Small Cause Courts Act bars the jurisdiction of the said judicial Commissioner's Court to entertain such a suit. The Small Cause Court alone can try such a suit even if it is brought under Order XXXVII of the Code. 5 S.L.R. 155=13 Ind. Cas. 244.

——Ss. 16, 32 (2), C. P. Code, S. 646-B—Institution of a suit before a Munsif exercising Small Cause Court powers up to a certain value—Trial by his successor invested with higher powers.

Where a suit for recovery of a sum of Rs. 70 was instituted in the Court of a Munsif exercising Small Cause Court powers up to Rs. 50 and subsequently during the pendency of the suit the Munsif was transferred and the substantive Munsif who succeeded him had powers of a Small Cause Court up to Rs. 100:—*Held*, that the suit should be tried as if the powers of the Court remained the same as they were when the suit was instituted. (1907) 12 C.W.N. 167

——S. 17.

Synopsis.

1. Sub-S. (1), proviso—Applicability.
2. Sub-S. (1), proviso—Mandatory nature of provision.
3. Sub-S. (1), proviso—Deposit or security—Discretion of Court.
4. Sub-S. (1), proviso—Deposit or security furnished before limitation.
5. Sub-S. (1), proviso—Deposit or security furnished beyond limitation.
6. Sub-S. (1), proviso—Insufficient security made good beyond limitation.
7. Sub-S. (1), proviso—Security bond in correct form not filed within limitation.
8. Sub-S. (1), proviso—Furnishing of security—Procedure.
9. Sub-S. (1), proviso—Interpretation.
10. Sub-S. (1), proviso — Requirements—Sufficiency of compliance.
11. Sub-S. (1), proviso—Security bond—(Miscellaneous).
12. Sub-S. (1), proviso—Time for deposit or filing of security — Extension.
13. Miscellaneous.

1. Sub-S. (1), proviso—Applicability.

——S. 17 (1), proviso—Applicability.

The judgment-debtor objected to an execution application on the ground that the applicant was not competent to apply for execution of the decree. The case was fixed for a certain date when the judgment-debtor was absent. The Court did not dispose of his objection on the merits and did not decide whether the applicant was competent to apply for execution of the decree or not, but passed an order "striking off the objection for default":

Held, (*i*) that his objection had not been dismissed on the merits, and it was open to him to take the same objection by another application instead of applying for the order of dismissal being set aside;

(*ii*) that the order could not be an order under S. 47 Civil P. C., and did not amount to a decree;

(*iii*) that the order in question could, in no sense, be considered to be an *ex parte* decree so as to attract the application of the proviso to S. 17. A.I.R. 1935 All. 502=1935 A.L.J. 403=1935 A.W.R. 427 = 157 Ind. Cas. 426.

——S. 17—Section 17 is not applicable to a case when an *ex parte* decree is passed by a Union Court. (1935) 62 C.L.J. 295=40 C.W.N. 349.

——Ss. 17, 35—Ex parte decree in Small Cause Court—Abolition of such Court—Application to set it aside, if governed by S. 17 or by Civil P. C.

Any proceeding arising out of a suit which has been decided by a Small Cause Court must be governed by the provisions of the Small Cause Courts Act. Consequently, where a person has obtained an *ex parte* decree in a Small Cause Court which has subsequently been abolished, an application to set aside the decree made to the Munsif is governed by S. 17, Small Cause Courts Act, and not by the Civil P. C. A.I.R. 1934 All. 943=1934 A.L.J. 917=57 All. 348=4 A.W.R. 382=153 Ind. Cas. 661.

——S. 17 (1), proviso—Secretary of State, whether bound to give security.

The Secretary of State is not exempted from the liability imposed by S. 17 of making a deposit or furnishing security on making an application for setting aside an *ex parte* decree in a small cause suit. A.I.R. 1932 All. 575=1932 A.L.J. 842=54 All. 879=139 Ind. Cas. 701.

——S. 17 (1)—Applicability of—Application to set aside—Dismissal for default.

An application for an order to set aside an order of dismissal for default is not an application for an order to set aside a decree *ex parte* and therefore he need not make the deposit as under S. 17 (1) Proviso. 23 C.L.J. 147=35 Ind. Cas. 45.

——S. 17—Applicability of—Application to set aside dismissal of suit for default.

A miscellaneous application for the restoration of an application under O. 9, Rr. 4 and 9 of the C. P. Code dismissed for the default of the applicant is not covered by S. 17 of the Act. 44 Cal. 950=21 C.W.N. 30=24 C.L.J. 446=35 Ind. Cas. 613.

2. Sub-S. (1), proviso—Mandatory nature of provision.

——S. 17 (1), Proviso—Review petition—Deposit of decree amount or security—Necessity.

The proviso to S. 17 (1) of the Provincial Small Cause Courts Act is mandatory and not merely recommendatory.

Where a Court admits and proceeds with a petition for review without the necessary deposit or security, even after the mandatory need for the security is brought to its notice, it errs in law. 1949 M.W.N. 47=A.I.R. 1949 Mad. 419=(1949) 1 M.L.J. 71.

——S. 17 (1), proviso—Deposit or security is necessary.

Section 17, Small Cause Courts Act (as amended in 1935) is mandatory in its provisions and it is, therefore incumbent on a party seeking to have an *ex parte* decree set aside either to deposit the decretal acount at the time of presenting the application for setting aside the decree or to file security as directed by the Court upon a previous application made for that purpose. A.I.R. 1943 All. 288=1943 A.L.J. 241=1943 A.W.R. 127=I.L.R. (1943) All. 658=211 Ind. Cas. 131.

——S. 17 (1), proviso—Provisions are mandatory.

The intention of S. 17, Provincial Small Cause Courts Act, is that a person who proposes to apply under O. 9, R. 13, Civil P.C., in the case of a decree of Small Cause Court and does not propose to

deposit the amount due under the decree along with his application but to deposit a security must previously make a formal application to the Court and obtain permission by means of such application for the giving of security. Where the applicant neither deposited the amount required nor had he previously made any application for permission to give security, the application for setting aside the *ex parte* decree must be dismissed. The provisions of the section, as amended by Act 9 of 1935 are absolutely mandatory. A.I.R. 1941 Oudh 103=1940 O.W.N. 1190=1940 A.W.R. 479=191 Ind. Cas. 736.

——S. 17 (1), proviso (as amended in 1935)—Terms of proviso are mandatory.

The terms of the proviso to S. 17 (1), Provincial Small Cause Courts Act, are mandatory and the deposit of the decretal amount or the furnishing of security is a condition precedent to the entertaining of an application under O. 9, R. 13, Civil P. C. It is, therefore, essential that the necessary deposit or security should be lodged at the time of the presenting of the application under O. 9, R. 13, and unless this is done, the application must be dismissed. There is, however, nothing to prevent withdrawal of an application which fails to comply with the proviso and the filing of a fresh application accompanied by the necessary deposit or security provided it is filed within the prescribed time. A.I.R. 1940 Sind 105=I.L.R. (1940) Kar. 154=188 Ind. Cas. 553.

——S. 17 (1), proviso (as amended in 1935)—Provisions are mandatory.

Section 17, as it now stands, contains a mandatory provision to the effect that an applicant for an order to set aside a decree passed *ex parte* must do one of two things at the time of presenting his application that is, he must either deposit the amount due from him under the decree, or give such security for the performance of the decree as the Court may, on a previous application made by him in this behalf, have directed. Where this mandatory provision has not been complied with, the Small Cause Court has no jurisdiction to entertain the application. A.I.R. 1939 All. 77=1938 A.L.J. 1058=1938 A.W.R. 753=180 Ind. Cas. 100.

——S. 17, proviso—Proviso is not directory.

Application for setting aside *ex parte* decree—Neither decretal sum deposited nor security given—Application, held must be rejected. A.I.R. 1936 Pesh. 91.

——S. 17 (1), proviso—Provisions not complied with—Effect.

The provisions of the proviso to S. 17 are mandatory and deposit of security should be made at the time of making the application.

Where the deposit contemplated by S. 17 was neither made at the time of the presentation of the application, nor was it made within the period of limitation, nor was the period extended by the Court:

Held, that the provisions of S. 17 were not observed and that the application for setting aside the decree passed *ex parte* was, therefore, not maintainable. A.I.R. 1935 Pesh. 159=158 Ind. Cas. 1112.

——S. 17 (1), proviso—Deposit or security.

Proviso to S. 17 is mandatory and it is a condition precedent to the granting of a new trial that the applicant should, when pesenting the application, either deposit the amount or give security. 116 Ind. Cas. 641=26 N.L.R. 63=A.I.R. 1930 Nag. 137.

——S. 17—Failure to deposit or furnish security—No setting aside.

The order of Small Cause Court setting aside an *ex parte* decree, in spite of the fact that the defendant did not deposit the decretal amount nor did he give security under S. 17 is *ultra vires*. 106 Ind. Cas. 830=A.I.R. 1929 Lah. 374.

——S. 17 (1), proviso—The provisions of S. 17 Provincial Small Causes Courts Act, are mandatory and the Court does not acquire jurisdiction until cash is deposited or security is given. A.I.R. 1923 All. 270, Foll.

The deposit may be made and security given within the period prescribed by the law of limitation for application for rehearing, *i.e.*, Art. 164, Limitation Act. 43 Mad. 579, Foll. 108 Ind. Cas. 464=50 All. 254=25 A.L.J. 1032=A.I.R. 1928 All. 111.

——S. 17 (1), proviso—Depositing money or giving security is a condition precedent to maintain an application to set aside an *ex parte* decree. 114 Ind. Cas. 502=5 O.W.N. 886=A.I.R. 1928 Oudh 488.

——S. 17 (1), proviso—The deposit of the decretal amount or the furnishing of the security is a condition precedent to the entertaining of an application to set aside an *ex parte* decree. 97 Ind. Cas. 581 =13 O.L.J. 592=3 O.W.N. 621=A.I.R. 1926 Oudh 544.

——S. 17 (1), proviso—No setting aside if provisions not complied with.

The provisions of S. 17 (1) are mandatory and unless they are complied with the order setting aside the *ex parte* decree is illegal. 48 Mad. 579, Foll. 69 Ind. Cas. 178=16 M.L.W. 606=31 M.L.T. 320=A.I.R. 1923 Mad. 83.

——S. 17—Dispensing with security — No power.

S. 17 is mandatory and the Court cannot dispense with the security. The mere word of the defendant against whom the decree is asked for in the suit, is no security at all. 72 Ind. Cas. 900=17 M.L.W. 579=32 M.L.T. 316=A.I.R. 1923 Mad. 594.

——S. 17—Application for review—Deposit of amount due condition precedent.

The provisions of S. 17 do not contemplate an application for a review of judgment being admitted unless, within the period allowed by law, there is a deposit in Court of the amount due from the applicant or unless security is furnished within that period to the satisfaction of the Court. 76 Ind. Cas. 863=1 Bur. L.J. 75=4 U.B.R. 117=A.I.R. 1922 U. B. 18.

——S. 17—Prayer for time to deposit—Is not compliance with section.

Where the applicant, against whom a suit was decreed *ex parte* did not deposit the decretal amount with the application for restoration, but prayed for time to deposit it.

Held, that the provisions of Section 17 were not complied with and the Court has no jurisdiction to entertain application without following the procedure prescribed in Section 17. 65 Ind. Cas. 596 =20 A.L.J. 209=A.I.R. 1922 All. 29.

———S. 17—Deposit, when to be made.

Under S. 17 of the Prov. Small Cause Court Act, it is a condition precedent to the granting of a new trial that the applicant should at the time of presenting his application deposit in Court the decretal amount or tender security for payment of the same. 54 Ind. Cas. 971 (Pat.).

——S. 17—Decree ex parte—Security not deposited—Jurisdiction.

When the law lays down a definite procedure it must be followed. A Small Cause Court cannot set aside as *ex parte* decree unless the amount due under it is deposited in the Court for its due performance. 38 Ind. Cas. 139 (All.).

——S. 17—Ex parte decree, setting aside of—Deposit of decretal amount or security.

To set aside an *ex parte* Small Cause Court decree the applicant must, at the time of presenting his application, either deposit in Court the amount of the decree or give security as provided for by S. 17. 35 Ind. Cas. 625 (All.).

——S. 17—Necessity of deposit.

Application to set aside an *ex parte* decree passed in a Small Cause suit must be heard and disposed of only after deposit of security. 34 Mad. 88=7 M. L.J. 308=(1910) M.W.N. 279=6 Ind. Cas. 400.

——S. 17—Application to set aside an ex parte decree—Necessity of depositing amount of decree or giving security.

S. 17 requires that at the time of presenting his application the applicant must either deposit in Court the amount of the decree, or give security as provided for by the section; so that the deposit of the decretal amount or the furnishing of security is a condition precedent to the entertaining of an application to set aside an *ex parte* decree. 1906 A. W.N. 93=3 A.L.J. 318=28 A. 470.

3. Sub-S. (1), proviso—Deposit or security—Discretion of Court.

——S. 17 (1), proviso—Option to furnish security or deposit amount.

Under S. 17, it is within the competence of the Court to decide whether the defendant who applies to set aside an *ex parte* decree, should give security to the satisfaction of the Court or whether he should deposit the decretal amount in Court, before his application is adjudicated upon. The choice does not lie with the defendant. (1932) 137 Ind. Cas. 230=33 P.L.R. 931.

——S. 17—Discretion of Court—As to deposit or security.

Upon an application for setting aside an *ex parte* decree the Small Cause Court has discretion either to ask for a deposit of the decretal amount or a security for that amount and where the time for testing a security is not sufficient, the Court exercises its discretion properly in ordering deposit instead of security and in dismissing the application for failure to make the deposit as ordered. 127 Ind. Cas. 143=A.I.R. 1930 Mad. 658.

——S. 17—Deposit or security—Option.

(Per *Niamatulla, J.*)—The meaning of the section is that the applicant has the option either to deposit the amount of the decree in cash or give security. But if he elects to adopt the latter course, the security must be to the satisfaction of the Court and subject to the Court's directions. It is necessary that an appellant who is not ready and willing to deposit the decretal amount and desires to give security instead should at the time of presenting the application obtain the directions of the Court as regards the security. The evidence as to the security being to the satisfaction of the Court may be taken on a subsequent date.

(Per *Mukerji, J.*)—With the presentation of the application for setting aside *ex parte* decree the applicant must seek Court's direction asking for its specific order whether he should deposit cash or furnish security and in what manner. 1929 A.L. J. 1273=A.I.R. 1929 All. 840.

——S. 17—Order for deposit after security—Is bad.

The Court is not justified in insisting upon the decretal amount being paid, when, as a matter of fact, the petitioner has given security for the amount decreed along with his petition, and when the Court has not passed any order rejecting the security tendered. 96 Ind. Cas. 19=23 M.L.W. 569=A.I.R. 1926 Mad. 647.

——S. 17—On an application to set aside an *ex parte* decree the Court can direct whether the security should be paid in cash or in property and if it gives a direction one way or the other, a reasonable time has to be allowed for carrying out that direction. 73 Ind. Cas. 219=A.I.R. 1924 Oudh 121.

——S. 17 (1), proviso—Sufficiency of security.

It is a matter of discretion of a Small Cause Court whether to accept security offered as required under S. 17 as sufficient or not. 114 Ind. Cas. 502=5 O. W.N. 886=A.I.R. 1928 Oudh 488.

4. Sub-S. (1), proviso—Deposit or security furnished before limitation.

——S. 17, proviso—Filing of security within limitation.

The applicant must present his application for setting aside the decree together with the security demanded before the expiration of the thirty days of limitation as provided by Art. 164, Limitation Act. If the security filed be in pursuance of a direction by the Court and the Court accepts the security without question and directs a notice to issue before limitation has expired, it, by necessary implication, gives a direction that the security furnished is sufficient to its mind. Where, therefore, the application for setting aside the *ex parte* decree was filed within the period of thirty days and the Court allowed the application for filing personal security and the personal bond as security was filed by the applicant clearly within that period and notice to the decree-holder opposite party was also issued before the limitation of thirty days had expired, the requirements of the proviso to S. 17 of Prov. Small Cause Court Act must be held to be fulfilled in reference to the application itself. 1947 A.L.J. 204=1947 A.L.W. 234=1947 A.W.R. (H.C.) 236=A.I.R. 1947 All. 125.

——S. 17 (1), proviso—Ex parte decree against defendant—Two applications by defendant on same day, one praying for permission to furnish personal security and other praying for setting aside ex parte decree—First application held 'previous application' within meaning of proviso to S. 17 (1)—Application for setting aside ex parte decree held competent.

The intention of the Legislature in enacting the

proviso to S. 17 (1) is that an application for setting aside an *ex parte* decree passed by a Court of Small Causes besides being required to be filed within limitation shall not be treated as a competent application until the applicant has either deposited the decretal amount in Court or has furnished such security for the performance of the decree as the Court may direct and that such direction must be obtained by means of an application which has not been filed subsequently to the filing of the application for setting aside the *ex parte* decree.

A defendant against whom an *ex parte* decree was passed by the Court of Small Causes filed two applications in the Court on the same day. In one application he prayed that he being not able to deposit cash security the Court should permit him to furnish personal security of one *G*. In the second application he prayed that the *ex parte* decree should be set aside. The Court disposed of and disallowed the former application before the expiry of the limitation for application to set aside the *ex parte* decree. Subsequently but well within limitation he deposited the decretal amount in cash. But the Court dismissed the application for setting aside the *ex parte* decree on the ground that the security not having been furnished at the time of the presentation of the application for setting aside the *ex parte* decree, the applicant must be deemed to have failed to comply with the terms of the proviso to S. 17 (1) and therefore the application would not be entertained although the cash security had been furnished within the limitation prescribed for making such application:

Held, that the application for permission to furnish personal security was a "previous application" within the meaning of the proviso to S. 17 (1).

Held further, that the utmost that could be said against the defendant was that his application for setting aside the *ex parte* decree was not a competent or complete application until the date on which he tendered the decretal amount in Court. But it must be held that by that date he had fully complied with the proviso to S. 17 (1) and that having taken place within limitation there was nothing against the petitioner. A.I.R. 1946 All. 425=1946 A.L.J. 243=I.L.R. (1946) All. 615=227 Ind. Cas. 76 =1946 A.L.W. 275=1946 A.W.R. (H.C.) 224.

——S. 17—Security furnished after application but within limitation — Section 17 is complied with.

Where after the application under S. 17, security is furnished by the petitioner within the time during which the application for setting aside the *ex parte* decree could have been made by him, the provisions of S. 17, have been complied with and the application for setting aside the *ex parte* decree may be deemed to have been legally presumed for the first time on the day when deposit was made. A.I.R. 1946 Lah. 62=222 Ind. Cas. 8.

——S. 17 (1), proviso—Deposit not with application but with stay application.

In order to comply with the first part of the proviso to S. 17, it is not essential that the deposit should be made at the time of making the application to set aside the decree; it is sufficient if the deposit is made within the time allowed by law for setting aside the decree.

If such payment is made, not with the application under S. 17, but with an application to stay execution with a request to treat it as deposit under S. 17, such payment should be treated as one under S. 17. A.I.R. 1943 Bom. 237=45 Bom.L.R. 470=209 Ind. Cas. 637.

——S. 17 (1), proviso—Deposit of security.

According to S. 17, the condition which is prescribed for furnishing security or depositing cash, will, in case of review, take effect within 90 days from the date of judgment. (1940) 188 Ind. Cas. 771.

——S. 17 (1), proviso—Security not deposited with application.

When security was not deposited along with the application for setting aside an *ex parte* decree but some days later, the application must be taken to have been presented in law on the day when the security was deposited. Where the application was made and security was furnished within 30 days there is substantial compliance with S. 17 of the Act as amended, and the applicant need not file another application praying for the acceptance of the security. A.I.R. 1939 All. 503=1939 A.W.R. 398=1939 A.L.J. 293=I.L.R. (1939) All. 554= 183 Ind. Cas. 691.

——S. 17 (1), proviso—Rule as to security when can be relaxed.

The requirement of S. 17, Prov. Small Cause Courts Act, that the amount due or security for it is to be furnished "at the time of presenting the application' can only be relaxed to this extent that if the application is presented without the money or the security bond and the security bond or money is put in thereafter, the application will be considered to have been duly filed on the date on which the money was put in or the security furnished as the case may be. The powers of the High Court to interfere in this respect under S. 115, Civil P. C., are very limited. A.I.R. 1938 Pat. 106=3 B.R. 207=166 Ind. Cas. 671.

——S. 17 (1), proviso—Deposit of security after date of application but within time.

Under S. 17, it is not necessary that an applicant who applies to set aside a decree passed *ex parte* must, at the time of presenting his application, either deposit the amount due under the decree or give security to the satisfaction of the Court for the performance of the decree; if the application is made within time and the security is subsequently furnished within time, the provisions of S. 17 will be sufficiently complied with. A. I. R. 1932 Bom. 40=33 Bom. L. R. 1433=55 Bom. 779=135 Ind. Cas. 465.

——S. 17 (1), proviso—Deposit at any time before lapse of time.

The provisions of S. 17 are mandatory. But if an application under S. 17 is filed without security and is subsequently completed within the time prescribed by the law of limitation for making the application by the deposit of the decretal amount or filing of security the applicant has a right to have his application heard on merits. 122 Ind. Cas. 328=6 O.W.N. 1014=A.I.R. 1930 Oudh 1.

——S. 17—Application to set aside "ex parte" decree.

An application to set aside an *ex parte* decree not accompanied by either security bond or cash cannot be treated as an application to set aside an

ex parte decree. But where, after presentation of such application, the Court directs security to be furnished and the security is furnished within the time allowed by law for applying for setting aside an *ex parte* decree the application can only be considered to be a proper application as and from the date after the proper deposit was made and the Court can consider such application. 32 C. 339 and 43 M. 579 (F.B.) Appr. A.I.R. 1930 All. 830=128 Ind. Cas. 765=1931 A.L.J. 7.

——S. 17—Deposit-time for making.

The deposit may be made and security given within the period prescribed by the law of limitation for applications for rehearing *i.e.*, Art. 164 Limitation Act. 108 Ind. Cas. 464=50 All. 254 =25 A.L.J. 1032=A.I.R. 1928 All. 111.

——S. 17—Provision mandatory.

The provisions as to the deposit of amount or the giving of security are mandatory but are sufficiently complied with if the deposit is made or the security is given before the time prescribed for such application in the Limitation Act has elapsed. 38 M.L.J. 539=11 L.W. 543=28 M.L.T. 17= 1920 M.W.N. 375=43 Mad. 579=55 Ind. Cas. 977 (F.B.).

——S. 17—Directory provisions.

The words "at the time of presenting his application" in S. 17 are directory and not mandatory and a deposit or security might be made after the court has decided as to which of the two is to be done. 19 P.L.R. 1919=50 Ind. Cas. 917.

——S. 17—Nature of provisions.

The provisions of S. 17 are mandatory; hence an application to set aside *ex parte* decree must be accompanied by the necessary security or deposit. 13 M. 178, Dissented from. The applicant has a right to have his application heard on merits if he subsequently furnishes security within the time prescribed by law. 15 C.W.N. 102=6 Ind. Cas. 154.

——S. 17—Mandatory—Effect.

The provisions of S. 17 are mandatory. Where an application under that section is filed without security but where the security is deposited within the time allowed by law for the application, the applicant has a right to have his application heard on the merits. (1910) 15 C.W.N. 102=6 Ind. Cas. 154.

——S. 17 (1), proviso—Deposit within limitation.

When an application has been presented under S. 17 without deposit of decretal amount or security therefor, if before such application is rejected and within the time limited for making the application such deposit is duly made, the application may rightly be regarded as satisfying substantially the requirements of the law and ought to be acted upon by the court. (1904) 1 C.L.J. 43=32 C. 339.

5. Sub-S. (1), proviso—Deposit or security furnished beyond limitation.

——S. 17 and O. 9, R. 13, C. P. Code—Application for setting aside ex parte decree—Security furnished after expiry of limitation—Application, if competent.

If an application under O. 9, R. 13, C. P. Code, for setting aside an *ex parte* decree passed in a Small Cause Court suit is filed on the last date of limitation without making the deposit of the amount due under the decree, or furnishing security for the same as required under S. 17 of the Provincial Small Cause Courts Act and security is furnished on a later date after the application is barred by limitation under Art. 161 of the Limitation Act, the application is incompetent and an order for restoration of the suit cannot be made thereon. 24 C.W.N. 380, foll. 2 D. R. 67.

——S. 17 (1), proviso—Application to set aside ex parte decree not accompanied with deposit—Subsequent deposit—No reason to justify extension of period—Proviso, if complied with.

Where an application for an order to set aside an *ex parte* decree was not accompanied, as required by S. 17 (proviso), by a deposit of the amount due under the decree or security to the satisfaction of the Court for the performance of the decree or compliance with the judgment, and it appeared that the requirements of the proviso were complied with on a later date, after time and there was nothing to show that there were circumstances to justify the exercise of the power under S. 5, Limitation Act, to extend the period:

Held, that the application for an order to set aside the *ex parte* decree was not made in compliance with the law at all, and that the lower Court exercised its jurisdiction illegally or with the material irregularity in entertaining that application. A. I. R. 1933 Pat. 134=14 P.L.T. 20=142 Ind. Cas. 599.

——S. 17—Deposit after limitation—Rejection proper.

Where the applicant for setting aside an *ex parte* decree was ordered to deposit first of all the security but no time was fixed for depositing the security and the order clearly implied that the deposit should be made within a reasonable time.

Held, that a deposit made more than two weeks after the expiry of the thirty days' period of limitation was rightly rejected by the lower Court. 89 Ind. Cas. 482=2 O.W.N. 440=A.I.R. 1925 Oudh 446.

6. Sub-S. (1), proviso—Insufficient security made good beyond limitation.

——S. 17 (1), proviso—Security insufficient—If can be made good beyond limitation.

The provisions of S. 17 are mandatory and security either in cash or in the form of a bond should be filed at least within the time allowed for making the application for setting aside an *ex parte* decree, but where the security bond was filed along with the application to set aside the *ex parte* decree and the security was found insufficient, it can be allowed to be made good beyond limitation. A.I.R. 1937 Oudh 206=1937 O.W.N. 53=166 Ind. Cas. 137.

——S. 17 (1), Proviso—Security found insufficient and additional security filed after thirty days—Maintainability of application.

Where, in the matter of an application to set aside an *ex parte* decree in a small cause suit, a draft of a security bond of immovable property was filed for the inspection of the Court within thirteen days after the decree and the fair bond on stamp paper was also filed in Court within thirty days of the decree but the Court subsequently found the security insufficient and additional security was furnished only after thirty days from the decree:

Held, that the delay by reason of which the full security was not furnished within thirty days was due to the action of the Court and cannot be laid at the door of the judgment-debtor and the security must be deemed to have been furnished within the thirty days prescribed. A.I.R. 1936 Mad. 524=163 Ind. Cas. 732.

——S. 17 (1), Proviso—Application to set aside *ex parte* decree—Security bond—Security found insufficient but report about insufficiency incorrect—Order for second security bond—Bond executed and filed after limitation:

Held, second bond was part of same transaction and not barred. A.I.R. 1936 Oudh 407=1936 O.W.N. 688=12 Luck. 287=164 Ind. Cas. 470.

——S. 17 (1), proviso—Application not accompanied with bond—Subsequent completion within time—Right to be heard.

If an application under S. 17 for setting aside an *ex parte* decree is filed without security and is subsequently completed within the time prescribed by the law of limitation for making the application, by the deposit of decretal amount or filing of security, the applicant has a right to have his application heard on the merits. Consequently, although the application was not accompanied with a cash deposit or with a security bond, yet the Court having permitted the applicant to file a security bond and the bond having been executed and filed within the period of limitation prescribed by Art. 164, Limitation Act, no fault can be found with the security bond. A.I.R. 1936 Oudh 407=1936 O.W.N. 688=12 Luck. 287=164 Ind. Cas. 470.

7. Sub-S. (1), proviso—Security bond in correct form not filed within limitation.

——Ss. 17, 25—Security bond not of nature specified in S. 17—Bond in correct form not filed within limitation—Ex parte decree set aside—Legality.

Where the security bond was not of the nature specified in S. 17 but was a bond undertaking to pay the amount of any future decree which might be passed against the applicant, and not security for the performance of the *ex parte* decree, should the application not be successful, and no security bond in the correct form was put in within the period of limitation:

Held, that the order of the Court setting aside the *ex parte* decree was without jurisdiction and would be set aside in revision. A.I.R. 1936 Pesh. 193=167 Ind. Cas. 479 (1).

——S. 17 (1), proviso—Security for appearance of judgment-debtor.

An *ex parte* decree was passed in a Small Cause suit and the judgment-debtor was arrested. The judgment-debtor presented an application for setting aside the decree and to comply with the provisions of S, 17, filed a security bond under which the surety undertook to produce the judgment-debtor when called upon to do so and to pay the decree amount if he failed to do so. The Court subsequently ordered him to deposit the amount of the decree. The amount was deposited and the decree was set aside:

Held (*i*) that the judgment-debtor had not complied with the requirements of S. 17 as the security furnished by him was only for his appearance and not for the due performance of the decree, and inasmuch as he did not seek for the direction of the Court as regards the security when the bond was presented:

(*ii*) that the subsequent payment of the decree amount could not remedy the original non-compliance with the provisions of S. 17.

The provisions of S. 17 are mandatory and non-compliance with those provisions amounts to an illegality and cannot be ignored on the ground that it is a mere irregularity.

The security contemplated by S. 17 is security for the performance of the decree or compliance with the judgment. The furnishing of security for the appearance of the judgment-debtor is not sufficient. A.I.R. 1931 All. 103=1930 A.L.J. 1494=130 Ind. Cas. 710.

8. Sub-S. (1), proviso—Furnishing of Security—Procedure.

——S. 17 (1), proviso—Applicant not prepared to make cash deposit of decretal amount—Previous application offering security is necessary.

Where, in an applicatoin to set aside an *ex parte* decree, the applicant is not prepared to deposit the decretal amount in cash, he must file an application, prior to his application for setting aside the *ex parte* decree, to the effect that he would desire to give security for the performance of the decree and must obtain the direction of the Court beforehand. This provision of the law contained in proviso to S. 17 (1) is mandatory. A.I.R. 1944 Oudh 104=1943 A.W.R. 189=1943 O.W.N. 486=211 Ind. Cas. 97.

——S. 17 (1), proviso—Application to set aside *ex parte* decree made on 7th April 1941—On 9th April, further affidavit offering security filed—Court ordering security to be tested—No registered bond filed though draft bond was put in within thirty days—Application rejected on 21st July, on ground that S. 17 was not complied with—Application of 7th April, held could be treated as made on 9th April—Action of applicant, held had been within the spirit of S. 17—Filing of draft bond, held not sufficient compliance with S. 17. A.I.R. 1943 Mad. 51=1942 M.W.N. 560=55 L.W. 573=(1942) 2 M.L.J. 425 208 Ind. Cas. 209.

——S. 17 (1), proviso—"Previous application" meaning of—Two applications filed.

The applicant applied under O. 9, R 13, Civil P. C., to have the *ex parte* decree set aside, and at the same time, he applied for permission to give security other than cash. The application for leave to furnish security other than cash was first entertained and decided by the Court:

Held, that it may fairly be assumed that the intention of the applicant, when preferring the two applications, was that the application for permission to file a security bond and obtain the Court's direction should first be taken up by the Court, and from this point of view it may reasonably be regarded as a "previous application" such as is contemplated by S. 17, Prov. Small Cause Courts Act. A.I.R. 1941 All. 284=1941 O.W.N. 750=1941 A.W.R. 193=1941 A.L.J. 340=1941 R.D. 471=I.L.R. (1941) All. 589=197 Ind. Cas. 35.

——S. 17 (1), proviso (as amended in 1935)—Filing of security bond without previously applying for Court's direction to that effect—Effect.

The provisions of S. 17 relating to the filing of security by an applicant for an order to set aside a

decree passed *ex parte* are clearly imperative and it is not within the power of the Court to condone any failure on the part of the applicant to carry out those provisions. He is not entitled to file a security bond along with his application without having previously obtained the direction of the Court. If he fails to make a previous application to the Court, he cannot later on ask the Court to show any indulgence to him. It is not within the power of the Court subsequently to entertain an application for an order to set aside an *ex parte* decree where it is not accompanied by a deposit in the Court of the amount due under the decree from the applicant, and no application has been previously made for obtaining the direction of the Court to file a security bond. A.I.R. 1939 All. 46=1938 A.L.J. 1078=1938 A.W.R. 768=179 Ind. Cas. 232.

——S. 17 (1), proviso—Security bond not verified by sureties—Verification two days after expiry of limitation.

The defendant made an application to set aside the *ex parte* decree which plaintiff had obtained against him, and filed at the same time, a security bond in accordance with the provisions of S. 17. The Court directed the bond to be verified and the bond was "finally verified on a date two days beyond the period of limitation prescribed for making the application and providing security. The *ex parte* decree was set aside. Plaintiffs applied to the High Court in revision:

Held, that the Court did not act illegally in setting aside the *ex parte* decree and hearing the suit on the merits, inasmuch as the bond as originally filed was not an ineffective bond and the Court went through the formality either for its satisfaction or for the protection of the decree-holder and not because the bond was not a perfectly good bond. A.I.R. 1933 All. 933=1933 A.L.J. 992=147 Ind. Cas. 853.

——S. 17 (1), proviso—Application, held valid.

Where a person against whom an *ex parte* decree has been passed by a Court of Small Causes, without formally applying for the Court's direction as to the nature of security to be furnished, applies to such Court for setting aside the *ex parte* decree and furnishes security with it and the Court directs a notice to issue to the other party, the Court must be taken to have directed the applicant to furnish security of the kind actually furnished by him.

The provisions of S. 17 are not merely directory but imperative and mandatory. A.I.R. 1931 All. 727=1931 A.L.J. 1049=54 All. 154=136 Ind. Cas. 609 (F.B.).

——S. 17 (1), proviso—Rejection of application, held illegal.

An application to set aside an *ex parte* decree in a small cause suit was made accompanied by the necessary security. The Court accepted the security and ordered notice to be issued to the plaintiff. The plaintiff subsequently objected to the security on the ground that it was difficult to send it for verification but not on the ground that it was insufficient:

Held, that the objection was not good and the application could not be rejected as the provisions of S. 17 had been sufficiently complied with. A.I.R. 1931 Oudh 319=8 O.W.N. 225=132 Ind. Cas. 238.

——S. 17 (1), proviso—Mere filing of draft security bond within time is not sufficient.

The mere filing of a draft bond within prescribed time is not sufficient compliance with the provisions of S. 17. The draft security bond is a mere piece of paper and it cannot have the effect of a security bond duly executed and registered which alone can be enforced. A.I.R. 1943 Mad. 520=56 L.W. 276=1943 M.W.N. 428=(1943) 2 M.L.J. 671=I.L.R. (1944) Mad. 194=211 Ind. Cas. 203.

——S. 17 (1), proviso—Draft-bond.

Where an application is made with draft security which is rejected it is to be deemed incompetent where there is no subsequent application made within the period of limitation with proper observance of the provisions of that section. 90 Ind. Cas. 194=7 P.L.T. 138=1926 P.H.C.C. 121=A.I.R. 1927 Pat. 90.

——S. 17 (1), proviso—Draft-bond not enough.

A small cause suit was decreed *ex parte* and the application to set it aside was made on next day without the necessary deposit or security as required by the proviso to S. 17. The defendant filed within 30 days a draft security bond but the actual bond was executed outside 30 days.

Held, the mere filing of the draft bond is not a sufficient compliance with the requirements of the proviso. The proviso to S. 17 of the Provincial Small Causes Courts Act is mandatory and the deposit of the security msust be made or given within the period of limitation prescribed for an application to set aside an *ex parte* decree. 70 Ind. Cas. 496=15 M.L.W. 186=A.I.R. 1922 Mad. 320.

9. Sub-S. (1), Proviso—Interpretation.

(a) "Amount due under the decree".

(b) "or in pursuance of the judgment".

(a). "Amount due under the decree".

——S. 17 (1), proviso—"Amont due under the decree"—Interpretation.

The words "the amount due under the decree" in S. 17 mean the amount due under the decree at the date it was given and not the amount due under the decree at the date when the application for restoration was presented. A.I.R. 1933 All. 13=1932 A.L.J. 260=54 All. 409=136 Ind. Cas. 839 (1).

——S. 17—Interpretation—"Amount due under decree".

The words "the amount due from him under the decree" mean "due under the decree at the date it was passed." 87 Ind. Cas. 370=47 All. 623=23 A.L.J. 296=6 L.R.A. (Civ.) 345=A.I.R. 1925 All. 412.

(b). Interpretation—"Or in pursuance of the judgment."

——S. 17—The words "or in pursuance of the judgment" in the said proviso must be read distributively and applied to the words "for a review of the judgment" which precede. 74 Ind. Cas. 64=45 All. 569=21 A.L.J. 522=4 L.R.A. (Civ.) 277=A.I.R. 1923 All. 605.

10. Sub-S. (1), proviso—Requirements—Sufficiency of compliance.

——S. 17 (1), proviso—Requirements—Complicance.

Where the application for setting aside an *ex parte* decree is accompanied by a cash deposit of the decretal amount or a security bond safeguarding the

interest of the decree-holder, it amounts to effective compliance with the requirements of S. 17, Provincial Small Cause Courts Act. A.I.R. 1945 All. 282 =1945 A.L.J. 226=1945 A.W.R. (H.C.) 129= 1945 O.W.N. (H.C.) 206=I.L.R. (1945) All. 635.

——S. 17—Error in stating amount—Bona fide —Substantial compliance.

Where an applicant for setting aside an *ex parte* decree gave full security,

Held, that the circumstance that he made a genuine error by which he stated the amount for which the security had to be given to be less than it really was, did not affect the fact that he had given full security for what was due, and that there was substantial compliance with S. 17. 88 Ind. Cas. 581=47 All. 728=23 A.L.J. 435=6 L.R.A. (Civ.) 343=A.I.R. 1925 All. 379.

——S. 17—Deposit of amount mentioned in decree erroneously.

It is the duty of the Court to enter correct figures in its decree. If a decree incorrectly states the amount to be deposited and the defendant deposits the amount stated therein under S. 17 of the Small Cause Courts Act he must be deemed to have complied with the law. 62 Ind. Cas. 689=43 All. 438 =19 A.L.J. 245=A.I.R. 1921 All. 144.

——S. 17—Ex parte decree—Deposit of amount mentioned in decree erroneously.

Where a notice of an application for execution of an *ex parte* decree wrongly omitted the costs and the judgment-debtor deposited under S. 17 the amount mentioned in the notice and deposited the cost later on, held that the provisions of S. 17 of the Act were sufficiently complied with. 14 Ind. Cas. 242 (All.).

——S. 17, proviso—Strict compliance—Mistake in calculation.

A strict compliance with the provisions of the proviso is necessary. Where owing to a mistake in calculation, the compliance is only substantial the defect cannot be condoned. 33 Ind. Cas. 133 (Cal.).

——S. 17—Sufficiency of compliance—Inability to pay into treasury—Payment next working day.

Where the applicant tendered the deposit amount to the Court on a Saturday but was unable to make his deposit in the treasury which had closed earlier in the day, and he actually deposited it only on the following Monday, he should be deemed to have substantially complied with the requirements of the proviso to S. 17 of the Act. 123 Ind. Cas. 825 (All.).

——S. 17 (1), proviso—Delay in payment into treasury.

An application for setting aside a Small Cause Court decree was made, together with tender of the decretal amount on 3rd December 1926, but the amount was actually paid into the treasury on the 6th December, 1926, 5th December 1926, being a holiday:

Held, that the tender was a good tender in view of R. 12 of Chapter 2 of the General Rules of the High Court. 102 Ind. Cas. 523=A.I.R. 1927 All. 608.

——S. 17 (1), proviso—Tender.

The presentation of a tender within time is substantial compliance with the provisions of S. 17, provided the applicant has done everything that was possible for him to deposit the money at the time of presenting the application: A. I. R. 1926 All. 602, Foll. 105 Ind. Cas. 169=2 Luck. 594= 1 L.C. 155=A.I.R. 1927 Oudh 262.

——S. 17 (1), proviso—Inability to pay into treasury.

Where the applicant did everything that was possible for him, to deposit the money at the time of presenting the application, and it was only to the particular rules in force of the local treasury, namely that no payments are passed by the treasury after 12 o'clock in the day, that it could not be deposited till the next day;

Held, that there was a sufficient compliance with S. 17. 92 Ind. Cas. 522=48 All. 342=24 A. L. J. 328=A.I.R. 1926 All. 602.

——S. 17 (1), proviso—Fixed deposit receipt.

The money attached under the *ex parte* decree cannot in itself be a sufficient security. Similarly, a mere deposit of a fixed deposit bank receipt which is not transferable, does not amount to an adequate security furnished by the applicant.

Where the Court accepted as sufficient security the fixed deposit receipt of a bank and no objection was raised within the time allowed for the deposit of security.

Held, that it could not be said that the applicant failed to furnish the security "to the satisfaction of the Court" under the circumstances though as a matter of fact the security was not sufficient. 111 Ind. Cas. 719=51 All. 402=1929 A.L.J. 96=A.I. R. 1928 All. 607.

——S. 17 (1), proviso—Delay of Court.

When the party has applied for a chalan and the delay in issuing the chalan is the delay of the officers of the Court, the maxim *nunc pro tunc* applies. Not mentioning to the office that the chalan is wanted urgently cannot be regarded as negligence and Court should excuse delay in such a case. 72 Ind. Cas. 220 =17 M.L.W. 187=A.I.R. 1923 Mad. 354=44 M. L.J. 247.

——S. 17—Deposit in Court.

A decree *ex parte* passed in Small Cause Court Ambala was transferred to Multan for execution. A deposit was made by judgment-debtor in Multan Court and application was made to Ambala Court to set aside the decree. The deposit must be treated as in compliance with the rule in S. 17. 54 P.R. 1910=141 P.L.R. 1910=6 Ind. Cas. 945.

——S. 17—Deposit—Deposit under S. 310-A, C. P. Code.

Where having already made a deposit under S. 310-A, C. P. C., the defendant made a further application to set aside an *ex parte* decree of a Small Cause Court:—*Held*, that there was a sufficient compliance with S. 17 and no further deposit was necessary. (1904) 8 C.W.N. 355.

11. Sub-S. (1), proviso—Security bond—(Miscellaneous).

——S. 17 (1), proviso—Security must relate to performance of ex parte decree.

The security required by the proviso to S. 17 (1) must relate to the performance of the *ex parte* decree and not to the performance of the decree which might ensue upon retrial. A.I.R. 1944 Nag. 103 =I.L.R. (1944) Nag. 161=1944 N.L.J. 52=212 Ind. Cas. 121.

——S. 17 (1), proviso—Purpose of security.

It is clear from the language of S. 17 that the purpose for which security has to be furnished is to ensue the performance of the *ex parte* decree in case that decree is not set aside. The security to be furnished is not for the performance of the ultimate decree that might be passed in the event of the *ex parte* decree being set aside. A.I.R. 1939 Cal. 748 =70 C.L.J. 4=185 Ind. Cas. 413 (1).

——S. 17 (1), proviso—"Performance of the decree" refers to ex parte decree.

The proviso to S. 17 (1), Prov. Small Cause Courts Act, states that when there is an application for setting aside an ex *parte* decree, the applicant shall at the time of presenting his application, give security to the satisfaction of the Court for the performance of the decree. The only decree referred to in the commencement of the proviso is an *ex parte* decree and, therefore, when the later sentences of the same proviso refer "to the decree" it can only mean the *ex parte* decree which has been referred to in the earlier part of the proviso. If that decree is set aside, it follows the surety is discharged. A.I.R. 1938 Nag. 75=I.L.R. (1939) Nag. 371=20 N.L. J. 266=172 Ind. Cas. 547.

——S. 17 (1), proviso—Surety.

To set aside an *ex parte* decree under proviso to S. 17 (1), security along with the application is furnished for the payment of the money under the actual decree, assuming that it is not set aside and it is not lodged to abide the ultimate result of the suit. Where, consequently an *ex parte* decree is set aside, the surety is discharged and is not liable for the decree that may ultimately be passed. A.I.R. 1938 Bom. 448=40 Bom.L.R. 898=178 Ind. Cas. 181.

——S. 17 (1), proviso—"The decree"—Refers to ex parte decree.

The words 'the decree' in the proviso to S. 17 (1) refer to the decree previously mentioned in the proviso, namly the *ex parte* decree. These words cannot mean any other decree which may eventually be passed in that suit.

Consequently, where under S. 17 (1), a judgment-debtor applies for setting aside the *ex parte* decree passed against him and another person stands surety and executes a security bond, and the *ex parte* decree is set aside, the case having been heard and decreed, the decree-holder cannot proceed against the surety. A.I.R. 1936 All. 593=1936 A.L.J. 933=1936 A. W.R. 644=164 Ind. Cas. 570.

——S. 17—Surety's liability.

In execution of a Small Cause Court's decree, a bullock was attached which was released on a surety executing a bond for the whole of the decree amount on judgment-debtor applying to set aside the decree. On dismissal of the application surety produced the bullock. *Held*, surety's liability extended to the whole of decree amount. 38 Ind. Cas. 90 (Pat.).

——S. 17 (1), proviso—Security bond—Court-fee.

A security bond furnished under the proviso to S. 17, Provincial Small Cause Courts Act, falls within Art. 6, Sch. II, Court-fees Act and requires a stamp of eight annas only. A.I.R. 1935 Mad. 380= 1935 M.W.N. 57=68 M.L.J. 466=41 L.W. 482=68 M.L.J. 466=58 Mad. 687=155 Ind. Cas. 559 (F.B.).

——S. 17 (1), Proviso—Unregistered security bond.

Where an application is made to set aside the *ex parte* decree of a Small Cause Court the security bond that is to be presented in Court should be registered. The Court should not set aside the *ex parte* decree taking as security an unregistered bond as an unregistered bond is no security at all. A.I.R. 1934 Pat. 74=15 P.L.T. 13=147 Ind. Cas. 764.

——S. 17 (1), proviso—Unregistered security bond.

A duly executed secuity bond, though unregistered, is a sufficient offer of a security within the meaning of S. 17 provided the delay in getting it registered is not due to any fault of the applicant himself. The test is whether the security which the party placed in the hands of the Court and which the Court ultimately accepted is sufficient to enforce the obligation upon him.

Per *Agarwala, J.*—Generally speaking, the word 'security' in the first clause of S 17 signifies anything that makes the money more assured in its payment or readily recoverable. A.I.R. 1933 Pat. 279= 14 P.L.T. 326=12 Pat. 745=145 Ind. Cas. 314.

——S. 17—Unregistered bond of hypothecation.

The applicant gave a security bond on the date of his application. The next day the Judge directed the applicant to deposit the amount in cash and the applicant did so in accordance with the order. The bond was one purporting to hypothecate immovable property. It was therefore invalid without registration and it was not registered.

Held, the applicant had failed to comply with the requirements of law. 71 Ind. Cas. 474=21 A. L. J. 173=4 L.R.A. (Civ.) 136=A.I.R. 1923 All. 270.

——S. 17—The word *faisala* in the phrase *ta faisala* in the security bond under S. 17, does not mean judgment of *ex parte* decree or future judgment but means satisfaction or adjustment. A.I.R. 1944 Nag. 103=I. L. R. (1944) Nag. 161=1944 N.L.J. 52=212 Ind. Cas. 121.

12. Sub-S. (1), proviso—Time for deposit or filing of security—Extension.

——S. 17—Extension of time for deposit or filing of security under—Power of Court.

The mandatory nature of the amended proviso to S. 17 (1) of the Provincial Small Cause Courts Act leaves no room for doubt that the Court has no jurisdiction to grant any extension of time either for making the deposit or for the filing of the security. 22 Luck. 291=A.I.R. 1948 Oudh 41=1947 O.W.N. 87=1947 A.W.R. (C.C.) 36=1947 O. A. (C.C.) 36.

——S. 17 (1), proviso (as amended in 1935)—Deposit or security—Procedure—Extension of time.

Under the amended proviso to S. 17 (1), the applicant, for setting aside the *ex parte* decree, must, at the time of making his application, either deposit the decretal amount or give security for the same as directed by the Court upon a previous application made by him in that behalf. The proviso clearly predicates the existence of an application to be made by an applicant, who is not prepared to deposit the decretal amount in cash to ask

for the filing of a security as a substitute therefor. Where, however, the applicant is prepared to deposit the decretal amount in cash, he shall do so at the time of presenting his application for setting aside the *ex parte* decree. Where, for some reason or other, he is not prepared to deposit the decretal amount in cash he must file an application prior to his application for setting aside the *ex parte* decree to the effect that he would desire to give security for the performance of the decree and must obtain direction of the Court before-hand. It is now quite clear that the mandatory nature of the amended proviso leaves no room for doubt that the Court has no jurisdiction to grant any extension of time either for making the deposit or for the filing of the security. 195 Ind. Cas. 103=1941 O.W.N. 195.

——S. 17 (1), proviso (as amended in 1935)—Court, if can extend time for making deposit or furnishing security.

As S. 17 (1) of the Provincial Small Cause Courts Act now stands, the procedure prescribed in the Civil P. C. shall, with a saving clause, be the procedure followed in a Court of Small Causes, provided that an applicant for a review of judgment or for an order to set aside a decree passed *ex parte* shall and must, at the time of presenting his application, do one of two things, namely, either deposit in the Court the amount due from him under the decree or give such security for the performance of the decree as the Court may have directed on a previous application made by him in this behalf. If he does not make the previous application, he must put in the money in full. If he has made it and been successful in getting an order for security instead of depositing the money in full, he can furnish the security which the Court may have previously directed. It is no longer open to the Court to extend the time within which the deposit is to be made or security furnished. A.I.R. 1938 Lah. 18=I.L.R. (1937) Lah. 728=40 P. L. R. 164=173 Ind. Cas. 952.

——S. 17 (1), proviso—Discretion of Court to allow time for deposit of security.

The provisions of S. 17 as regards the deposit of the amount due from the defendant under the decree are directory and not mandatory and it is open to the Court in appropriate cases to extend the time within which the deposit is to be made. But these words do not give an unlimited license to the defendant and certainly are no justification for not depositing for an indefinite period the decretal amount as directed by the section. A.I.R. 1936 Lah. 140=161 Ind. Cas. 518 (1).

——S. 17 (1), proviso—Time to furnish security.

The Court cannot grant time to a judgment-debtor to furnish security under S. 17. A.I.R. 1935 All. 379=1935 A.L.J. 414=1935 A.W.R. 178=159 Ind. Cas. 51.

——S. 17 (1), proviso—Enlargement of time for deposit or giving security.

The proviso to S. 17 is mandatory and an applicant is bound to make the deposit or give security along with his application and not at any subsequent stage of the proceedings and the Court has no power to enlarge the time for making the deposit or furnishing of the security. A.I.R. 1934 Nag. 43=144 Ind. Cas. 394.

——S. 17 (1), proviso—Extension of time—Jurisdiction.

Where on an application to set aside an *ex parte* decree within 15 days of the passing thereof the Judge passed the following order: "The security bond produced is not satisfactory. I can allow the application on condition of the applicant depositing the entire decretal amount in Court within two weeks,"

Held, the order certainly does and can only mean that the security bond was not accepted by the Small Cause Court as sufficient; therefore the application was not in accordance with law and the Court below had no jurisdiction to extend the time and grant the application. The subsequent restoration of the case after the putting in of the decretal amount is also without jurisdiction. A.I.R. 1922 All. 265.

——S. 17—Time for deposit—Extension of—C. P. Code, S. 148.

The section is mandatory and at the time of making the application to set aside *ex parte* decree the applicant must furnish security for the performance of the decree. The court cannot grant time for furnishing it. 1920 P.H.C.C. 203=1 Pat. L.T. 323=56 Ind. Cas. 810.

——S. 17—Deposit beyond time—Lim. Act, S. 5—Application for review of Judgment on the last day.

An application for review of judgment of a small Cause Court was made on the last day of the period prescribed for limitation but without deposit of the amount of costs or security for the same as required by S. 17. On the following day the Court allowed the applicant time for making the deposit which was eventually made and the application for review was granted. *Held*, that as the application failed to comply with S. 17 was barred under Art. 161, Limitation Act. It was doubtful whether S. 5, Limitation Act applied to the case at all as the application was made within time. 24 C.W.N. 380=31 C.L.J. 197=56 Ind. Cas. 551.

——S. 17 (1), proviso—Power of Court to extend time for deposit or security.

The provisions of S. 17 that an applicant for an order to set aside an *ex paree* decree shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or give security to the satisfaction of the Court for the performance of the decree as the Court may direct, are directory and not mandatory and it is open to the Court in appropriate cases to extend the time within which the deposit is to be made or security furnished. A.I.R. 1931 Lah. 332=32 P. L. R. 504=12 Lah. 359=131 Ind. Cas. 635.

——S. 17—The proviso as to a deposit or security being made at the time of presenting an application is merely directory and not mandatory and Court has power to extend the time. 43 Mad. 579, Not foll. 99 Ind. Cas. 779=A.I.R. 1927 Nag. 165.

——S. 17 (1), proviso—Bona fide mistake of Vakil's clerk.

Where a person against whom an *ex parte* decree was made in small cause suit applied for setting it aside but owing to the fact that the chalan for depositing the decree amount was mislaid by the *Vakil's* clerk, he was not able to deposit the amount within the prescribed time:

Held, (*i*) that as there was a *bona fide* mistake of the *Vakil's* clerk, the applicant was entitled to the benefit of S. 5, Limitation Act:

(*ii*) that the applicant should, however, be made to bear the costs of the decree-holder in the trial Court

as well as in the High Court. A.I.R. 1932 Mad. 142=61 M.L.J. 710=34 L.W. 795=135 Ind. Cas. 737.

——S. 17 (1), proviso—Mistake of Vakil's clerk.

Along with an application to set aside the *ex parte* decree which was passed under the provisions of the Provincial Small Cause Courts Act, the full amount of the decree and costs was not, owing to a mistake on the part of the vakil's *gumasta*, paid within the 30 days. The difference was made up after the 30 days when the error was discovered.

Held, the Court could excuse the delay. The payment of the decretal amount into the Court is not independent of the petition for setting aside the *ex parte* decree. 66 Ind. Cas. 104=15 M.L.W. 494 =1922 M.W.N. 266=30 M.L.T. 342=45 Mad. 628=A.I.R. 1922 Mad. 186=42 M.L.J. 484.

——S. 17—Extension of time—Can be made.

A Cout has discretion under S. 5 of the Limitation Act to excuse delay in making the application as required by S. 17 of the Provincial Small Cause Courts Act. 24 C.W.N. 380, not Appr.: A.I.R. 1922 Mad. 186, Appr. 102 Ind. Cas. 228=10 N.L.J. 76=A.I.R. 1927 Nag. 238.

——S. 17 (1), proviso—Conditional order for deposit of decretal amount and costs—Deposit not made in time—Extension.

Where a decree directed that the amount should be deposited within one month from the date of the order and one of the defendants who was *ex parte* applied for setting aside the *ex parte* decree and obtained an order in revision that subject to depositing the decretal amount and payment of costs, the Court below should issue notice to the opposite party to show cause why the decree as against the applicant should not be set aside and the suit restored to the pending file, but the money was not deposited within the period:

Held, that the period was not an essential part of the decree and the delay could be condoned and period extended for sufficient reason. A.I.R. 1936 All. 371=1936 A.W.R. 220=162 Ind. Cas. 909.

——S. 17 (1), proviso—Time for deposit granted till a certain date—If includes that date—Default—Dismissal on that date—Impropriety of.

When time is granted by a Court for the performance of any act till a certain date, it includes that date. On application by a defendant to set aside an *ex parte* decree in a Small Cause suit, the Court granted time to the applicant till a certain date to deposit the decree amount but dismissed the same as no deposit was made before the application was taken up for orders on that date. *Held*, that the Court had no jurisdiction to pass the order dismissing the application. 39 Mad. 583=2 L.W. 729=30 Ind. Cas. 544=18 M.L.T. 199.

13. Miscellaneous.

——S. 17—Setting aside ex parte decree—Imposition of terms—Discretion of Court—C. P. Code, O. 9, R. 13.

That the Court has very wide discretion with regard to the imposing of such terms as a condition to the order of restoration as it thinks fit before setting aside the *ex parte* decree is clear from the provisions of O. 9, R. 13, C. P. Code. 1947 A. L.J. 204=1947 A.L.W. 234=1947 A.W.R. (H.C.) 236=A.I.R. 1947 All. 125.

——S. 17—Reasons for decree.

The law does not ordain that reasons should be set out in the decree of a Small Cause Court. A. I.R. 1934 Pat. 243=146 Ind. Cas. 1056.

——S. 17—Powers of review.

Where the memorandum of evidence did not show any statement made as to consideration, but the Court found the defence plea of denial of execution to be false and decreed the suit, *held*, that the absence in the memo. of any statement as to consideration is no proof that such statement was not made, and the suit was rightly decided. 68 Ind. Cas. 303= A.I.R. 1923 Cal. 319.

——S. 17—High Court's power.

High Court's powers of interference should be exercised only to cure injustice. 13 S.L.R. 201=56 Ind. Cas. 69.

——Ss. 17, 32—Judgment of Small Cause Court. *See* 31 B. 314=9 Bom.L.R. 327.

——S. 18. See C. P. CODE, S. 102. 1904 A. W.N. 227=27 A. 200.

——S. 23.

Synopsis.

1. Appeal, Second Appeal and Revision.
2. Discretion and Power of Court.
3. Plaint, when may be returned.
4. Plaint, when may not be returned.
5. Procedure on return of plaint.
6. Retransfer to Small Cause Court.
7. Miscellaneous.

1. Appeal, Second Appeal and Revision.

——S. 23—Suit transferred under, is triable as ordinary suit—Decision is open to first appeal to District Judge.

When the suit is transferred under S. 23, Provincial Small Caues Courts Act, it is triable as an ordinary suit and the decision is open to appeal, although it does not thereby cease to be one cognizable by a Small Cause Court within the meaning of S. 102, Civil P. C. Therefore, although no second appeal would lie, a first appeal would lie to the District Judge. A.I.R. 1940 Cal. 399=189 Ind. Cas. 688.

——S. 23—Appeal—Right to—Effect on—Nature of suit not changed.

The transfer of a suit under S. 23 does not and cannot change its nature and it is the nature of the suit which is the test under S. 102, C. P. Code and O. 43, R. 1 (*v*), C. P. Code. A first appeal is, therefore, valid, but under S. 102, C. P. Code, a second appeal is barred. 94 Ind. Cas. 77=23 M. L.W. 518=A.I.R. 1926 Mad. 622.

——S. 23—Transfer of suit—Appeal.

A decree in a suit of the nature of a Small Cause transferred to original jurisdiction is appealable. 45 Ind. Cas. 645 (Cal.).

——S. 23—Suit instituted as Small Cause suit—Transfer of case—Judge having small cause and regular jurisdiction.

Where a judge, having both Small Cause and regular jurisdiction, transferred a suit instituted as Small Cause on to the regular line, he rightly exercised the power under S. 23, Provincial Small Cause Courts Act and he need not return the plaint as he himself had jurisdiction. There was a right of

appeal from the decree passed by the judge. 38 Bom. 190=15 Bom. L.R. 1036=1 Ind. Cas. 832.

——S. 23—Suit of Small Cause Court nature tried as money suit by Judge with Small Cause Court powers —No appeal lies against decree. (1935) 62 C.L.J. 530.

——S. 23, Sch. II, Art. 7—Where the suits instituted by the landlord against his tenants for rent were of a small cause nature but on objections by the tenants as to the right of the plaintiff to the rent the plaintiffs co-sharers were also added as defendants:

Held, that that though, at the inception, the suits were for rent, after the joinder of co-sharers, they ceased to be suits merely for rent and the declaration of title to the plaintiff's share became really a substantial question for decision as against the co-sharers, the suit could not be one of a small cause nature because the question in issue between them was one of title, that is, to what shares in the lands were each entitled to? Therefore, the nature of the suit must be judged after the joinder of the parties is considering whether a second appeal would lie or not. As the suits ceased to be merely for rent and the declaration of title was not merely an incidental relief but also a substantial relief on which the consequential relief as to the amount of rent that the plaintiff would be entitled to would depend, the suits ceased to be of a small cause nature. They would, virtually, be suits involving an apportionment of rent of immovable property within the meaning of Art. 7 of Sch. II. A.I.R. 1940 Mad. 507=1940 M.W.N. 60=191 Ind. Cas. 496.

——S. 23—Small cause suit—Question of title —Trial as regular suit—Second appeal, competency of.

Though a small cause suit which is transferred to the regular side under S. 23, Provincial Small Cause Courts Act, becomes a regular suit, the nature of the suit still continues to be a small cause, and a second appeal is barred under S. 102, C. P. Code. 134 Ind. Cas. 251=1931 A.L.J. 967.

——S. 23—Jurisdiction—Appeal—Suit for damages.

The small causes Court has jurisdiction to try suits for damages for trespass and removal of wood. The party therefore cannot prefer second appeal in such cases if they be below Rs. 500 even though they involve question of title. S. 23 of the Act lays down the direction for the trial of suits involving title-question as a regular suit in the interest of parties, and not a ground to hold that such suits are not cognizable by the Court. 12 M.L.T. 206=(1912) M.W.N. 810=23 M.L.J. 193=16 Ind. Cas. 201.

——Ss. 23, 25—Order returning plaint—Appealability of.

An order under S. 23 returning a plaint for presentation to the proper Court is not appealable. A.I.R. 1933 All. 106=1932 A.L.J. 1068=54 A. 1048=143 Ind. Cas. 464.

——S. 23—Returning of plaint—Revision.

Suit on two receipts opposed in defence by subsequent agreement which the plaintiff rejoined as rescinded owing to defendant's default was held by Court of small causes to involve a question of title and the plaint was returned for presentation to proper Court. *Held,* that the High Court, can interfere as the Court below failed to exercise jurisdiction vested in it by law by not deciding the question of non-performance of the subsequent agreement. 57 Ind. Cas. 602 (Pat.).

——Ss. 23 and 25—Order returning plaint.

An order made under S. 23 for the return of the plaint to be presented to the proper Court is not a decision on a case and the High Court cannot interfere in revision under S. 25. 13 C.W.N. 403=1 Ind. Cas. 288.

2. Discretion and Power of Court.

——S. 23—Scope and object of—Return of plaint—Matter of discretion.

The object of S. 23 of the Provincial Small Cause Courts Act is to meet cases in which the Judge is satisfied that the question of title is so intricate that it should not be decided summarily and then it should return the plaint for presentation to the proper Court. Under S. 23 the Court has a discretion. The Court is not bound to return a plaint in every case, in which a question of title is raised. 1950 A. M.L.J. 3.

——S. 23—Scope.

Section 23 does not lay down that the Small Cause Court has not got jurisdiction to determine the question of title to immovable property, but it gives that Court an option to send a case to a Court having jurisdiction to determine the title, probably on the ground of convenience. A.I.R. 1937 All. 676=1937 A.L.J. 727=1937 A.W.R. 646=171 Ind. Cas. 736.

——S. 23—Discretion of Court.

Although a question of title to immovable property is not one that can be decided in the Small Cause Court, yet if a *bona fide* question of title arises incidentally in a Small Cause Court suit, the Court should determine it. But under S. 23, a Small Cause Court is given a considerable discretion and when the Court has not considered it necessary to decide the question of title, and did not consider that the question was a *bona fide* one, it cannot be said that the Court acted illegally. A.I.R. 1934 All. 695=4 A.W.R. 496=150 Ind. Cas. 144.

——S. 23—Suit for use and occupation against an alleged trespasser is cognizable by Small Cause Court. Section 23 leaves a discretion with the Judge in such a case. A.I.R. 1934 Lah. 355=150 Ind. Cas. 980 (1).

——S. 23—Determining character of suit.

It is for the Court of Small Causes to decide whether a question of title is involved in a case. If the Small Cause Courts so desires it may return the plaint. 119 Ind. Cas. 285=A.I.R. 1929 All. 816.

——S. 23—Discretion of Court—Decision on title.

A question of title to immovable property can no doubt be decided incidentally by a Small Cause Court but S. 23 clearly gives the Court a discretion in cases in which the right of the plaintiff depends upon the proof or disproof of the title to immovable property or other title which the Court cannot finally determine, to return the plaint. 43 P.R. 1902, Disappr. 60 Ind. Cas. 319=3 L.L.J. 335=A.I.R. 1921 Lah. 91.

——S. 23—Title — Question of—Suit for damages.

Although the decision of a small cause Court on a question of title to land in a suit for damages for trespass thereon may not be conclusive, the Court is not precluded from trying and deciding that question in such a suit. 23 C.W.N. 647=52 Ind. Cas. 265.

——S. 23—Title to immovable property—Return of plaint.

A small cause Court has power to return the plaint for presenting to the proper Court when a question of title is raised even though it is alleged to be *res judicata*. 48 Ind. Cas. 612 (Cal.).

——S. 23 (1)—Object of.

S. 23 (1) of the Act is designed to meet cases in which a Small Cause Court Judge is satisfied that the question of title raised is so intricate that it should not be decided summarily but in a Court in which evidence is recorded in full and the decision is open to appeal the matter is one of discretion. 20 C.W.N. 1080=1 Pat.L.J. 465=3 Pat.L.W. 55=37 Ind. Cas. 129.

——S. 23—Return of plaint for presentation to proper Court.

A Small Cause Court case can return a plaint under S. 23 of the Act on the ground that the relief claimed involves a question of title. This point must be put by the Court clearly in passing an order. 12 A.L.J. 334=25 Ind. Cas. 81.

——Ss. 23 and 25—Question of title raised by defendant—Court, duty of.

If the defendant raised the question of title in a small cause suit the Court should try the question of jurisdiction or return the case and direct the plaintiff to lodge the plaint in a Court competent to decide the question of title. 14 Ind. Cas. 2 (Oudh).

——Ss. 23, 16—The exercise of the power of returning plaints given to Small Cause Courts whenever a question of title is involved is discretionary with the Small Cause Courts, and when it is exercised the effect is to give the Courts jurisdiction to try the small cause suit as an original suit. (1906) 29 M. 329.

——S. 23—Exercise of power — Jurisdiction necessary.

The power to act under S. 23 being a discretionary power which only a Court having jurisdiction can exercise, cannot be exercised by a Court which has ruled that it has no jurisdiction over a suit. 70 Ind. Cas. 153=15 M.L.W. 35=A.I.R. 1922 Mad. 300.

3. Plaint, when may be returned.

——S. 23 (1)—Question of title.

Where a complicated question of title is involved, namely, whether the plaintiff has any subsisting right to the property so that she should also be entitled to claim a share in the price of the trees which stood on that property, the Judge, Small Cause Court, should take action under S. 23 (1). A.I.R. 1940 Pesh. 34=189 Ind. Cas. 314.

——S. 23—Dispute of title to immovable property.

Under S. 23, the inquiry is limited to the right of the plaintiff and to the relief claimed by him and it is the right of the plaintiff and the relief claimed by him which has got to be considered. There are no words which would justify the inference that the plaintiff and the defendant should be rival claimants to the immovable property. It is not necessary that there must be a dispute of title to immovable property between the plaintiff and the defendant, each setting up title in himself before the question of returning the plaint for presentation to the proper Court arises. A.I.R. 1935 All. 148=4 A.W.R. 1477=1935 A.L.J. 301=159 Ind. Cas. 70 (2).

——S. 23—Intricate question of title involved—Summary decision, if proper.

Section 23 shows that a Small Cause Court is competent to decide a question of title, but it should finally determine the same and not in a cursory manner. It is not always convenient for a Small Cause Court Judge to decide an intricate question of title and the object of the above provision is to meet cases in which the Judge is satisfied that the question of title is so intricate that it should not be decided summarily and then it should return the plaint for presentation to a proper Court. A.I.R. 1935 All. 148 =1935 A.L.J. 301=4 A.W.R. 1477=159 Ind. Cas. 70 (2).

——S. 23—Suit for damages for trees appropriated by tenant—Jurisdiction.

Under S. 23, a suit is barred from the jurisdiction of the Small Cause Court when the right of the plaintiff and the relief claimed by him depends upon the proof or disproof of a title mentioned in that section. Where the relief of damages for which the plaintiff asks does depend upon the proof or disproof of the title of the plaintiff to trees which constitute immovable property, the suit is entertainable by ordinary Civil Courts. A.I.R. 1934 All. 290=1934 A.L.J. 115=18 R.D. 13=3 A.W.R. 61=148 Ind. Cas. 888.

——S. 23—Question of title—When involved.

K brought a suit against *R* in the Small Cause Court for damages on the basis of an agreement averring that *R* took from him a lease of the house belonging to him on monthly rent of Rs. 15 for a year agreeing to vacate it on completion of the year. In default he agreed to pay damages at Rs. 30 per month, *R* failed to give possession and *K* served on him a notice to quit and the suit was filed for damages for about eight months. The payment of rent for the year was admitted and *K* reserved the right to sue for ejectment at a later date. The defence was that the kabuliyat represented a benami transaction and *R* and his brother being servants of *K* were accustomed to execute such benami documents in his favour and that *K* had no right at all to the house.

Held, that the suit involved a question of title and in view of the postponing of his suit in respect of title it should not have been tried summarily as a small cause. 126 Ind. Cas. 145=A.I.R. 1930 Pat. 389.

——S. 23—Question of title—Raised in pleadings.

A Small Cause Court is no doubt entitled to decide a question of title if it arises incidentally. But where the plaint and the written statement show that the issue to be found out and decided is one of title, the suit cannot be considered to be one of small cause nature. 92 Ind. Cas. 899=23 M.L.W. 520=1926 M.W.N. 528=A.I.R. 1926 Mad. 656.

——S. 23—Suit by landlord for damages against tenant for cutting trees—Jurisdiction.

A suit by a landlord against a tenant for damages for cutting trees on his holding cannot be decided by a Small Cause Court as the relief claimed depends upon the determination of the status of the deft. as a tenant. 41 Ind. Cas. 494 (Cal.).

——S. 23—Title, question of.

Where in a suit brought by executors in a Small Cause Court the defendant pleaded that the testator had no power to dispose of the lands by will as they belonged to charity.

Held, the Small Cause Court had no power to try the suit. 4 L.W. 349=38 Ind. Cas. 608.

——S. 23—Reliefs, one of several, cognisable only by Munsif's Court—Jurisdiction.

A suit wherein alternative reliefs are asked, one of which can be granted by the Small Cause Court, but the other only by the Munsif Court, the suit is triable only by the Munsif's Court. 33 Ind. Cas. 768 (All.).

——S. 23—Jurisdiction to determine questions of tile—Suit for rent—Title found necessary for determination—Procedure.

A Small Cause Court cannot inquire into questions relating to title, and where a suit for rent filed therein is found to involve the determination of title the Court should return the plaint for presentation to the proper Court. 15 M.L.T. 214=I.L.W. 203=26 M.L.J. 225=22 Ind. Cas. 799.

4. Plaint, when may not be returned.

——S. 23—Rent suit.

Where, although the suit is based on a rent-deed the defence clearly denies the title of the plaintiff but does not deny the execution of the rent-deed, the procedure prescribed under S. 23 does not apply, as the tenant cannot deny the title of the landlord. A. I.R. 1939 Pesh. 14=181 Ind. Cas. 241.

——S. 23—Question of title—Incidental.

Though a question of title cannot be fully decided in a Small Cause Suit, it can be decided incidentally for the purpose of deciding the chief point to the case which is properly within the jurisdiction of the Small Cause Court. 99 Ind. Cas. 845=A.I.R. 1927 Mad. 459.

——S. 23—Parties estopped from raising title questions.

Where one party is precluded from disputing the title of the other party by virtue of estoppel, it would be wrong to apply S. 23. 93 Ind. Cas. 826=24 A. L.J. 384=A.I.R. 1926 All. 344.

——S. 23—Suit against tenant—Plea of lease from third persons.

Where plaintiff sued his alleged lessee who however pleaded lease from a third person, plaint cannot be returned as involving title to immovable property. 92 Ind. Cas. 735=A.I.R. 1926 Nag. 276.

——S. 23—Tenant setting up title in third party.

Where a defendant tenant does not claim ownership in himself but sets up a title in third party, no question of title is involved so as to deprive the Small Cause Court of its jurisdiction to try the suit. 87 Ind. Cas. 286=A.I.R. 1925 Oudh 687.

——S. 23—Return when can be made—Only when question arises on pleadings.

The return of a plaint by a Small Cause Court is not sustainable on the ground that an account of the land sold to, and the value of the land taken away from, the plaintiff and the profits due to the plaintiff have to be ascertained and some questions of ownership of the lands might arise, where on pleadings no question has been raised as to title to immovable property, nor any other question of title which the Court could not finally determine. 70 Ind. Cas. 153 =15 M.L.W. 35=A.I.R. 1922 Mad. 300.

——S. 23—Suit for damages for use and occupation—Question of title, if can be gone into.

A Small Cause Court has jurisdiction to entertain a suit for damages for use and occupation, and for that purpose may incidentally go into a question of title. 9 Bur.L.T. 60=31 Ind. Cas. 893.

——S. 23—Question of title—Incidental determination of.

A Small Cause Court has jurisdiction to decide questions of title that arise incidentally in a suit within its cognizance. 6 S.L.R. 85=16 Ind. Cas. 868.

5. Procedure on return of plaint.

——S. 23—Procedure on return of plaint.

When a plaint is presented to the Civil Court under an order made under S. 23 of the Provincial Small Cause Courts Act the case should be tried as framed and the question of title may be gone into only incidentally in order to decide the merits of the case. The suit remains one of the nature triable by Small Cause Court. 85 Ind. Cas. 1002=A.I.R. 1926 Cal. 83.

——S. 23—Return of plaint—Subsequent trial as small cause suit—Legality.

Where a district Judge assigned a Small Cause Suit regularly triable by a 2nd Munsiff to a 3rd Munsiff owing to the second Munsiff's absence on leave and the third Munsiff returned the plaint saying that as it involved complicated question of title it is to be tried by an ordinance Court, but the second Munsiff on his return from leave tried it as a Small Cause Suit ignoring the order of the Munsiff and decreed it, *held*, that the action of he second Munsiff in trying it as a Small Cause Suit, was illegal. 27 Ind. Cas. 751 (Cal.).

——S. 23—Return of plaint for presentation to proper civil Court—If civil Court can refuse to entertain plaint.

Where a Small Cause Court returns a plaint for presentation to a regular civil Court the latter has no jurisdiction to refuse to entertain it. 18 C.W.N. 380=18 Ind. Cas. 325 (Cal.).

——S. 23—Order returning plaint—Effect of.

The effect of an order returning the plaint under S. 23 is to remove the bar to the jurisdiction of the ordinary Courts imposed by S. 16. The suit may be presented to any Court having jurisdiction to try the suit. 9 M.L.T. 372=10 Ind. Cas. 267.

6. Retransfer to Small Cause Court.

——S. 23—Retransfer to Small Cause Court—No power.

Where a suit was originally filed as a Small Cause Court suit by the plaintiffs and on the application of the defendant it was transferred to the regular list and became a regular suit until the record was closed and where without stating reasons in writing the Judge re-transferred the case back to the Small Cause Court list.

Held, he had no power to do so. 87 Ind. Cas. 820 =27 Bom.L.R. 246=A.I.R. 1925 Bom. 246.

——S. 23—Retrasfer of suit—Objection—When to be raised.

A rent suit was filed on Small Cause Side of the Munsiff's Court but the defendant obtained an order under S. 23 to transfer the case to a Court authorised to determine question of title. It was then presented to the original side of the Munsiff's Court but on finding that there was no question of title the suit was re-transferred to Small Cause Side. The defendant objected that the order under S. 23 had not been set aside.

Held, the objection could not be taken for the first time in revision. 60 Ind. Cas. 145=12 L.W. 423.

7. Miscellaneous.

——S. 23—Test—Nature of suit and not of defence.

The question whether a suit is cognizable by a Court of Small Causes or not must depend on the nature of the suit and not on the nature of the defence set up. A suit on an allegation of pure contract is cognizable by a Court of Small Causes. But when an intricate question of title to property arises, a Court of Small Causes is authorized by S. 23 of the Act to return the plaint for presentation to a regular Court. But from this it does not follow that merely because a question of title is raised in defence the character of the suit is changed. 87 Ind. Cas. 659=A.I.R. 1925 All. 821.

——S. 23—Suit not cognizable—Return of plaint—Power of Court.

The proper course for a Small Cause Court when it finds that a suit is not cognizable by it, is to return the plaint and not to dismiss the suit. S. 23 sets out a special case and does not stand in the way of a Small Cause Court from returning a plaint when the suit is not cognizable by it. 11 A.L.J. 238=19 Ind. Cas. 427.

——S. 23—Title—Suit involving question of title, nature of.

In a suit for value of trees wrongfully cut and carried away, the deft. contested the plff.'s title. The plaint was then returned for presentation to proper Court.

Held, that though the case was tried on the regular side it none the less was a suit of a small cause nature. 20 M.L.T. 281=4 L.W. 245=(1916) 2 M.W.N. 215=36 Ind. Cas. 202.

——Ss. 24, 27 and 17—No appeal lies against an order under S. 95, C. P. Code, passed by the Small Cause Court. A.I.R. 1937 Nag. 126=I.L.R. (1938) Nag. 301=169 Ind. Cas. 614.

——S. 24—Order awarding costs—Appeal lies.

When a Small Cause Court grants costs under S. 35-A, C. P. Code, an appeal lies to District Judge. 94 Ind. Cas. 790=A.I.R. 1926 All. 554.

——S. 25.

Synopsis.

1. Applicability of section.
2. Case decided.
3. Error of Law.
4. Error of procedure.
5. Finding of fact.
6. Grounds for interference.
7. Interlocutory order.
8. Judgment of Small Cause Court—Contents.
9. New Plea.
10. Other Remedy open.
11. Powers of High Court.
12. Question of costs.
13. Question of jurisdiction.
14. Question of Limitation.
15. Review cases.
16. Miscellaneous.

1. Applicability of section.

——S. 25—Applicability—Small cause suit tried along with original suit—Common evidence and joint decree given—Appeals—Revision under the Small Cause Courts Act in respect of decree in the small cause suit—Competency.

A small cause suit loses its character as such immediately it is withdrawn to the original side and tried along with an original suit.

Where three small cause suits filed by the plaintiff against three different defendants were by consent taken and tried along with an original suit filed by the same plaintiff and there were common defences and they were tried on common evidence and a joint decree against four separate main defendants was also given, on the question whether pending a regular appeal by plaintiff a revision filed under S. 25 of the Provincial Small Cause Courts Act against the decree in the small cause suit would be proper.

Held: that a small cause suit could not continue in the category of small causes once it was taken on to the original side and disposed of along with an original suit. Hence the revision petitions should be returned to be re-presented as appeals on which an *ad valorem* fee should be paid. 1950 M.W.N. 797 =(1950) 2 M.L.J. 495=A.I.R. 1951 Mad. 275.

——S. 25—Applicability.

Suit for damages for breach of contract valued at less than Rs. 500—Suit cognizable by Small Cause Court but tried by Munsif as regular suit—Court cannot treat it as revisable under S. 25, Provincial Small Cause Courts Act, as this section has no applicability to the case where an appellate decision of the District Judge is challenged. A.I.R. 1936 Oudh 129=1935 O.W.N. 1244=165 Ind. Cas. 251.

——S. 25—Applicability of.

High Court can exercise the power under this section of the Act only when the case is tried by a small cause court. 57 Ind. Cas. 551 (Pat.).

2. Case decided.

——S. 25—Where a Court of Small Causes holds that the plaintiffs and defendants were partners and that its jurisdiction was barred under Act 29 of the Provincial Small Cause Courts Act, the case is finally decided by it and a revision is competent to the High Court. A.I.R. 1937 Nag. 68=19 N.L.J. 306=169 Ind. Cas. 95.

——S. 25—Suit instituted in Small Cause Court—Court subsequently abolished—Case to be sent to ordinary Civil Court having jurisdiction under S. 35—Such Court acquiring before date of trial power to deal with suit as Small Cause Suit—Section 32 is applicable and decision of Court must be deemed to be that of Small Cause Court and final under law and only open to revision under S. 25. A.I.R. 1935 Cal. 556=61 C.L.J. 137=157 Ind. Cas. 1026.

——S. 25—Small Cause Judge returning plaint to be filed in proper Court—Whether case decided.

Even though the Court does not decide a case on its merits yet when the Court arrives at a finding that the suit was not cognizable by the Small Cause Court and directs the plaint to be returned for presentation to the proper Court, the case must be deemed to have been decided so far as the Court of Small Causes was concerned, and there is nothing in the provisions of S. 25 to prevent the High Court from exercising revisional powers in respect of orders

passed by the Judge in the course of the proceedings in the Small Cause Court suit before him. A.I.R. 1934 Oudh. 429 (2)=11 O.W.N. 1135=10 Luck. 199=151 Ind. Cas. 283.

——S. 25—'Decided,' meaning of—Return of plaint.

Returning plaint is deciding the case. 15 C.W.N. 666, Foll. 13 C.W.N. 403, Diss. 92 Ind. Cas. 735=A.I.R. 1926 Nag. 276.

——S. 25—Return of plaint.

Where a Small Cause Court returns a plaint holding that it has no jurisdiction to try the same, there is a case decided within S. 25 and a revision lies. 41 All. 42, Foll. 87 Ind. Cas. 286=A.I.R. 1925 Oudh 687.

——S. 25—Return of plaint—Jurisdiction, refusal to exercise.

The High Court can revise the S. C. Court's order returning plaint if the S. C. Court has thereby refused to exercise jurisdiction vested in it by law. 15 C.W.N. 666=14 C.L.J. 118=10 Ind. Cas. 8.

——S. 25—"Case".

Where the order under S. 23, Provincial Small Cause Courts Act, is illegal or irregular or the lower Court has acted grossly wrongly or with material irregularity, it must be treated as if a case has been decided which will give jurisdiction to the High Court to interfere under S. 25.

The word "case" is used in a wider sense than "suit" and must include the termination of a legal proceeding pending in a Court which, so long as the order is not set aside, cannot be revoked. A.I.R. 1933 All. 106=54 All. 1048=1932 A.L.J. 1068=143 Ind. Cas. 464.

——S. 25—Case decided according to law.

Under S. 25, the High Court has only to be satisfied that a decree or order in a case decided by a Court of Small Causes is according to law, and where the case as presented to the Court was one based on a document which has been rightly held to be an acknowledgment as defined in Art. 1, Stamp Act, it is impossible to hold that the case has been decided otherwise than in accordance with law. A.I.R. 1933 All. 577=1933 A.L.J. 897=146 Ind. Cas. 882.

——S. 25—Passing of decree.

Until the case has been decided a party has no *locus standi* to apply in revision. So, where an award in plaintiff's favour is set aside and a decree is passed dismissing the suit, the plaintiff's application for revising the setting aside of the award cannot be made immediately after the award is set aside but only after the case has been decided. 86 Ind. Cas. 788=6 L.R.A. Civ. 158=A.I.R. 1925 All. 393.

——S. 25—Refusal of amendment.

The application for leave to amend is not a case, and therefore, no revision can lie against an order refusing to grant leave to amend under S. 25 of the Provincial Small Cause Courts Act. 77 Ind. Cas. 553=A.I.R. 1925 Oudh 254.

——S. 25—'Decided'—Meaning of—Decision of issue as to jurisdiction.

A suit for compensation for breach of a contract was brought in the Court of Small Causes at Agra. The defendant pleaded want of local jurisdiction and many other defences. On the issue as to jurisdiction the Court took evidence and held that the suit had been properly instituted at Agra. *Held*, that no revision lay as the case had not been disposed of within S. 25 of the Provincial Small Cause Court Act. 41 All. 42=16 A.L.J. 777=47 Ind. Cas. 610.

——S. 25—'Decided' meaning of—Leave to withdraw without giving reasons.

Quaere.—Whether a suit which has been allowed to be withdrawn with liberty to sue afresh is a case "decided" within S. 25 of the Provincial Small Cause Court Act. The High Court will interfere under S. 107 of the Government India Act in a case where leave has been given without adequate reasons. 2 Pat.L.J. 682=43 Ind. Cas. 455.

——S. 25—'Decided', meaning of—Decision not on merits.

'Decided', in S. 25 does not mean decided on the merits but simply means 'disposed of' and a High Court's power of Revision is not restricted to cases where there is a decision on the merits. (14 C.L.J. 118, Foll.; 13 C.W.N. 403, Diss.) 27 M.L.J. 494=16 M.L.T. 502=25 Ind. Cas. 643.

3. Error of Law.

——S. 25—"Contrary to law"—Decree in small cause suit set aside on ground of non-service of summons by separate suit—Absence of fraud—Interference by High Court in revision. *See* C. P. CODE, O. 9, R. 13. A.I.R. 1950 Pat. 284.

——S. 25—Error of law—Court requiring higher standard of proof than laid down by Evidence Act.

If a Court exercising powers under the Small Causes Courts Act fails to appreciate the import of the term "proved" as defined in S. 3 of the Evidence Act and requires a standard of proof higher than that laid down by that Act, it is an error of law rendering the decision as one not according to law and the High Court has power to interfere with such a decision even within the limited powers given to it by S. 25 of the Provincial Small Causes Courts Act. I.L.R. (1947) Nag. 45=228 Ind. Cas. 519 =1947 N.L.J. 15=A.I.R. 1947 Nag. 157.

——S. 25—Interference under—Dismissal on erroneous view of law without going into merits of case.

Where the lower Court on an erroneous view of the law dismisses the suit of a plaintiff without going into the merits of the case, it is a fit case for the High Court for taking action under S. 25 of the Provincial Small Cause Courts Act. 21 Luck. 536=A.I.R. 1947 Oudh 15=225 Ind. Cas. 536=1946 O.W.N. 256=1946 A.W.R. (C.C.) 157=1946 O.A. (C.C.) 157.

——S. 25—Failure of Judge to apply proper test to point at issue.

Where a Judge has failed to realize that the terms "loan" and "deposit" are not mutually exclusive and has thus failed to realize that the test to be applied is whether there was an obligation on the depositee to seek out the depositor and repay him, it cannot be said that there has been any proper trial or decision on the point at issue, and the application for revision will, therefore, be allowed. A.I.R. 1944 Nag. 101 —1944 N.L.J. 83=I.L.R. (1944) Nag. 462=212 Ind. Cas. 76.

——S. 25—Where a person has obtained a decree to which he is not entitled and the lower Court has taken an erroneous view of the plaintiff's right to sue, the High Court can interfere in revision because substantial injustice has been done to the defendant. A.I.

R. 1942 Oudh 202=1941 O.W.N. 1357=1942 A.W. R. 8=198 Ind. Cas. 98.

——**S. 25**—Where the Small Cause Court Judge has taken an erroneous view of the law which has resulted in substantial injustice that is a sufficient ground for interference in revision. A.I.R. 1939 All. 590=1939 A.L.J. 460=I.L.R. (1939) All. 709=1939 A.W.R. 477=184 Ind. Cas. 860.

——S. 25—Error of law.

In a suit for damages against the Secretary of State in respect of consignment booked with a Railway Company, if the plaintiff fails to prove wilful neglect, he equally fails to prove wilful misconduct which cannot be less than wilful neglect. The expression "wilful neglect" means that the act was done deliberately and intentionally and not by accident or inadvertence so that the mind of the person who does the act goes with it.

Where, therefore, there is no finding, nor is there any evidence on which a finding could be based, that there was any omission on the part of the Railway to observe any prescribed precaution for the protection of the goods from risk of damage by rain-water by which they are alleged to have been damaged and the lower Court holds that misconduct should not be inferred from the mere fact that damage was caused by the entry of water into the wagon between the hinges of the door-flaps, he cannot be said to have committed any error of law and the High Court will not interfere in revision under S. 25. A.I.R. 1936 Pat. 257=2 B.R. 485=162 Ind. Cas. 793.

——S. 25—Findings arrived at on no evidence.

Where it appeared that not only had the trial Judge committed every possible error which was possible in the circumstances to commit, but the case must be described as a mis-trial and made the profound mistake in placing the onus upon the plaintiff to prove the passing of consideration and allowed himself to get into a state of utter confusion by mixing up the *rehan* bond with the promissory note and on no evidence considered that the hand note in question was executed by reason of threat:

Held, that it could not be said that the case had been properly tried and that the case must go back for re-trial according to law. A.I.R. 1936 Pat. 132=2 B.R. 151=159 Ind. Cas. 1075.

——S. 25—Decision involving legal inference from facts.

Where the decision of the suit involves the decision of legal inferences to be drawn from the established facts and the question is an important question of law, a revision application does lie even if the suit is one of a small cause nature. A.I.R. 1936 Pesh. 148=163 Ind. Cas. 448.

——S. 25—Wrong allocation of burden of proof —Negotiable Instruments Act, 1881, S. 118.

In a suit based on a promissory note, the defendants pleaded that though they had signed, they had only fixed their signature to a blank paper and there was no consideration in cash as they had affixed their signatures only to induce the plaintiff to give evidence in their favour in a case. The Judge framed the issue throwing the burden of proof on the plaintiff and dismissed the suit holding that the defence had been made good:

Held, (i) that the Court ought to have made a presumption that the pro-note was made for consideration and erred in throwing the burden of proof on the plaintiff;

(ii) the fact that both sides had produced evidence was immaterial in the circumstances of the case and as the Court had misdirected itself, its decision could be set aside in revision under S. 25. A.I.R. 1932 All. 164=54 All. 375=135 Ind. Cas. 241.

——S. 25—Onus wrongly placed—Good ground.

When the plaintiff sued the defendant Railway Company for damages for loss of a package sent by him, and it was found that the plaintiff had executed Risk Notes in Forms *A* and *B* and the Lower Court had placed the *onus* wrongly on the defendant Company.

Held, that the *onus* lay on the plaintiff to prove the the loss was caused by the wilful neglect of the defendant and the wrong-placing of the *onus* is a ground for interference under S. 25 of the Act. **67 Ind. Cas. 664=3 Pat.L.T. 222=A.I.R. 1922 Pat. 17.**

——S. 25—Inference from documents—Question of law.

The inference to be drawn from proved documents being a pure question of law, it is open to the Chief Court in revision to consider whether the inference drawn by the lower Court from certain documents has been correctly drawn or not. A.I.R. 1932 Oudh 283=8 O.W.N. 800=7 Luck. 116=134 Ind. Cas. 411.

——S. 25—Failure to take into consideration all facts and circumstances—Interference.

The defendant contracted to sell 1,000 maunds of husks to the plaintiff. He duly delivered 589½ maunds but delayed in the delivery of the remaining 410½ maunds and finally tendered husks mixed with sand of which the plaintiff refused to accept delivery. It was admitted on behalf of the defendant that the husks tendered to the plaintiff contained a certain amount of sand but it was contended that the presence of some sand among the husks was unavoidable and that there had been a similar proportion of sand in the husks previously supplied to the plaintiff. The evidence adduced on his point on the side of the defendant was scanty and conflicting. During the time that elapsed between the making of the contract and the tender of the balance of the husks contracted for, the price of husks had risen. The trial Court held that there was nothing to show that the defendant had agreed to supply husks of a better quality than those tendered or that they had actually supplied husks of a better quality on previous occasions and accordingly, disallowed the plaintiff's claim for damages. On revision:

Held, that the trial Court had erred in law in not taking all matters into consideration and in not considering the fact that husks mixed with sand are not fit for cattle consumption and on the evidence ought to have held that defendant had broken the contract. A.I.R. 1931 Cal. 163=52 C.L.J. 528=130 Ind. Cas. 575.

——S. 25—Question partly one of law.

Where the question to be decided is certainly a question of fact and is also partly a question of law, the powers given to High Court are wide under S. 25 which gives power to interfere in revision in any case where the decision is not according to law. 31 Bom. L.R. 1249=54 Bom. 14=A.I.R. 1930 Bom. 68.

——**S. 25**—Gross errors of law are revisable. under S. 25, Sm. C. C. Act. 78 Ind. Cas. 434=5 L.R. A.Civ. 252=A.I.R. 1924 All. 691.

——S. 25—Decree in premature suit.

Where the suit was premature but was decreed, the High Court interfered in revision. 74 Ind. Cas. 938=4 P.L.T. 606=A.I.R. 1924 Pat. 135.

——S. 25—Misapplication of law.

Where the right sought for was not the right of easement but the trial Court stated it as such.

Held, there was clearly misapplication of law and revision was competent. 76 Ind. Cas. 812=1 Rang. 281=2 Bur.L.J. 136=A.I.R. 1923 Rang. 205.

——S. 25—Wrong view of law.

Where in pursuance of a stipulation for forfeiture of deposit on certain conditions, the defendant claimed to forfeit a certain sum and the Lower Court taking a wrong view of the law, decided that the sum could not be forfeited, *held,* that the decision can be revised. 70 Ind. Cas. 96=11 L.B.R. 420=1 Bur.L.J. 158 =A.I.R.' 1923 Rang. 47.

——S. 25—In the absence of an error of law the High Court will not interfere in revision under S. 25 of the Provincial Small Cause Courts Act. 67 Ind. Cas. 851 (Cal.).

——Ss. 25 and 23—Error of law—Omission to determine material issue.

The omission to determine a material issue as to the genuineness of the mortgage, amounts to an error in law and High Court can interfere under S. 25 of the Prov. Sm. C. C. Act. If the Court was of opinion that the question of the genuineness of the bond was beyond the scope of the suit it was incumbent on the Court in the discretion vested in it by S. 23 to return the plaint to be presented to the proper Court. Failure to do so brought the case within S. 25. 5 Pat.L.J. 248=1 Pat.L.T. 225=57 Ind. Cas. 653.

——S. 25—Error of law—Revision.

Where the decree of a Court of small causes which must also include the judgment, involves a clear error of law, causing failure of justice the High Court can interfere. 40 Ind. Cas. 890 (L.B.).

——S. 25—Error of law.

The Deft. produced a document purported to be a receipt for the amount for which he was sued. The Small Cause Court doubted its genuineness. No revision under S. 25 was necessary as there was no error of law or procedure justifying intervention. 73 P.W.R. 1916=32 Ind. Cas. 793.

——S. 25—Doubtful question of law—Interference in—None where decision is just.

Where the decision on the merits does justice between parties, the High Court will not interfere in revision especially where the question of law is very doubtful. 13 A.L.J. 563=29 Ind. Cas. 1008.

——S. 25—Question of law doubtful.

The High Court will interfere in exceptional cases in suits tried by Small Cause Courts if the decision arrived at is capricious or perverse and contrary to Law but it is no good ground for interference under S. 25 of the Act that the Judge had a doubtful issue of Law [illegible] determination which the High Court will decide if it came in a second appeal. 14 O.C. 343= 13 Ind. Cas. 803.

——S. 25—Doubtful question of law—Lower Court's order not shown to be clearly erroneous —No interference—C. P. Code. S. 43.

Where it was not quite clear that S. 43, C. P. Code, was a bar, the High Court declined to interfere with the order of the lower Court that S. 43, was not a bar. Two suits were here brought in respect of two separate and distinct breaches of the same contract. The contract itself was for sale and the breaches were for refusal to take delivery of two separate shipments in respect of the same contract. 1908 A.W.N. 199.

——S. 25—Technical defect in order—Substantial justice done—No interference.

High Court will not interfere in revision under S. 25 merely on the ground of a technical defect in order of the lower Court, if a substantial justice has been already done and the interference is likely to perpetuate an injustice. A.I.R. 1946 Oudh 1=20 Luck. 517=1945 A.W.R. (C.C.) 117=1945 O.W.N. (C.C.) 163.

——S. 25—Discretion of High Court—Error of law.

Section 25 gives discretion in the High Court but in every case in which a possible error of law has been made, the High Court would not call for the record and pass an order thereon. A.I.R. 1936 Pat. 132=2 B.R. 151=159 Ind. Cas. 1075.

——S. 25—High Court, power of—Question of law wrongly decided.

Cases under S. 25 cannot be argued before the High Court as if they are second appeals. The High Court has no right to interfere wherever any question of law has been wrongly decided. It will only interfere where there is a substantial injustice, *i.e.,* when a clear error of law is shown or when there is obvious perversity in the decision of a question of fact. A.I.R. 1936 Pat. 84=16 P.L.T. 887=2 B.R. 290=160 Ind. Cas. 1086.

——S. 25—Failure of justice necessary.

Where Small Cause Court has jurisdiction to decide a point, but it commits an error of law in deciding it, High Court will not interfere in revision unless such error of law has resulted in failure of justice. 114 Ind. Cas. 111=A.I.R. 1929 Sind 117.

——S. 25—Prejudice necessary.

It is not for every mistake of law that the High Court will interfere under S. 25 unless it is shown to have affected the result or to have prejudiced the petitioner. 76 Ind. Cas. 738=A.I.R. 1924 Pat. 793.

——S. 25—No revision of the decision of a Small Cause Court can be allowed merely because it is wrong in law. 70 Ind. Cas. 291=A.I.R. 1922 Oudh 130.

——S. 25—Error of law—Substantial justice.

The Chief Court refused to interfere in revision with an erroneous decision on a question of law, when it appeared that substantial justice had been done by the decree of the Small Cause Court. 171 P.L.R. 1915=107 P.W.R. 1915=30 Ind. Cas. 429.

——S. 25—Error of law—Substantial justice.

A decision which though wrong in law, does substantial justice, will not be interfered with in revision. 93 P.R. 1911=161 P.W.R. 1911=228 P.L.R. 1911=11 Ind. Cas. 445.

4. Error of procedure.

——S. 25—Materal irregularity—Small cause suit—Date of hearing fixed in the absence of officer empowered to act as Court of Small Causes, is invalidly fixed—Court taking up case on such date and passing ex parte decree without issuing notice to defendant acts with material irregularity.

Where in a small cause suit, an order fixing a date in the case is passed on a day on which there was no officer who could have the powers of a Judge of the Court of Small Causes, the date so fixed is not validly fixed and the Court cannot therefore take up the case on that date without issuing a notice to the defendant and if it records evidence on such a day and passes an *ex parte* decree, the Court acts with mate-

rial irregularity. A.I.R. 1946 Lah. 62=222 Ind. Cas. 8.

——S. 25—Trying of Small Cause Court suit as an ordinary suit—Dismissal—First appeal—Second appeal cannot be converted into revisional application under S. 115, C. P. Code—Suit remanded to trial Court for trial by a Judge invested with Small Cause Court powers—Provisions of S. 25, whether wider than provisions of S. 115, C. P. Code.

A suit which ought to have been tried as a Small Cause Court suit was tried as an ordinary suit by a Judge who did not have Small Cause Court powers. The suit was partly decreed and the plaintiff filed an appeal. The first appeal was dismissed by the Appellate Court. In second appeal, it was discovered that no second appeal lay as the suit was a Small Cause Court suit;

Held, that the suit having been tried as an ordinary suit, an appeal did lie to the lower Appellate Court and, therefore, the only way the High Court could entertain the appeal which was filed as a second appeal would be by converting it into a revisional application under S. 115, C. P. Code. But that procedure would prejudice the appellant because if the suit had been tried by a Judge having Small Cause Court powers, the appellant would have had the right to come to the High Court under S. 25, Provincial Small Cause Courts Act and the provisions of S. 25 Prov. Small Cause Courts Act are much wider than the provisions of S. 115, C. P. Code, and by the suit not having been tried by a Judge having the powers of a Small Cause Court, the appellant was deprived of the right of filing a revisional application to the High Court under S. 25, Prov. Small Cause Courts Act. Under the circumstances, the suit should be remanded to the trial Court to be tried by a Judge invested with Small Cause Court powers. A.I.R. 1945 Bom. 197=47 Bom.L.R. 38=I.L.R. (1945) Bom. 382=220 Ind. Cas. 202 (F.B.).

——Ss. 25 and 17—Application to set aside *ex parte* decree—Deposit not made—Court ordering to furnish cash security—Default—Application to file a security bond—Court allowing it and setting aside the decree.

Held, that the defendant had not complied with the provisions of S. 17 which is mandatory, and there was sufficient injustice caused to the plaintiff by the Court's order of setting aside the decree. The High Court could, therefore, interfere in revision under S. 25. 1938 A.L.J. 742=1938 A.W.R. 434.

——S. 25—Where the Court restored a small cause suit which had been dismissed for default and on the same day, passed an *ex parte* decree against the defendants and the latter applied to the High Court to revise the decree:

Held, that it was not incumbent on the defendants to apply for setting aside the decree under S. 17 and the High Court had power to set aside the decree in revision. A.I.R. 1935 Mad. 196=41 L.W. 117=1935 M.W.N. 110=155 Ind. Cas. 575.

——S. 25—Absence of proper trial.

In a revision from a judgment of a Small Cause Court, it is necessary for the High Court to satisfy itself that there has been a decision in accordance with law, and in order to find out whether there has been a decision in accordance with law, it is necessary for the High Court to be satisfied that the Judge of the Small Cause Court has come to his decision judicially and not arbitrarily.

Where the decision of a Small Cause Court Judge was not one that followed inevitably from the statement of the plaintiff and that was all the evidence that was on the file, and the Judge had not framed issues on the questions raised by the pleadings:

Held, that there had been no proper trial and the Judge had not proceeded according to law and hence the High Court would interfere with the decision. A.I.R. 1933 All. 339=1933 A.L.J. 316=145 Ind. Cas. 579.

——S. 25—Departure from usual procedure.

If a Judge of Small Cause Court chooses to depart from the procedure laid down for the conduct of cases in such a Court, he should not fall back on the provisions of that procedure in order to suit his own convenience. A.I.R. 1933 Lah. 452=145 Ind. Cas. 704.

——S. 25—Where no order was passed by a Small Cause Court, under O. 5, R. 19, declaring that the summons was duly served, or ordering further service, and an *ex parte* decree was passed, the decree was set aside. 15 M.L.W. 17=A.I.R. 1922 Mad. 417.

——S. 25—Error in procedure—Instance of.

In a small cause suit the Judge, after the completion of the taking of evidence and the hearing of arguments and having reserved judgment, sent for the parties and asked them to argue the case in his presence and decided the case on the basis of the statements made by them (which he did not record) and on the evidence already taken.

Held, that he had acted very irregularly and that a retrial should be ordered. 25 C.W.N. 599=A.I.R. 1921 Cal. 558.

——Ss. 25, 17—Error in procedure—Security bond, accepted by Court, but not registered—Ex parte decree, if can be set aside—Revision.

The requirements of S. 17 are mandatory and compliance with the essential requisites is necessary before the *ex parte* decree can be vacated. Where a security bond was given and accepted by the Court but not registered, it was held that an *ex parte* decree cannot be set aside under S. 17 where it was set aside the order was revised under S. 25. 26 C.L.J. 315=42 Ind. Cas. 751.

——S. 25—Error in procedure—Admission of claim—Dismissal of suit.

Court cannot dismiss a suit for failure to prove consideration of the bond in suit where defendant admitted the claim but pleaded for instalments. 41 Ind. Cas. 393 (Cal.).

——S. 25—Error in procedure—Specific Relief Act, S. 12—Relief being not cognisable and not grantable.

When one of two alternative reliefs sought in the Small Cause Court is not cognisable by that Court but is not also grantable in law, a direction to strike it out and thus amend the plaint would be the proper course of action. 20 C.W.N. 1020=37 Ind. Cas. 665.

——S. 25—Genuineness of document, question of—If a ground for revision.

Where the genuineness of a document purporting to be a receipt for the amount was doubted, the High Court cannot revise as there is no error of law or procedure. 73 P.W.R. 1916=32 Ind. Cas. 793.

——S. 25—Error of procedure—Revision—Record of evidence, meagre—Judgment after 7 months.

The law pre-supposes a prompt and continuous trial, usually finished in one hearing followed by an immediate decision while the evidence of both sides, most

of it un-recorded, is still fresh in all its details in the mind of the judge. This is of the very essence of the Small Cause Court procedure. The judgment in a case was delivered by a Small Cause Court Judge seven months after he had heard the evidence and the record of evidence was very incomplete and imperfect: *Held*, that his judgment was without the basis necessary for a legal decision and therefore, a retrial should be ordered. 8 N.L.R. 91=15 Ind. Cas. 938.

——S. 25—Error in procedure—Injustice necessary.

High Court will not ordinarily exercise the powers under S. 25 unless it appears that some substantial injustice has directly resulted from a material error in procedure. A.I.R. 1926 Oudh 264, Foll. 105 Ind. Cas. 912=A.I.R. 1928 Oudh 144.

——S. 25—Error in procedure whether good ground for—Practice.

The High Court will not usually under S. 25 of the Provincial Insolvency Act, interfere in revision merely for correcting errors of procedure where substantial justice has been done. 8 A.L.J. 929=11 Ind. Cas. 259.

5. Finding of fact.

(a) When may be interfered with.
(b) When may not be interfered with.

5. (a) Finding of fact—When may be interfered with.

——S. 25—Finding of fact—Error in appraisement of evidence — Interference.

It is quite true that under S. 25 of the Provincial Small Cause Courts Act the High Court should not interfere with pure findings of fact, but where the finding is based upon an obvious error in the appraisement of the evidence, then it cannot be described as a finding in accordance with law. A.I.R. 1950 Cal. 201.

——S. 25—Lower Court overlooking important evidence.

In revision under S. 25, a finding of fact in arriving at which the lower Court has overlooked important piece of evidence on the record, can be interfered with. A.I.R. 1941 Oudh 161=1940 O.W.N. 1212=1940 R.D. 590=1941 A.W.R. 3=16 Luck. 402=191 Ind. Cas. 708.

——S. 25—Finding of fact—Revision, when lies.

Judicial Commissioner's Court will interfere in revision on questions of fact when it appears clearly from the record that the finding of the Court on questions of fact is perverse and cannot be supported by the evidence.

Quaere.—Whether cross-objections lie in a revision application. (1937) 172 Ind. Cas. 506=31 S. L.R. 1.

——S. 25—Finding of misconduct.

The question whether certain proved facts amount to misconduct or not is not purely a question of fact, and it is open to the High Court in a revision under the Small Cause Courts Act, to hold that the facts found by the trial Court do not, in law, constitute misconduct. A.I.R. 1935 Lah. 206=153 Ind. Cas. 625.

——S. 25—Findings of fact opposed to evidence on record.

Although generally in an application under S. 25, the High Court will not generally interfere with findings of fact, where it is shown that the findings are such as could not have been arrived at on the state of the evidence on the record, it is open to the High Court to interfere in revision under S. 25.

It is hardly proper to stigmatize the books of a respectable firm as books which it is not difficult to fabricate without coming to a specific finding that the books produced were, as a matter of fact, fabricated and without giving reasons therefor. A.I.R. 1933 Pat. 145=14 P.L.T. 61=142 Ind. Cas. 463.

——S. 25—Finding—Obviously wrong and perverse.

It may be that the High Court has power to interfere in small cause revision even on a question of fact, but that can apply only in a case when the lower Court's judgment is obviously wrong and perverse and only one conclusion is possible . 105 Ind. Cas. 351=39 M.L.T. 331=A.I.R. 1927 Mad. 960=54 M.L.J. 157.

——S. 25—Finding of facts—Perversity.

It is not the practice of the High Court to interfere in cases under S. 25 with findings of fact but where the judgment is absolutely perverse it will set it aside. 100 Ind. Cas. 1032=A.I.R. 1927 All. 393.

——S. 25—Assumptions against evidence.

The High Court under S. 25 will not ordinarily interfere on a question of fact but is not absolutely debarred from doing so. Where the lower Court decided the case on the assumption that the plaintiff would not be likely to bring a false claim for so small a sum against the whole weight of the evidence given in the case, the High Court would interfere: A.I.R. 1925 Rang. 310, Foll. 101 Ind. Cas. 632=6 Bur.L.J. 54=A.I.R. 1927 Rang. 159.

——S. 25—Finding—Not clear.

Where there is no clear finding of fact by a Small Cause Court, the High Court is entitled to interfere in revision. 85 Ind. Cas. 423=A.I.R. 1925 Oudh 486.

——S. 25—Perverse finding of fact is ground for revision.

The phrase 'according to law' cannot be held to exclude cases in which there has been a grossly erroneous decision on facts. But unless it can be shown that the conclusions on fact were so perverse as to lead to a conclusion that the Judge made no serious attempt to deduce them from the evidence before him or was utterly incapable of making such deduction a High Court will not interfere in revision on questions of fact. 45 Bom. 292 and 27 All. 531, Foll. 91 Ind. Cas. 679=4 Bur.L.J. 127=3 Rang. 471=A.I.R. 1925 Rang. 310.

——S. 25—Assailability—Grounds.

Small Cause Courts have doubtless been given very wide powers with regard to decisions on question of fact and in revision the High Court is always reluctant in questioning a decision on the facts. But there is no doubt that it has, for good reasons, power to do so. In cases where the findings of fact are based on or involve assumptions or inferences which there is nothing in fact or probability to support, or are not justified by sufficient evidence, or where the finding of fact is opposed to the evidence or on flagrant misinterpretation or disregard of evidence, or if injustice would otherwise be done the High Court has power to interfere in revision. 73 Ind. Cas. 1055=19 N.L.R. 72=A.I.R. 1923 Nag. 292.

——S. 25—No evidence.

A revision would be allowed if the Lower Court found a certain fact for the finding of which there did not exist any evidence. 70 Ind. Cas. 291=A.I.R. 1922 Oudh 130.

——S. 25—Interference in cases of injustice.

Although High Court would be adverse to interfering under S. 25 on pure questions of facts, it cannot be said that the High Court has no power whatever of interfering with decisions on questions of fact.

However, interference in regard to appreciation of evidence should in general only be exercised when there appears to the Court to be a very clear case of misappreciation which has resulted in injustice to a party and makes the decree one that cannot be regarded by a Revisional Court as "according to law." 59 Ind. Cas. 267=45 Bom. 292=A.I.R. 1921 Bom. 407.

——S. 25—Findings of fact—When can be interfered with.

Per *Oldfield, J.*—A finding of Small Cause Court on a question of fact reached without reference to material evidence must be rejected even in revision under S. 25 of the Provincial Small Cause Courts Act. 38 M.L.J. 360=(1920) M.W.N. 198=11 L.W. 358=28 M.L.T. 49=55 Ind. Cas. 754.

——S. 25—Finding of fact—Finding opposed to evidence.

The powers conferred by S. 25 though discretionary are very wide and when a small cause Court arrives at a finding entirely opposed to the evidence in the record, the decision will be set aside in revision on the ground of miscarriage of justice. 63 P.R. 897; 21 B. 250, Foll. 165 P.W.R. 1917=42 Ind. Cas. 198.

——S. 25—Findings of fact.

The powers of Court under S. 25 are wider than under S. 115, C. P. Code (1908) where a small cause court decree is based on a finding which is clearly opposed to the evidence resulting in grave injustice to the defendant the High Court can reverse it. 8 S.L.R. 164=27 Ind. Cas. 366.

——S. 25—Finding of fact—Entry in creditor's book.

A finding of fact based on extremely meagre evidence can be set aside in revision. A mere entry in a creditor's book unsupported by independent testimony is of no avail as against the sworn affirmation of the person liable thereunder. 173 P.L.R. 1914 =70 P.W.R. 1914=24 Ind. Cas. 883.

——S. 25—Finding of fact—Revision.

A suit was based on a document which was neither on pronote nor an acknowledgment of debt, but a mere receipt. A decree was passed on the mere settlement of plaintiff that the receipt was for money advanced as a loan. It appeared that the parties were at one time partners in business and it was impossible to make out whether the money was or was not really paid in the course of some transaction arising out of the firm's business. The case was a fit one for revision and the suit must be dismissed. 133 P.L.R. 1913=139 P.W.R. 1913=19 Ind. Cas. 943.

——S. 25—Finding of fact.

A finding of fact can be set aside on revision under S. 25 when based upon ostensibly unreliable evidence or no evidence at all. 89 P.W.R. 1910=7 Ind. Cas. 530.

5. (b) Finding of fact—When may not be interfered with.

——S. 25—Appreciation of evidence—Interference by High Court.

Under S. 25 of the Provincial Small Cause Courts Act, the High Court will not interfere on a pure question of appreciation of evidence. A.I.R. 1949 Ajmer 43.

——S. 25—Question of fact gone into by Judge—Fact that it is not mentioned in judgment is of no significance—Interference by High Court.

Where the evidence makes it clear that a question of fact was gone into by the Judge, no significance can be attached, in a Small Cause Court matter, to the fact that the Judge has not actually mentioned it in his judgment and if the High Court is satisfied that the Judge did not consider the facts, the High Court will not, in revision, review a decision of fact by Small Cause Court Judge. 1946 A.W.R. (H.C.) 421=1946 A.L.W. 329 (1)=A.I.R. 1947 All. 24=230 Ind. Cas. 221.

——S. 25—High Court, if can review evidence and reverse finding of fact.

The High Court, under S. 25 cannot constitute itself a Court of Appeal. It has no right to reverse the trial Court on question of fact, unless the trial Court has given a perverse judgment or has overlooked essential evidence in the case. A.I.R. 1944 Mad. 181=(1943) 2 M.L.J. 668=45 Cr.L.J. 464 =57 L.W. 168=1944 M.W.N. 26=I.L.R. (1944) Mad. 643=212 Ind. Cas. 39.

——S. 25—Findings of fact are to be accepted unless they are perverse or unreasonable.

In a revision application against a Small Cause Court decision, the findings of fact are to be accepted unless they are perverse or unreasonable and it has also to be remembered that the depositions of the witnesses are not taken down in full. A.I.R. 1939 Nag. 19=1939 N.L.J. 118.

——S. 25—A finding on a pure question of fact supported by documentary evidence cannot be assailed in revision under S. 25. A.I.R. 1936 Cal. 497=40 C.W.N. 942=63 C.L.J. 455=I.L.R. (1937) 1 Cal. 1=164 Ind. Cas. 226 (F.B.).

——S. 25—Finding regarding genuineness of signature.

The finding regarding the genuineness of signature arrived at by the lower Court by taking into consideration the evidence of the hand-writing expert is clearly one of fact based on due consideration of the evidence, both direct and circumstantial, and is not open to challenge in revision. A.I.R. 1936 Oudh 176=1936 O.W.N. 245=161 Ind. Cas. 150 (D.B.).

——S. 25—It is not open to the High Court in revision under S. 25 from a Small Cause Court to consider the findings of fact on their merits. A.I.R. 1935 All. 690=1935 A.L.J. 511=1935 A.W.R. 433=157 Ind. Cas. 122.

——S. 25—Question of fact—Court disbelieving evidence of plaintiff and dismissing suit.

Where the question before the Small Cause Court was one of fact and being unable to believe the evidence adduced by the plaintiff who had to establish the necessary fact, dismissed the suit, and though not bound to give reasons, the Court gave reasons for dismissal and the decree was not shown to be not according to law:

Held, that the High Court would not interfere with

the decision of the Small Cause Court. A.I.R. 1934 Pat. 243=146 Ind. Cas. 1056.

——**S. 25**—The High Court will not intervene in revision in what is really a pure question of fact unless it is clear that the judgment of the lower Court is perverse. A.I.R. 1933 All. 373=144 Ind. Cas. 270.

——**S. 25**—Finding of pure fact supported by admissible evidence will not be interfered with in revision under S. 25. A.I.R. 1933 Oudh 393=8 Luck. 119=10 O.W.N. 1311=147 Ind. Cas 227 (2).

——**S. 25—Suit for rent by B accepted as landlord—Decree—Suit for rent by C—Admission—Decree—Interference with decision—If proper.**

A took certain premises for rent and negotiated with *B* who alleged himself to be owner. *A* gave *B* an acknowledgment that he had taken the premises from him on rent and would, in future, pay rent to him. Despite this, *A* sent a letter to *B* that he was convinced that *C* was the real owner and that he proposed to deal with *C* in future, *B* instituted a suit for rent of the shops for a certain period and got a decree. Subsequently *C* filed a suit for rent for a subsequent period and got a decree for rent on consent:

Held, that *B's* suit was rightly decided in that the defendant *A,* having accepted *B* as his landlord, was estopped from denying his title, according to the principles laid down in S. 116, Evidence Act.

Held, also, that in view of the admission, *C's* suit was also rightly decreed and that the decision in each of the suits taken separately was unimpeachable and there was no justification for interfering under S. 25, Provincial Small Cause Courts Act, simply because the two results taken together were anomalous. A.I.R. 1933 Oudh 129=10 O.W.N. 48=143 Ind. Cas. 838.

——**S. 25—Interference with findings of fact—Principles.**

The Court will not ordinarily interfere under S. 25 with finding of facts unless the judgment is perverse and can be shown to be such on the face of it. A.I.R. 1933 Sind 363=6 R.S. 155=147 Ind. Cas. 415 (D.B.).

——**S. 25**—Though an application for revision under S. 25, Small Cause Court Act, has a much larger scope than one under S. 115, C. P. Code, a clear finding of the Small Cause Court cannot be reversed or modified in revision upon the sole ground that the balance of evidence is in favour of the applicant. A.I.R. 1931 All. 210=130 Ind. Cas. 289.

——**S. 25—Injustice or perversity—Absence of.**

The High Court will not interfere solely upon a question of fact where there is no obvious injustice involved or no obvious perversity in the decision upon a finding of fact. 21 Bom. 250 and 27 All. 531, Appr. 104 Ind. Cas. 294=51 Bom. 814=29 Bom. L.R. 928=A.I.R. 1927 Bom. 454.

——**S. 25**—The High Court will not interfere in revision with a finding of fact. Wilful negligence is a finding of fact. 85 Ind. Cas. 474=47 All. 136=6 L.R.A. Civ. 59=A.I.R. 1925 All. 273.

——**S. 25—Absence of evidence or perversity.**

Unless there was no evidence before the Judge to support the finding or unless the finding was an impossible or perverse one, it is unfair to interfere on the revision side. (7 A.L.J. 83, Foll.) 84 Ind. Cas. 794=22 A.L.J. 1036=6 L.R.A. Civ. 24=A.I.R. 1925 All. 172.

——**S. 25—Interference only in cases of error of law or of injustice.**

Under S. 25 it is not open to the High Court to interfere except where some clear error of law and injustice resulting therefrom are apparent. Where there is a certain amount of evidence in the case on which the finding is sustainable, the High Court cannot interfere and set aside the finding. 66 Ind. Cas. 489=15 S.L.R. 193=A.I.R. 1921 Sind 99.

——**S. 25—Finding of fact—Burden of proof—Misdirection as to.**

Per *Sadasiva Aiyar, J.*—The High Court should not interfere in revision with a finding of fact in a small cause suit on the mere ground that the Court misdirected itself as to the burden of proof. 4 L.W. 611=35 Ind. Cas. 204.

——**S. 25—Finding of fact—Negligence of bailor.**

The question of negligence is one of fact. The High Court will not generally interfere with a finding on that question in revision. Where it is not shown that the Judge of the First Court misapplied the standard of care required of a bailor under S. 51 of the Contract Act, or where it was not proved that there was a perverse finding, the High Court will not interfere. 18 M.L.T. 119=(1915) M.W.N. 533 =2 L.W. 628=30 Ind. Cas. 493.

——**S. 25—Finding of fact—Finding opposed to evidence.**

Even if a finding of fact arrived at by a Lower Court is entirely opposed to the evidence the High Court has no power to interfere in revision under S. 25. (1912) M.W.N. 181=15 Ind. Cas. 186.

6. Grounds for interference.

——**S. 25**—Refusal to follow plainly worded statute—Interference in revision.

Under S. 25 of the Provincial Small Cause Courts Act, the High Court has jurisdiction to interfere with the decision of a Small Cause Court if it refuses to follow a plainly worded and unambiguous statute. When there is a special statute governing the case, the Small Cause Court acting judicially cannot ignore it and decide either on the general law or on some vague and general principle. If it does so, the jurisdiction of the High Court is attracted under the section. I.L.R. (1949) Nag. 506=A.I.R. 1949 Nag. 330=1949 N.L.J. 251.

——**S. 25**—Where the parties have led evidence and the Small Cause Court had ample material to come to the conclusion, its decree is not liable to be set aside on account of its failure to frame an issue on simple point when the applicant has not been prejudiced. A.I.R. 1944 Nag. 120=I.L.R. (1944) Nag. 46=1944 N.L.J. 110=212 Ind. Cas. 539.

——**S. 25—Judge not applying his mind.**

Where it is found that the trial Judge had not applied his mind in deciding the dispute, High Court can revise that decision. A.I.R. 1944 Nag. 145= 1944 N.L.J. 200=I.L.R. (1944) Nag. 419=217 Ind. Cas. 295.

——**S. 25**—The High Court should not interfere with a judgment of a Small Cause Court on a question, either of fact or of law, even though the decision may appear to be erroneous unless the conclusion of the Court is one which no Judge acting judicially could reasonably reach. S. 25, Provincial Small Cause Courts Act, ought not to be construed as giving the parties a right of appeal on points of law. A.I.R.

1944 Sind 168=I.L.R. (1944) Kar. 42=216 Ind. Cas. 40.

——S. 25—High Court, when should interfere.

There should be no interference by the High Court in revision under S. 25, with the judgment of the Small Cause Court on a question of fact or law even though the decision may appear to be erroneous unless the conclusion of the Small Cause Court is one which no Judge, acting judicially, could reasonably reach. A.I.R. 1943 Nag. 117=I.L.R. (1943) Nag. 176=1943 N.L.J. 196=206 Ind. Cas. 286 (F.B.).

[Impliedly overrules A.I.R. 1923 Nag. 292=73 Ind. Cas. 1055].

——S. 25—Revision is justified in case of palpable injustice and simple error of law. 1942 N.L.J. 311.

——S. 25—Extent of powers.

Under S. 25, Provincial Small Cause Courts Act, the High Court has wider powers of interference than those given by S. 115, Civil P. C., and it will interfere in exercise of that power on grounds similar to those which would justify interference under S. 115, Civil P. C., or, apart from those grounds, when there is reason to think that there has not been a fair trial or that a palpable injustice has been committed or even in the case of a simple error of law if it is a matter of general importance. Section 25, however, cannot be used in such a way as to give an ordinary right of appeal on points of law. A. I. R. 1941 Bom. 67=42 Bom.L.R. 1098=I.L.R. (1941) Bom. 153=193 Ind. Cas. 35.

——S. 25—The revisional powers under S. 25 should be exercised in exceptional circumstances to correct palpable errors and to prevent miscarriage of justice. A.I.R. 1941 Oudh 277=1941 O.W.N. 115=1941 A.W.R. 66=193 Ind. Cas. 38.

——S. 25, Sch. II, Art. 3—Tender depositing money with tender for supply of grass to prison department—Conditions of tender not fulfilled—Deposit forfeited by Inspector-General of Prisons—Suit for return of deposit—Jurisdiction of Small Cause Court to entertain such suit, held, was excluded—Powers of High Court under S. 25, held, could be exercised. A.I.R. 1940 Oudh 245=1940 O.W.N. 347=1940 A.W.R. 155=187 Ind. Cas. 209.

——S. 25—Powers are discretionary—When may be exercised.

The power of interference which the High Court has under S. 25 is purely discretionary and the mere fact that an order passed by a Small Cause Court is either illegal or without jurisdiction does not necessarily justify interference by the High Court. The real test is whether any substantial injustice has been done by the order complained against. In other words, there should be merits in the application apart from technicality. A.I.R. 1939 All. 77=1938 A.L.J. 1058=1938 A.W.R. 753=180 Ind. Cas. 100.

——S. 25—Section 25 ought not to be construed as giving the parties a right of appeal on points of law. The object of S. 25 is to enable the High Court to see that there has been no miscarriage of justice, that the decision was given according to law. Wherever the Court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, then the Court can interfere. But, the Court ought not to interfere merely because it thinks that possibly the Judge who heard the case may have arrived at a conclusion which the High Court would not have arrived at. A.I.R. 1938 Bom. 223=40 Bom.L.R. 125=174 Ind. Cas. 1004.

——S. 25—Court using discretion and setting aside ex parte decree—No interference.

It is not permissible for the applicant in an application under S. 25 to ask the High Court to interfere with the exercise of the discretion of the trial Court. Consequently, where the Court uses discretion in setting aside an *ex parte* decree, the High Court will not interfere. A.I.R. 1937 Oudh 206=1937 O.W.N. 53=166 Ind. Cas. 137.

——S. 25—Interference with orders of Small Cause Court Judge—When justified.

The High Court will interfere only in exceptional circumstances with orders of the Judge of the Court of Small Causes, but when the Judge is clearly wrong and if his order is upheld, there would, in fact, be a fraud perpetrated upon the plaintiff and he would be debarred from bringing a suit which suit he is entitled to bring, the High Court will interfere. A.I.R. 1937 Sind 155=170 Ind. Cas. 116.

——S. 25—Technical defects.

The Revisional Court would not upset the judgment of a Small Cause Court on a bare technicality, if substantial justice has been done. A.I.R. 1936 Pesh. 1=160 Ind. Cas. 462.

——S. 25—Held, on facts that there was no reason to interfere in revision.

Held, in view of the fact that the acknowledgment in the suit was made by the defendant and the plaintiff had himself given evidence that the advance was made to the defendant and that the defendant's father had not given evidence, there was no sufficient reason for rejecting the plaintiff's evidence that the advance was made to the defendant. The fact that the khata was in the name of both the defendant and his father was consistent either with the advance being made to the defendant alone, as the plaintiff pleaded, or to the defendant's father as the defendant pleaded and that there was no reason for interference. (1936) 167 Ind. Cas. 448=19 N.L.J. 251.

——S. 25—Application for restoration—Small Cause Court holding grounds insufficient and refusing to allow restoration—Revision.

Held, that where the Small Cause Court holds that the grounds alleged for restoration are not sufficient and refuses to allow restoration, the High Court should not overrule it in revision. A.I.R. 1935 All. 437=1935 A.L.J. 708=1935 A.W.R. 273=154 Ind. Cas. 516 (1).

——S. 25—Substantial injustice must have resulted from material misapplication or misapprehension of law.

Section 25 was not intended to give, in effect, a right of appeal in all Small Cause Court cases either on law or fact. The revisional powers given by that section are only exercisable where it appears that some substantial injustice to a party to a litigation has directly resulted from a material misapplication or misapprehension of law or from a material error in procedure. A.I.R. 1935 All. 379=1935 A.L.J. 414=1935 A.W.R. 178=159 Ind. Cas. 51.

——S. 25—Suit for use and occupation against an alleged trespasser is triable by Small Cause Court. S. 23 leaves a discretion with the Judge in such a case and no ground for revision exists on the ground that question of title is raised in the suit. A.I.R. 1934 Lah. 355=150 Ind. Cas. 980 (1).

——S. 25—In all revisional application under S. 25, the High Court must be satisfied before it interferes that some substantial injustice has been done; in other

words, that there are merits in the application apart from technicality.

Where there are no merits in the application it may be dismissed, even though a question of jurisdiction is involved. A.I.R. 1933 All. 145=144 Ind. Cas. 172.

——S. 25—Omission to consider material evidence—Mistake in appreciation of evidence.

Where substantial injustice has been done to a party by reason of the omission of the lower Court to consider material evidence or due to mistake in the appreciation of evidence, the High Court is entitled to interfere under S. 25. A.I.R. 1933 Cal. 501=37 C.W.N. 275=144 Ind. Cas. 740.

——S. 25—High Courts should not ordinarily exercise the powers under S. 25 unless they have reason to suppose that there has been a real mismanagement of the case or actual perversity in the decision by the trial Court. Where the judgment showed that there had been a real mismanagement of the case before the trial Court and in consequence, substantial injustice had resulted, the High Court interfered in revision. A.I.R. 1932 Oudh 283=8 O.W.N. 800=7 Luck. 116=134 Ind. Cas. 411.

——S. 25—Miscarriage of justice.

High Courts should not ordinarily exercise their powers under S. 25 unless they have reason to suppose that there has been a real mismanagement of the case or actual perversity in decision and it behoves a High Court to exercise such powers simply and solely for the purpose of preventing miscarriage of justice or gross illegalities. A.I.R. 1932 Oudh 60=8 O.W.N. 1263=137 Ind. Cas. 495.

——S. 25—Interference in revision under S. 25 is discretionary and High Court will not, as a rule, interfere in revision unless some substantial injustice has resulted from the error or irregularity complained of. A.I.R. 1931 Lah. 606=32 P.L.R. 163=133 Ind. Cas. 283.

——S. 25—Judgment very brief.

The High Court will not interfere under S. 25 with the judgment of a Small Cause Court if it is satisfied that the Judge has really applied his mind to the case and given a decision on the evidence even though the judgment is very brief. (1931) 132 Ind. Cas. 240=7 O.W.N. 1202.

——S. 25—Grounds for interference.

Where a decree is opposed to public policy it is not improper to interfere with it. 34 C.W.N. 388=A.I.R. 1930 Cal. 596.

——S. 25—New case—No objection—No revision.

Where plaintiffs raise a new case at the time of the hearing at variance with the case made in the plaint and the defendants having had notice of the precise grounds on which the plaintiffs led evidence do not ask for adjournment in order that they might furnish evidence to rebut the new case set up, and the Court passes a decree, it cannot be said that the decision was in any way wrong or vitiated so as to necessitate remand by High Court. 49 C.L.J. 551=A.I.R. 1929 Cal. 654.

——S. 25—Wrong forum by choice.

Where at their own instance the plaintiffs chose to move the Small Cause Court they could not ask the revising Court to hold that that Court had no jurisdiction. 118 Ind. Cas. 139=A.I.R. 1929 Pat. 722.

——S. 25—Inferences from facts not fairly drawn—Good ground.

Under S. 25, High Court will not go into decisions of Small Cause Courts as to what is a fair inference in a particular case unless it is shown that the inference is not one that can fairly be drawn from the facts. A.I.R. 1923 Bom. 389, Foll.

Certain tins of ghee were consigned to the defendant company at Sangli for conveyance to the plaintiff and were wholly lost during transit. The goods were sent under a risk note in form (H) as amended. In certain cases it provided that the Railway Administration "shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor." Plaintiff brought a suit for damages for loss of goods. The Court found that such misconduct was not proved by the plaintiff, but that it could be "fairly inferred from the evidence given in accordance with the proviso in the risk-note *H* and he decreed the plaintiff's claim.

Held, that if the evidence proved facts strongly preponderating in favour of an inference that went against the view that there was misconduct on the part of the railway servants, it might justify interference under S. 25; for it would mean that the inference of such misconduct clearly was not a "fair" one, and thus the decision was unjust and not "according to law."

Held, further, that the risk note *H* did not require such misconduct to be "proved" but only that such misconduct could be "fairly inferred" from the evidence and interference by High Court was not justified. 118 Ind. Cas. 241=52 Bom. 770=30 Bom. L.R. 1104=A.I.R. 1928 Bom. 504.

——S. 25—It is not permissible for an applicant in an application under S. 25 to ask the High Court to interfere with the exercise of discretion with regard to sufficiency or otherwise of security offered. 114 Ind. Cas. 502=5 O.W.N. 886=A.I.R. 1928 Oudh 488.

——S. 25—Conditional instalment decree.

Where the Small Cause Court made the decretal amount payable by instalments, adding that the order relating to instalments will be operative in case the defendant executes a mortgage of his zamindari share in a certain village within a certain time and in the event of his failure to do so the plaintiff will be entitled to realize the entire decretal amount,

Held, that the Court has not acted contrary to law in passing a decree payable by instalments on a certain condition. 101 Ind. Cas. 816=1 L.C. 75=A.I.R. 1927 Oudh 236.

——S. 25—Misinterpretation of evidence.

A Court of revision is reluctant to interfere with the findings of the Small Cause Court unless they are based on misinterpretation of evidence, and decide the case for itself on the material on record: 19 N.L.R. 72, Foll. 100 Ind. Cas. 406=A.I.R. 1927 Nag. 77.

——S. 25—Careful trial—No revision.

Where in a suit on a pro-note the whole proceedings show that the Judge fully understood the questions at issue and took pains to ascertain whether the defendant did or did not execute the pro-note, and

where he had also in his notes given reasons for believing that the defendant wrote the note,

Held, that there was no case for revision. A.I.R. 1926 Oudh 264, Foll. 103 Ind. Cas. 886=1 L.C. 263=A.I.R. 1927 Oudh 569.

——S. 25—Careful and sound judgment.

Where the Judge of the Small Cause Court applies his mind to the evidence and arrives at a perfectly intelligent finding upon it, and his judgment is in conformity with the first para. of O. 20, R. 4, his decision should not be set aside, although the superior Court has very wide powers under that section. 8 O.C. 44, not Foll. 94 Ind. Cas. 397=A.I.R. 1926 Oudh 478.

——S. 25—Perversity or mismanagement of case.

High Courts should not ordinarily exercise the powers under S. 25 unless they have reason to suppose that there has been a real mismanagement to the case or an actual perversity in decision. 93 Ind. Cas. 108=1 Luck. 297=13 O.L.J. 335=3 O.W.N. 191=A.I.R. 1926 Oudh 264.

——S. 25—A decree based upon plaintiff's statement which was contradicted by all his witnesses is not in accordance with law. 80 Ind. Cas. 860=A.I.R. 1925 Oudh 188.

——S. 25—Evidence not fully considered.

Where on the face of the Small Cause Court's decision the evidence of the plaintiff has not been sufficiently considered and the suit is dismissed, the High Court would interfere in revision. 77 Ind. Cas. 865 =1 Pat.L.R. 199=A.I.R. 1924 Pat. 354.

——S. 25—Doubt as to correctness no ground.

Where the applicant has not shown that the view of the case as taken by the lower Court is wrong but has succeeded, at the utmost, in throwing some doubt on its correctness, the High Court will not interfere in revision. A.I.R. 1923 Nag. 309.

——S. 25—Wrong appreciation of evidence.

Where the Small Cause Court dismissed plaintiff's case on the ground that he avoided going into witness-box and without properly considering the evidence in the case, the High Court reversed its decision. A.I.R. 1922 Pat. 39.

——S. 25—Matters of discretion.

It is a matter entirely within the discretion of the Trial Judge whether to wait for the pleader to appear or not and it is not for the High Court to interfere if the Judge has not used his discretion to wait. 66 Ind. Cas. 789=15 S.L.R. 172=A.I.R. 1921 Sind 50.

——S. 25—Evidence—Different view—No revision.

That the revisional Court takes a different view of the evidence in the case, is no ground for revision. 48 Ind. Cas. 907 (Nag.).

——S. 25—Revision — Grounds in.

A Small Cause Court judgment is liable to be set aside in revision if it (1) assumes facts (2) refuses to receive and consider pleas of the parties (3) does not decide material points of dispute. 54 P.W.R. 1914=146 P.L.R. 1914=25 Ind. Cas. 26 (2).

7. Interlocutory order.

——S. 25—The word "case" in S. 115, Civil P. C., is wide enough to cover an interlocutory order, and, therefore, it should also be wide enough in S. 25, Provincial Small Cause Courts Act. A.I.R. 1937 Nag. 136=I.L.R. (1937) Nag. 266=170 Ind. Cas. 48.

——S. 25—Suit dismissed for non-payment of additional court-fee—Restoration on application under S. 151, Civil P. C.—Suit decreed — Application attacking only order of restoration—Maintainability.

A suit was dismissed for non-payment of certain additional court-fee. The plaintiff's application for restoration made under S. 151, Civil P. C., was granted. The defendant then filed the written statement and the suit was decreed. More than two months after the decision, defendant filed an application under S. 25, Provincial Small Cause Courts Act, not attacking the final decree itself but attacking the order for restoration on the ground that the trial Court had no jurisdiction to restore the suit on the application made under S. 151:

Held, that the trial Court was wrong in restoring the suit on the basis of an application under S. 151, Civil P. C., but in view of the fact that the suit had proceeded to its termination before this present application was made, the High Court could not under S. 25, Provincial Small Cause Courts Act, interfere with the order restoring the suit to hearing. That order was clearly an interlocutory order and the proper remedy of the applicant was to apply under S. 25, Small Cause Courts Act against the final decree itself. A.I.R. 1937 Oudh 364=13 Luck. 263 =1937 O.W.N. 677=168 Ind. Cas. 201.

——S. 25—Interlocutory order.

A suit was filed in the Court of a Sub-Judge as a small cause suit. The Sub-Judge having gone on leave, was succeeded by another Judge who had no small cause powers. The suit was sent to another Judge to be tried as an original suit. It was heard on merits and posted for arguments. The Sub-Judge who had proceeded on leave returned, and got the suit transferred to his file to be tried as a small cause suit:

Held, that the order of the Sub-Judge not being an interlocutory order, was revisable.

Held, also, that even assuming that it was an interlocutory order, still the High Court had jurisdiction to act under S. 25, Provincial Small Cause Courts Act, to satisfy itself that the decree or order was according to law as the order in question amounted to "case decided".

Held, further, that the order of the Sub-Judge, was, in effect, a transfer order of a Court exercising higher power by calling off a case from an inferior Court and S. 24, C. P. Code, was a bar to it, for, under that section, it is only a High Court or a District Court who can withdraw any suit, appeal or other proceeding pending in any Court subordinate to it. A.I.R. 1936 Sind 160=30 S.L.R. 226=167 Ind. Cas. 193.

——S. 25—Interiocutory order—Revisable.

Where a Small Cause Court Judge refuses to summon witnesses, the aggrieved party can forthwith apply in revision against that order, but his failure to do so does not bar his right to apply in revision when the case is over. 97 Ind. Cas. 335=A.I.R. 1926 Pat. 575.

——S. 25—Interlocutory order refusing amendment.

Section 25 applies only when a case is decided by Small Cause Court and not to an interlocutory order passed by it. An order rejecting amendment is an interlocutory order and cannot be revised by High Court. A.I.R. 1934 Lah. 165.

——S. 25—Interlocutory order.

An interlocutory order of a court of small causes is not subject to reversion under S. 25. 4 Bur.L.T. 23=9 Ind. Cas. 467.

8. Judgment of Small Cause Court—Contents.

——S. 25—Order 20, R. 4 (1), C. P. Code should be considered along with the provisions of S. 25, Provincial Small Cause Courts Act, which impliedly requires the Judge to make his judgment sufficiently intelligible to enable the High Court to be satisfied that his decision is according to law. A.I.R. 1943 Bom. 416=45 Bom.L.R. 806=210 Ind. Cas. 33.

——S. 25—Contents of judgment.

Suit on pro-note—Case set up by defendant not found in his written statement and not supported by evidence:

Held, that in such cases, plaintiff's claim cannot be dismissed without stating any reason in the judgment. 1936 M.W.N. 1376.

——S. 25—Judgment — Contents.

The discretion conferred on the High Court under S. 25 of the Provincial Small Cause Courts Act is more extensive than the powers in revision under S. 115, C. P. C. A Judge of the Court of Small Causes is not required to write an elaborate judgment but he must indicate that he has applied a judicial mind to the case. Where the parties were examined by the Judge who disposed of the case without even stating whether he believed the evidence, **held,** that the case was not properly tried and that the judgment be set aside. 1930 A.L.J. 1090=A.I.R, 1930 All. 832.

——S. 25—Judgment without reasons.

The judgment of a Small Cause Judge should contain a brief statement of the reasons for the decision to satisfy the High Court that the Judge did apply his mind to the matters before him. 59 Ind. Cas. 906=12 L.W. 285.

9. New plea.

——S. 25—New plea raising a question of law.

In revision under S. 25, a new plea raising a question of law can be entertained for the first time though it was not specifically raised in the trial Court or in the grounds of revision. A.I.R. 1941 Oudh 111=1940 O.W.N. 988=1940 A.W.R. 462=191 Ind. Cas. 305.

——S. 25—Plea of Jurisdiction.

The fact that the parties did not take the objection as regards jurisdiction might in certain circumstances, incline the High Court to refuse to exercise its discretion in favour of the petitioners; but where the case is so clear as to show that in any event, the Judge had no jurisdiction, that principle does not apply. A.I.R. 1938 Pat. 378 =4 B.R. 385=19 P.L.T. 539=174 Ind. Cas. 144.

——S. 25—Question of jurisdiction — First time in revision—Can be raised.

The failure to raise an objection to jurisdiction in lower Courts cannot disentitle a party so omitting from raising the objection for the first time in the High Court in revision: A.I.R. 1926 Bom. 362, Foll. 101 Ind. Cas. 338=29 Bom. L.R. 273=A.I.R. 1927 Bom. 663.

——S. 25—New plea not bound to interfere.

Where the plea of jurisdiction is not taken in the lower Court, but is raised for the first time in revision in the High Court the High Court is not bound to interfere. A.I.R. 1923 All. 428, Foll. 9 L.L.J. 245=28 P.L.R. 311=A.I.R. 1927 Lah. 399=102 Ind. Cas. 679.

——S. 25—New plea—Merits necessary.

High Court will not interfere under S. 25, if objection as regards jurisdiction is not raised in the trial court unless it is necessary to interfere on the merits of the case. 81 Ind. Cas. 566= A.I.R. 1925 Oudh 88.

——S. 25 — Objection as to jurisdiction—Power of High Court to interfere.

A revision application based mainly on the ground that the Small Cause Court had no jurisdiction to try the suit, which objection was not urged in the lower Court, is not sustainable in the High Court. 29 Ind. Cas. 566 (Cal.).

——S. 25—A plea of limitation can be raised for the first time before the High Court. A.I.R. 1936 Cal. 497=40 C.W.N. 942=63 C.L.J. 455 =I.L.R. (1937) 1 Cal. 1=164 Ind. Cas. 226 (F.B.).

——S. 25—New plea — Fresh plea of limitation —If can be raised in.

The omission to raise a plea of limitation in the trial Court would not estop the defendant from raising that plea in revision before the High Court. If such plea depends upon evidence the case should be remanded for retrial. 2 U.P.L.R. (All.) 143=56 Ind. Cas. 513.

——S. 25—Revision — New plea — Res Judicata.

On an application under S. 25 a party can raise the plea of **res judicata** though not raised in the lower Court or in the grounds of revision petition. 4 A. 69, Foll. 7 M.L.T. 175=5 Ind. Cas. 925.

——S. 25—It is not open to a litigant to make out a new case in revision on a point of fact which has not been urged in the trial Court. A.I.R. 1933 Sind 363=147 Ind. Cas. 415.

——S. 25—A person seeking revision under S. 25 cannot be allowed to take any new plea before the Court of revision which was not taken in the Court below. A.I.R. 1932 Oudh 230=9 O.W.N. 436=138 Ind. Cas. 160.

——S. 25—New plea.

It is not open to an unsuccessful litigant to raise in revision a new plea even as regards his own pleading, much less in regard to the pleading of his successful adversary. 32 Bom.L.R. 181 =A.I.R. 1930 Bom. 361.

——S. 25—New plea.

No revision lies where a Judge of Small Cause Court has awarded compensation to defendant under S. 95, C. P. Code, and the plaintiff for the first time in revision raises a plea that even though he may have applied for a warrant of arrest which was not justified, yet he had compromised the case with the defendant by relinquishing a portion of his claim in consideration of the defendant not claiming compensation from him for

wrongful arrest. 123 Ind. Cas. 225=A.I.R. 1930 Sind 173.

——S. 25—There should be no interference in revision on a ground which has never been taken up in the Lower Court. 70 Ind. Cas. 291=A.I.R. 1922 Oudh 130.

——S. 25—New plea—Question of fact.

The objection whether the plaintiff is or is not the agent of a particular person on whose behalf he has instituted a suit to recover money in the Small Causes Court, cannot be taken for the first time in revision. 27 Ind. Cas. 807 (All.).

——S. 25—Objection as to the admission of a review in a Small Cause revision. See C. P. CODE, O. 47, Rr. 7 AND 9. 19 M L.J. 56=2 Ind. Cas. 488.

10. Other Remedy open.

——S. 25—If controlled by S. 24—Order under S. 35-A, C. P. Code—Interference in revision—If barred by reason of provision for appeal.

The powers of revision under S. 25 of the Provincial Small Cause Courts Act are not curtailed by the fact that a separate remedy by way of appeal is provided under S. 24; and the fact that an order under S. 35-A, C. P. Code, is appealable is no ground for holding that it cannot be interfered with in revision under S. 25. I.L.R. (1947) Nag. 409=1947 N.L.J. 265=229 Ind. Cas. 511=A.I.R. 1947 Nag. 247.

——S. 25—Order under S. 35-A, C. P. Code—Revision, competency of.

The exercise of the right of interference under S. 25, Provincial Small Cause Courts Act does not depend on the question whether an appeal lies or not. Consequently, a person is not shut out from questioning under S. 25, Provincial Small Cause Courts Act, an order made against him under S. 35-A, C. P. Code; in a Small Cause suit. A.I.R. 1933 Oudh 477=10 O.W.N. 1085=146 Ind. Cas. 993.

——S. 25—Dismissal of suit for non-payment of process-fee — Interference.

Under S. 25, Provincial Small Cause Courts Act, it is competent to the High Court to set aside an order dismissing a suit under O. 9, R 2 C. P. Code, even though the party has another remedy.

Where, however, the plaintiff failed to prosecute the suit on two occasions and his suit was dismissed under O. 9, R. 2.

Held, that the High Court would not interfere. A.I.R. 1932 Oudh 106=9 O.W.N. 1179=138 Ind. Cas. 796.

——S. 25—Not dependent on right of appeal.

The exercise of the right of interference by the High Court under S. 25 does not depend on the question whether an appeal lies or not. Still it is a matter for consideration whether, when there is a speedy remedy open to a party, he should be allowed to come up in revision and drag the opposite party to the High Court where the expense of engaging Counsel must be greater than in the mofussil. 94 Ind. Cas. 790=A.I.R. 1926 All. 554.

——S. 25—Return of plaint.

Where plaint is wrongly returned under S. 23 although there may be another remedy open to the aggrieved party by way of suit on the regular side, revision will lie. 93 Ind. Cas. 826=24 A. L.J. 384=A.I.R. 1926 All. 344.

——S. 25—Return of plaint.

An order returning a plaint under S. 23 of the Provincial Small Cause Courts Act is revisable under S. 25 of the Act. 60 Ind. Cas. 319=3 L. L.J. 335=A.I.R. 1921 Lah. 91.

——S. 25—When the Small Cause Court declines to grant instalments under the provisions of S. 5 (1), U. P. Agriculturists' Relief Act, the remedy of the applicant lies in an appeal under S. 5 (2) of the said Act and not in an application under S. 25, Provicial Small Cause Courts Act. Consequently, when no appeal was filed under S. 5 (2) U. P. Agriculturist's Relief Act, the High Court will not interfere under S. 25, Small Cause Courts Act. A.I.R. 1937 Oudh 358=1937 O. W.N. 589=1937 R.D. 321=13 Luck. 331=168 Ind. Cas. 470.

——S. 25—Existence of right to appeal.

On an application for revision under S. 25, the High Court will not interfere with an order of a Subordinate Court if it is open to the aggrieved party to institute a regular appeal. The section is not intended to give a general right of appeal. A.I.R. 1933 Oudh 454=10 O.W.N. 995=147 Ind. Cas. 184.

11. Powers of High Court.

(a) General.
(b) When may be exercised.

(a) General.

——S. 25—Power, if restricted by S. 115, C. P. Code.

In a revision under S. 25, Small Cause Courts Act, the powers of High Court are not limited by the conditions laid down in S. 115, C. P Code. A.I.R. 1939 All. 590=1939 A.W.R. 477=1939 A.L.J. 460=I.L.R. (1939) All. 709=184 Ind. Cas. 860.

——S. 25—The powers of revision vested in the High Court under S. 25 of Provincial Small Cause Courts Act are wider than those under C. P. Code. S. 115. 115 Ind. Cas. 757=A.I.R. 1928 Lah. 274.

——S. 25—Widest scope.

Section 25 of the Small Cause Court Act is of the widest scope in conferring discretion upon the High Court in contradiction to the narrow terms of S. 115, C. P. Code.85 Ind. Cas. 362 =1 Rang. 372=2 Bur.L.J. 154=26 Cr.L.J. 523 =A.I.R. 1924 Rang. 54.

——S. 25—The powers of the High Court under S. 25 of the Small Cause Courts Act are wider than the powers under S. 115 of the Code. 63 Ind. Cas. 435=19 A.L.J. 555=A.I.R. 1921 All. 325.

——S. 25—Revision, interference in—Powers of High Court.

Under S. 25 the High Court has wider powers of interference than under S. 115, C. P. Code. 54 Ind. Cas. 436.

——S. 25—C. P. Code, S. 622—Power of interference of High Court—Practice.

Held, that the High Court has greater power of interference under S. 25 than it has under S. 622. 1904 A.W.N. 227=1 A.L.J. 637=27 A. 192.

——S. 25—Not less wide than under O. 41, R. 4, C. P. Code.

The power of the Court in revision under S. 25 of the Provincial Small Cause Courts Act is not less wide than under C. P. Code, O. 41, R. 4. 61 Ind. Cas. 563=17 N.L.R. 20=A.I.R. 1921 Nag. 105.

——S. 25—Powers are limited.

The revisional powers of the High Court, even in a case decided under the Provincial Small Cause Courts Act are very limited. A.I.R. 1937 Pat. 524=3 B.R. 797=170 Ind. Cas. 797.

——S. 25—The section does not allow the Court to review evidence as a Court of appeal. A.I.R. 1944 Mad. 181=(1943) 2 M.L.J. 668=45 Cr.L.J. 464=57 L.W. 168=1944 M.W.N. 26=I L.R. (1944) Mad. 643=212 Ind. Cas. 39.

——S. 25—High Court cannot undertake duties of Court of first appeal.

In an application under S. 25, no High Court can be intended to be or can possibly undertake the duties of a Court of first appeal from decision of a Small Cause Court Judge. While the High Court has the power to interfere even upon a point of fact, it behoves it to exercise this power simply and solely for the purpose of preventing miscarriage of justice or gross illegalities. The powers conferred by S. 25 are purely discretionary. It is not intended by S. 25 to give in effect a right of appeal in all Small Cause Court cases either on law or fact. A.I.R. 1939 Oudh 141=14 Luck. 588=1939 O.W.N. 203=180 Ind. Cas. 15.

[See also 93 Ind. Cas. 912=1 Luck. 323=13 O.L.J. 641=3 O.W.N. 228=A.I.R. 1926 Oudh 519.]

——S. 25—Where, although no appeal lies from the decision of a Subordinate Judge in a suit of a Small Cause nature within the pecuniary limits of his jurisdiction and no cross-objection lies when the whole litigation is before the High Court, it may well be considered in the light of the powers of the High Court under S. 25. A.I.R. 1936 Pat. 562=2 B.R. 561=163 Ind. Cas. 133.

——Ss. 25 and 17—Proviso — Ex parte decree set aside.

The High Court can, in revision under S. 25, interfere with the lower Court's order setting aside the ex parte decree. A.I.R. 1944 Nag. 103 =1944 N.L.J. 52=I.L.R. (1944) Nag. 161= 212 Ind. Cas. 121.

——S. 25—Question of fact, if can be raised.

The explanation "according to law" in S. 25 limits the power of the High Court in revision to grounds of law that might be raised in a second appeal and it does not cover a revision on question of fact. A.I.R. 1935 All. 372=1935 A.L.J. 396=1935 A.W.R. 190=159 Ind. Cas. 35.

——S. 25—Finding of fact—Power to interfere.

Under S. 25 of the Act, the High Court though averse to interfere on pure question of fact, yet has the power to interfere with a decision on a question of fact. 22 Bom.L.R. 1199 =59 Ind. Cas. 192.

——S. 25—High Court, if bound by question of waiver between parties.

Under S. 25, the High Court may call for a case for the purpose of satisfying itself that a decree or order made in any case has been decided by a Court according to law, and is not in any way bound by questions of waiver as between the parties. The High Court is bound to interfere when the order of the lower Court violates the rules of procedure laid down in O. 27, C. P. Code. A.I.R. 1934 All. 107=54 Ind. Cas. 15.

——S. 25—Revision — High Court, powers ci— Duty of Judge of Small Cause Court.

The Judge of a Court of Small Causes must place on record enough materials to make it clear to the High Court what the grounds really are on which his decision proceeds; otherwise the High Court will interfere in revision. Duty of a Judge of the Court of Small Causes and limits of revisional jurisdiction of High Court pointed out. 15 A.L.J. 680=41 Ind. Cas. 873.

——S. 25—Power of High Court under.

The interference of the High Court under S. 25 is a matter of discretion. 3 L.W. 408=30 M.L.J. 492=(1916) 2 M.W.N. 79=34 Ind. Cas. 6.

——S. 25—Discretion of High Court.

The High Court is not bound to interfere in revision with every decree of the Small Cause Court. 5 Ind. Cas. 322 (All.).

——S. 25—Suo motu orders.

As under S. 115, C. P. Code, the High Court can and may deal with a case under that section without there being any application by any of the parties, so also it can under S. 25 of the Small Cause Courts Act and may in special circumstances pass such orders as it thinks fit if it is satisfied that the judgment of the Small Causes Court is not according to law. Where the Small Cause Court passed decree against defendant No. 2, and exonerated defendant No. 1 and on application by defendant No. 2 the High Court exonerated defendant No. 2.

Held, that plaintiff though not applying in revision should be given a decree against defendant No. 1. 78 Ind. Cas. 736=A.I.R. 1924 Nag. 154.

——S. 25—Application not necessary for revision—Second appeal converted into revision petition.

S. 25 does not require an application before action is taken; and the High Court can interfere in revision with the order of a Munsif in a Small Cause suit without an application therefor. Where a second appeal preferred from an appellate judgment in the small cause suit became incompetent by reason of the judgment of the lower appellate court having become a nullity for want of jurisdiction;

Held, there was nothing to prevent the High Court from interfering in revision with the first court's judgment if the same be found erroneous. 20 M.L.J. 722=7 M.L.T. 74=5 Ind. Cas. 742 (1). See also 1905 A.W.N. 77=2 A.L.J. 297 27 A. 531; (1900) 5 C.L.J. 413.

——S. 25—Dismissal of petition under S. 25, for default—Petition cannot be restored.

There is no difference in principle between a revision petition under S. 115, C. P. Code, and one under S. 25, Provincial Small Cause Courts Act so far as the question of maintainability is concerned. Hence, when a revision petition under either of these sections is dismissed for default of appearance, the petition cannot be restored. A.I.R. 1943 Mad. 260 (1)=1942 M.W.N. 580=55 L.W. 576=(1942) 2 M.L.J. 356=208 Ind. Cas. 110.

(b) When may be exercised.

——S. 25—Power of interference is discretionary—No injustice to applicant by trial Court's decision—Interference resulting in injustice to other party—High Court refused to interfere.

As the powers of revision under S. 25 are discretionary, the High Court will refuse to interfere with the trial Court's decision when no injustice has resulted therefrom to the applicant even though there has been a misapplication of the law of limitation by the Court below and especially when injustice will result to the opposite party by such interference. A.I.R. 1946 Cal. 526=228 Ind. Cas. 386.

——S. 25—Revision under — Question before the Court.

In a revision under S. 25 of the Provincial Small Cause Courts Act, the only question before the Court is whether substantial justice has been done. I.L.R. (1948) Nag. 431=1948 N.L.J. 259=A.I.R. 1949 Nag. 113.

——S. 25—Substantial justice between parties—High Court will not interfere.

Where substantial justice has been done between the parties, the High Court will not interfere under S. 25, Small Cause Courts Act. A.I.R. 1946 Nag. 130=1945 N.L.J. 503.

——S. 25—Interference under, in revision—Scope of.

The High Court ordinarily will not exercise its discretionary powers in revision under S. 25 unless some error had been committed resulting in injustice.

The decree-holder obtained his decree against the estate of the deceased in the hands of **S** believing in good faith that **S** was the real legal representative of the deceased debtor. In the execution proceedings T the true legal representative objected to the execution The objection was wrongly dismissed by the executing Court. The correct position being that the objection well founded and the decree-holder's remedy was to file suit against the true legal representative and obtain a fresh decree and then to execute it:

Held that inasmuch as substantial justice had been done between the parties as in any case the debt would have been recoverable from the estate of the deceased and interference with the lower Court's order rejecting the objection was likely to perpetrate an injustice no interference should be made under S. 25. A.I.R. 1946 Oudh 1=1945 O.W.N. 163=20 Luck. 517.

——S. 25—Substantial justice done by lower Court.

Where the lower Court's order has done substantial justice, the High Court will not interfere in revision under S. 25. A.I.R. 1941 Nag. 273=1941 N.L.J. 371=I.L.R. (1942) Nag. 294=197 Ind. Cas. 76.

——S. 25—It is the duty of the High Court acting under S. 25 to see that substantial justice is done as between the parties. A.I.R. 1941 Oudh 485=1941 A.W.R. 256=1941 O.W.N. 861=194 Ind. Cas. 744.

——S. 25—Discretion of Court.

Section 25 does not give any right of appeal on law or fact and the powers conferred by the section are purely discretionary and not to be exercised unless it appears that some substantial injustice has resulted from the decree of the Court of Small Causes. A.I.R. 1933 Oudh 346=10 O.W.N. 581=146 Ind. Cas. 595 (2).

——S. 25—Discretion.

Section 25 does not give any right of appeal on law or fact; the powers conferred by the section are purely discretionary and are not to be exercised unless it appears that some substantial injustice has resulted from the decree of the Small Cause Court. A.I.R. 1932 Oudh 230=9 O.W.N. 436=138 Ind. Cas. 160.

——S. 25—Powers under S. 25 are purely discretionary and should not be exercised unless some substantial injustice is apprehended. (1932) 9 O.W.N. 962.

——S. 25—The powers of revision conferred by S. 25 are discretionary and the High Court should not interfere unless it appears that some substantial injury is done to the aggrieved party. 7 O.W.N. 760=A.I.R. 1930 Oudh 420.

——S. 25—Substantial justice — To do justice or to remedy substantial injustice done.

S. 25 is not intended to give in fact a right of appeal in all Small Cause Court cases and the revisional powers given by that section are only exercisable where it appears that some substantial injustice to a party to a litigation has directly resulted from a material misapplication or misapprehension of law, or from a material error in procedure.

A applied to set aside an **ex parte** decree and in accordance with rules filed a security bond with two sureties **B** and **C**. **B** applied to withdraw his name and **A** deposited into the Court Rs. 335 sufficient to represent **B's** suretyship. Subsequently the decree-holder objected to the bond on the ground that **C** being a Hindu and having two sons, his surety was worth nothing. The Small Cause Court Judge accepted this contention and dismissed **A's** application. On appeal it was contended that the Court sitting in revision was not entitled to interfere in the case on the ground that a proprosition of law was incorrect.

Held, that there was a very substantial injustice, for **A** had been deprived of all opportunity of having his case heard on restoration and that therefore the Court in revision was entitled to consider the correctness of the proposition of law decided by the Small Cause Court Judge. 120 Ind. Cas. 555=1929 A. L. J. 1285=52 All. 153=A.I.R. 1930 All. 87.

——S. 25—High Court's jurisdiction under S. 25 is discretionary and cannot be exercised except to remedy injustice. 114 Ind. Cas. 288=A.I.R. 1929 Nag. 70.

——S. 25—S. 25 must not be invoked in absence of substantial injustice.

There should be no interference under S. 25 unless it clearly appears that some substantial injustice to a party to the litigation has directly resulted from a material misapplication or misapprehension of law or material error in procedure in the Court of Small Causes. Although any decree passed on a wrong view of law must cause substantial injury to a party whose suit is dismissed by reason of that mistake such injury is not necessarily an injustice.

When, therefore, the lower Court found that the plaintiff, the maker of a pro-note, was not entitled in justice to recover the amount of the pro-note as he made no payment to the debtor and as the debtor had paid the real person in consideration of whose loan the pro-note was executed.

Held, that the dismissal of the suit did not cause a substantial injustice to the plaintiff and hence no revision lay. 13 All. 277 (F.B.), Foll. 100 Ind. Cas. 703=49 All. 457=25 A.L.J. 402=A.I.R. 1927 All. 463.

——S. 25—The revisional powers given by the section are only exercisable where it appears that some substantial injustice to a party to the litigation has directly resulted from a material misapplication or misapprehension of law, or from a material error in procedure. 13 All. 277 and A.I.R. 1926 Oudh 519, Foll.

Where therefore the Judge has applied his mind to the decision of the case carefully his finding cannot be questioned in revision. 105 Ind. Cas. 846=A.I.R. 1927 Oudh 627.

——S. 25—High Court will not interfere in revision unless there has been substantial injustice occasioned by the order or decree attached. 85 Ind. Cas. 474=47 All. 136=6 L.R.A. Civ. 59=A.I.R. 1925 All. 273.

——S. 25—No interference.

An error of law or procedure in the Small Cause Court confers jurisdiction upon the High Court to exercise the power committed to it by S. 25 of the Provincial Small Cause Courts Act; but the powers so conferred are purely discretionary and there is nothing in the nature of an appeal either on law or fact. The Court should only interfere to remedy injustice, and where substantial justice has been done, it will not interfere, though the Small Cause Court may technically have erred. 85 Ind. Cas. 362=1 Rang. 372=2 Bur.L.J. 154=26 Cr.L.J. 523=A.I.R. 1924 Rang. 54.

——S. 25—The High Court will not exercise the discretionary power under S. 25 unless any injustice is done by the Court below. 69 Ind. Cas. 103=1922 Pat.H.C.C. 145=3 Pat.L.T. 215=A.I.R. 1922 Pat. 106.

——S. 25—Though it is found that a decree is not in accordance with a correct view of the law, High Court is entitled to maintain the decree if by setting aside the decree injustice could be caused. 64 Ind. Cas. 726=4 N.L.J. 270=A.I.R. 1921 Nag. 66.

——S. 25—Revision — Discretion of High Court.

It is purely discretionary with the High Court to exercise its revisional powers. The broad rule is that this court should not interfere to perpetuate injustice but only to promote the ends of justice. 55 Ind. Cas. 209 (Lah.).

——S. 25—Scope of—Interference.

The High Court will intervene under S. 25 of the Act only when a substantial injustice has directly resulted from a material misapplication or misapprehension of law or from a material error of procedure. 6 Bur.L.T. 144=14 Cr.L.J. 496=7 L.B.R. 76=20 Ind. Cas. 752.

12. Question of costs.

See also NOTE 10.

——S. 25—Question of costs—No interference.

Orders with regard to costs are discretionary orders and the High Court will not ordinarily make use of its powers, under S. 25 to upset an order of the Small Cause Court as to costs. 5 O.L.J. 109 Foll. 90 Ind. Cas. 1036=2 O.W.N. 660=A.I.R. 1925 Oudh 539.

——S. 25—Question of Costs — Arbitrary refusal of.

Ordinarily costs should follow the event. When the Lower Court does not act on this rule, it ought to give a sufficient reason for not doing so. Where the reason given by subordinate judge for disallowing the costs of a successful plaintiff is unsatisfactory, the High Court can interfere under S. 25. (1912) M.W.N. 366=15 Ind. Cas. 202.

——S. 25—Question of costs—Costs not allowed—Illegality.

A judgment of a Small Cause Court disallowing costs to a successful party without reasonable grounds is against law and the High Court will interfere in revision. 43 P.W.R. 1911=113 P.L.R. 1911=10 Ind. Cas. 847.

13. Question of jurisdiction.

——S. 25—Omission to decide point of local jurisdiction is material irregularity.

A Judge acts with material irregularity in the exercise of his jurisdiction if he does not decide the point of local jurisdiction which was raised by the defendant in his pleas. A.I.R. 1940 Lah. 13=41 P.L.R. 543.

——S. 25—An order that the Court has jurisdiction to hear a particular case is an interlocutory order under S. 25 and is not revisable. If and when, however, the whole case is decided it will be open to the petitioner to take a ground of revision that the Court has erroneously exercised jurisdiction. (1939) 41 P.L.R. 864.

——S. 25—Security bond not of nature specified in S. 17—Bond in correct form not filed within limitation—Order setting aside **ex parte** decree—Order, held was without jurisdiction and would be set aside in revision. A.I.R. 1936 Pesh. 193=167 Ind. Cas. 479 (1).

——S. 25—Where the question of jurisdiction is involved and it is by no mean a trivial one, the High Court should interfere in revision, even though the equities may be in favour of the oppo-

site party. A.I.R. 1935 All. 842=1936 A.L.J. 981=1935 A.W.R. 972=158 Ind. Cas. 516.

——S. 25—Where there are no merits in the application under S. 25, it may be dismissed even though a question of jurisdiction is involved. A. I.R. 1933 All. 145=144 Ind. Cas. 172.

——S. 25—Even when objection is not taken, when there is a complete absence of jurisdiction, acquiescence of the parties cannot give the Court jurisdiction in the matter. A.I.R. 1933 Mad. 346 =1933 M.W.N. 208=142 Ind. Cas. 613 (1).

——S. 25—A decree by a Court having no jurisdiction is liable to be set aside in revision where the Court tried the case owing to the misrepresentation of the plaintiff. 80 Ind. Cas. 569=A. I.R. 1925 Oudh 103.

——S. 25—Absence of jurisdiction—Procedure.

Where the Court decides that it has no jurisdiction, it is not competent for it go into the merits of the case and give a decision on them. It should return the plaint for presentation to the proper Court. 94 Ind. Cas. 550=1926 M.W.N. 286= 23 M.L.W. 757=A.I.R. 1926 Mad. 679=51 M. L.J. 158.

——S. 25—Question of jurisdiction.

Decision of a suit not cognizable by Small Cause Court should be set aside by the High Court which should return the plaint to the plaintiff for presentation to proper Court. 27 C.L.J. 590=41 Ind. Cas. 203.

——S. 25—Question of jurisdiction.

Where a Munsif entertains a suit on the original side, which ought to have been instituted on the small cause side, the High Court can interfere under S. 25 of the Act. No application to the High Court therefore is necessary. 7 M.L. T. 74=20 M.L.J. 722=5 Ind. Cas. 742.

14. Question of Limitation.

——S. 25—Question of limitation — Erroneous decision—Revision—Limitation Act, S. 3.

S. 3 of the Limitation Act casts a duty on the Court to dismiss the suit if it is instituted after the period of limitation. Where the conclusion of the lower Court that a claim was not barred by limitation is one which is contrary to law, and is one which no Court acting judicially could reasonably reach, the High Court will interfere in revision. I.L.R. (1950) Nag. 464=A.I.R. 1950 Nag. 228 =1950 N.L.J. 150.

——S. 25—Scope of powers of interference—Question of limitation.

Though the power under S. 25 of the Provincial Small Cause Courts Act of sending for the records is discretionary, once the record has been sent for, and the decree of the trial Court found to be not in accordance with law, the High Court cannot refuse to interfere. In the case of revision a plea of limitation has to be treated in the same way as any other plea of law. 1950 A.W. R. 215=1950 A.L.J. 308.

——S. 25—Question of limitation.

Revision lies from an order wrongly dismissing a suit as time barred. 115 Ind. Cas. 757=A.I. R. 1928 Lah. 274.

——S. 25—Where a Small Cause Court dismissed a suit on an instalment bond without reference to the provisions of Limitation Act applicable to the case, though prima facie some of the instalments are within time, the High Court could interfere in revision and set aside the decree and direct a retrial. 65 Ind. Cas. 107=20 A.L.J. 89=L.R. 3 A. 67.

——S. 25—Question of Limitation.

When it is apparent on the face of the judgment of the Court below that the Court would have done better to enquire into the facts of a case and to determine it as a whole including the question of limitation, when fully satisfied as to the facts the High Court in the exercise of its discretion, would be acting reasonably in interfering in the interests of justice. 13 A.L.J. 394=28 Ind. Cas. 969.

——S. 25—Question of Limitation.

The decision of a Small Cause Court on a question of limitation is reversable by the High Court. 20 Ind. Cas. 175 (All.).

——S. 25—Question of Limitation.

The question of limitation is a proper ground for revision under S. 25 of the Act. 11 A.L.J. 295=19 Ind. Cas. 782.

——S. 25—Question of Limitation.

The High Court can interfere in revision with a decision of the Court of Small Causes on a question of limitation. 15 A. 139, not foll. 6 A. L.J. 944=3 Ind. Cas. 817.

——S. 25—Limitation—Erroneous decision.

An erroneous decision of a small cause court on a question of limitation can be interfered with, in revision under S. 25 of the Act. 21 O.C. 139= 46 Ind. Cas. 804.

——S. 25—Execution of decree — When High Court will interfere.

A decree-holder ought not to be deprived of the fruit of his decree unless an express provision of law debars him, and if substantial justice calls for it, the High Court, acting under S. 25, may interfere in his favour although the question is one of limitation. 6 A.L.J. 944=3 Ind. Cas. 817.

——S. 25—Revision—Competency—Point of limitation.

A revision will not lie against the decision of a Small Cause Court Judge on a legal point of limitation only. 1946 A.M.L.J. 42 (1).

——S. 25—Discretion of High Court—Misapplication of law by Court below—No injustice.

As the powers of revision under S. 25 of the Provincial Small Cause Court Act are discretionary the High Court will not interfere with the decision of the Court below although there has been a misapplication of the law of limitation by it, when no injustice has resulted thereby. A.I.R. 1946 Cal. 526=228 Ind. Cas. 386.

——S. 25—Interference, when not justified.

Where, in a revision under S. 25, the question of limitation raised is even one of law, interference is not justified if the Court is satisfied that far from furthering any ends of justice, it would perpetrate an injustice in interfering with the decree of the lower Court. A.I.R. 1942 Oudh 161 =1941 O. W. N. 1112=1941 A.W.R. 319=17 Luck. 226=196 Ind. Cas. 511.

——S. 25—Where a decree of a Small Cause Court has been transferred to another Court for execution on its regular side, an order of the transferee Court that the execution is barred by limitation is not open to revision. A.I.R. 1941 Pat. 624=8 B.R. 306=22 P.L.T. 819=7 C.L.T. 33 =197 Ind. Cas. 824.

——S. 25—Trial Court deciding only one issue—No decree or order passed — High Court, if can take action.

The High Court can only act under S. 25 where a decree or order has been passed. Where the trial Court only tries the issues of limitation and no decree or order has been made in the case, the High Court cannot proceed under S. 25. A.I.R. 1938 Mad. 252=46 L.W. 924=1937 M. W. N. 1343=(1938) 1 M.L.J. 61=174 Ind. Cas. 960.

——S. 25—Commission of error resulting in injustice.

It is the settled policy of the Oudh Chief Court not to interfere under S. 25 unless some error has been committed resulting in injustice. Even if the Court below was wrong on the question whether the uncertified payment saved limitation, the Chief Court will not necessarily interfere unless it has felt that the error has resulted in some miscarriage of justice.

Where the defendant dishonestly stated that although he had made a payment to the decree-holder, he had not made the payment in part satisfaction of the decree and it was found as a fact that he had made the payment in part satisfaction of the decree and had actually endorsed the fact of the payment in his own hand on the decree itself:

Held, that the order passed was not unjust and the High Court would decline to interfere. A.I.R. 1936 Oudh 297=1936 O.W.N. 533=162 Ind. Cas. 717.

——S. 25—Held, on facts that though the question involved was one of limitation interference would perpetrate injustice.

The Court should not ordinarily exercise its discretionary powers in revision under S. 25 if no injustice has been done. The question whether interference should be made or not under this section must depend upon the facts and circumstances of each case.

Held, that it was no doubt true that the question raised on behalf of the applicant was one of law being one of limitation, and the Court was not precluded from interfering with the lower Court's decision on that ground but after careful consideration of the facts and circumstances of the case, if the High Court interfered with the decree of the lower Court, far from furthering any ends of justice, the Court would be pepetrating an injustice. A.I.R. 1936 Oudh 247=1936 O.W.N. 330=161 Ind. Cas. 389.

——S. 25—Revision, when proper.

The powers conferred by S. 25 are purely discretionary and are not to be exercised unless it appears that some substantial injustice has resulted from the decree of the Court of Small Causes. Where, therefore, it is alleged the Judge of the Small Cause Court had committed an error in deciding the question of limitation but no injustice had been done, the revisional powers under S. 25 will not be used. 161 Ind. Cas. 423=1936 O. W.N. 332.

——S. 25—Question of limitation wrongly decided—Yet substantial justice meted out to parties—High Court would not interfere. A.I.R. 1935 Lah. 137.

——S. 25—A wrong decision on a question of limitation is not per se ground for interfering in revision. 93 P.R. 1911, foll. 100 Ind. Cas. 874 =A.I.R. 1928 Lah. 51.

——S. 25—Substantial justice—Test.

In the exercise of its discretional powers of revision under S. 25, High Court will not interfere with an erroneous decision on a point of limitation where the judgment of the lower court does substantial justice between the parties. 93 P.R. 1911, Foll. 108 Ind. Cas. 378 (Lah.).

——S. 25—Substantial justice—Test.

A wrong decision on a quesion of limitation is not a valid ground for interference on revision under S. 25 when substantial justice has been done; 100 Ind. Cas. 922=A.I.R. 1927 Lah. 395.

——S. 25—The High Court has a discretion under S. 25. But it will not in that discretion set aside a decree by the Small Cause Court on the possibility that the Small Cause Court may have gone wrong by a few days on a question of some nicety relating to limitation. 90 Ind. Cas. 321= A.I.R. 1926 Oudh 62.

——S. 25—Question of limitation — Revision—Scope.

S. 25 does not give any right of appeal in law or fact and the powers conferred by it are discretionary and not to be exercised unless there has been miscarriage of justice. Revision does not lie against an erroneous decision on the question of limitation. 13 A. 277, foll. 15 O.C. 319 =17 Ind. Cas. 470.

15. Review cases.

——S. 25—Review cases.

Although the revising Court's power is much wider under S. 25, Small Cause Courts Act than under S. 115, C. P. Code, every order, in which in granting a review, a Court fails to observe the terms of O. 47, should not be interfered with in revision. 104 Ind. Cas. 740=A.I.R. 1928 Mad. 56.

——S. 25—Erroneous grant of Review.

Although O. 47, R. 7 of the C. P. Code is not applicable to Small Cause Courts its provisions may well guide the High Court in revising an order of the lower court granting a review. 53 Ind. Cas. 44 (Mad.)

——S. 25—Review cases.

The High Court's revisional powers should not be exercised to restore an erroneous order of a Small Cause Court set aside by him on review; it is in the discretion of the Judge to deal in review with an order proceeding on a mistaken view of the law. 4 Bur.L.T. 147=12 Ind. Cas. 903.

——S. 25—Power of High Court to interfere with order rejecting review petition.

The powers of High Court in cases where review is refused by the Lower Court are much wider in the cases where the Lower Court exer-

cises Small Cause jurisdiction. 140 P.W.R. 1911=195 P.L.R. 1911=11 Ind. Cas. 15.

——S. 25—Review Cases.

The High Court in revising a final decree of small cause court under S. 25, can enquire whether the Small Cause Court was right in admitting an application for review; S. 629, C. P. Code, (1882) is no bar to the exercise of such power by the High Court. 19 M.L.J. 56=5 M.L.T. 73 =2 Ind. Cas. 488.

16. Miscellaneous.

——S. 25—Difference of opinion in revision—Procedure.

Where in a case in which the High Court acts in revision under S. 25 of the Provincial Small Cause Courts Act and the Judges constituting the Bench differ in opinion, S. 98 of the C. P. Code has no application but under Cl. 36 of the Letters Patent the opinion of the senior Judge should rule. 85 Ind. Cas. 1016=A.I.R. 1925 Mad. 281=47 M.L.J. 876.

——S. 25—Revision — Court-fee—N. W. F. P. Justice Regulation, S. 84—Suit tried under in Small Cause Courts Act.

Where a suit was tried on the Small Cause side and a revision was presented to the Judicial Commissioner, N. W. F. P. and was admitted, such application must be held to have been admitted under S. 25 of the Prov. Sm. Cause Court Act and not under S. 84 of the Regulation. The Court fee payable is Rs. 2 by Art. 1 (d) Sch. II, of the Court Fees Act. 14 P.L.R. 1915=3 P.W.R. (N.W.F.P.) 1914.

——S. 25—Reference — Dt. Court, power of to make a reference to the High Court.

The Small Cause Court being a court subordinate to the Dist. Court the Dist. Judge is competent to make references of cases tried by that Court to the High Court under O. XLVI. R. 7, C. P. Code. 34 Ind. Cas. 527 (Cal.).

——S. 25—Application under — Dismissal by single Judge — Appeal. **See** LETTERS PATENT ART. 15. 27 M. 340.

——S. 27—Order in small cause suit heard in ordinary jurisdiction—Appeal.

The fact that a suit of a Small Cause nature was heard and tried by a Munsif who had jurisdiction to try such suit in his ordinary jurisdiction, does not take away the prohibition of an appeal contained in the Provincial Small Cause Courts Act. A.I.R. 1950 Cal. 109.

——S. 27—Where a small cause has been tried by a Judge, who exercises Small Cause Court's powers on the regular side, no appeal lies against his decision. A.I.R. 1939 Pesh. 14=181 Ind. Cas. 241.

——S. 27—Small cause suit tried as regular suit by mistake—Decree.

Held, that the decree was a decree in small cause suit and was not appealable. A.I.R. 1937 Mad. 227=44 L.W. 874=(1937) 1 M.L.J. 14=1937 M.W.N. 261=168 Ind. Cas. 691.

——S. 27—Small cause suit tried in a regular way through mistake.

A trial by an error of a small cause suit in a regular way by a Court having small cause powers does not give jurisdiction to the District Court to hear an appeal against the decree of such a Court. A.I.R. 1934 Rang. 312=152 Ind. Cas. 144.

——S. 27—Munsif with small cause powers trying suit on ordinary file.

Where a suit which is cognizable by a Court of Small Causes is tried by a Munsif invested with the powers of a Judge of the Court of Small Causes in his ordinary file, the decision in the suit is not appealable A.I.R. 1933 Cal. 784=37 C.W.N. 917=148 Ind. Cas. 14.

——S. 27—No appeal—Trial by mistake.

Where the same Judge presides over Small Cause Court and a Township Court and tries by mistake as Judge of the Township Court a suit of a small cause nature, the mistake does not alter the character of the suit and no appeal lies from the decree. 121 Ind. Cas. 803=7 Rang. 809=A.I.R. 1930 Rang. 139.

——S. 27—Where a suit of a small cause nature and valued at less than Rs. 100 was tried by the Munsif who was vested with powers of a Small Cause Court Judge, to try cases up to the value of Rs. 100 under his ordinary jurisdiction.

Held, that no appeal lay from his decision. 106 Ind. Cas. 859=46 C.L.J. 552=A.I.R. 1928 Cal. 153.

——S. 27—Trial in regular form.

A plaintiff brought a suit for damages for the loss of a cow which had been grazed under a contract by the opposite party. The claim was for Rs. 100. The suit was filed before a Munsif with powers of a Small Cause Court Judge. The suit was tried in the regular form and the plaintiff was successful but he lost on appeal before the Subordinate Judge. Plaintiff filed a revision application.

Held, that no appeal lay to the Subordinate Judge. As this was a suit of a small cause nature, it must be taken to have been tried as a small cause though plaintiff did not raise the question in lower appellate Court. 109 Ind. Cas. 46=9 P.L.T. 499=A.I.R. 1928 Pat. 451.

——S. 27—Small Cause suit tried by ordinary Court—Appeal lies.

In order to attract the prohibition of appeal contained in S. 27, it is not enough that the suit was one cognizable by a Court of Small Causes. It is necessary that it should be decided by a Small Cause Court Judge. When the suit is tried by an ordinary Court after the plaint is returned by a Small Cause Court under S. 23 of the Act, S. 27 would not apply and the decision would be open to appeal under S. 96, C. P. Code. Though the suit being a Small Cause Court suit, the right of second appeal would be subject to the provisions of S. 102, C. P. Code. A.I.R. 1943 Cal. 464=47 C.W.N. 664=209 Ind. Cas. 302.

——S. 27—Small cause suit—Transfer of, to regular side—Decision, if appealable.

A suit of a small cause nature was filed before the Munsif with small cause powers. The Munsif's successor had no small Cause powers and he ordered the suit to be transferred to the regular file and it was tried as a regular suit.

Held, that an appeal lay against the decision.

22 Ind. Cas. 909, Appr.; 13 A. 324, Not Foll. 37 All. 450=13 A.L.J. 639=29 Ind. Cas. 996.

——S. 27—Transfer for execution — No second appeal.

Where a decree passed by a Court of Small Causes was transferred to Sub-Judge's Court for execution as it involved the sale of immovable property, it must be supposed under S. 42 that the decree was passed by the Court executing it and its order would be subject to the same rules in respect of appeal as if the decree had been passed by itself. First appeal would, therefore, lie against such order, but a second appeal would be barred by S. 102, the original suit being of a nature cognizable by the Court of Small Causes. 114 Ind. Cas. 861=53 Bom. 46=30 Bom.L.R. 1447 =A.I.R. 1928 Bom. 534.

——S. 27—Order in execution by Sub-Judge of decree transferred by Small Cause Court is appealable but second appeal does not lie. 89 Ind. Cas. 22=23 A.L.J. 961=6 L.R.A. (Civ.) 553=A.I.R. 1926 All. 161.

——S. 27—Transfer for execution.

When the decree has been transferred to the ordinary Court to be executed as if it were a decree made by that Court, the orders made in execution are appealable in the same way as orders made in execution of decrees passed by that Court. 31 All. 1, Foll. 67 Ind. Cas. 6= 34 C.L.J. 477=A.I.R. 1921 Cal. 242.

——S. 27—Execution of Small Cause decree—Appeal.

An order by a Munsif, in execution proceedings of a small cause decree transferred to High Court under S. 223 of the C. P. Code as immoveable property was sought to be sold, is appealable to the District Judge and S. 27 of Small Cause Court Act has no application to such a case. 31 All. 1 =(1908) A.W.N. 254=5 A. L. J. 612=1 Ind. Cas. 553.

——S. 27—Small Cause suit — Tried as ordinary suit—Appeal.

Where a Court invested with Small Cause Court jurisdiction tries under the regular procedure, a suit which should be tried as Small Cause Courts suit, the decree made in the suit is not appealable. 55 Ind. Cas. 642 (Cal.).

——S. 27—Order in execution—Finality.

An order in execution by a Small Causes Court is final. 67 Ind. Cas. 6=34 C.L.J. 477=A.I.R. 1921 Cal. 242.

——Ss. 27 and 25—Execution in small cause — Appeal.

No appeal lies from an order passed in Execution Proceedings of Small Cause Court decree. 3 Pat.L.W. 146=42 Ind. Cas. 467.

——Ss. 27 and 25—Execution on Small Cause side —Revision or appeal.

S. 27 of the Act bars an appeal against the order in execution on the Small Cause side and a revision petition lies under S. 25 of the Act. 19 M. L.T. 146=(1916) 1 M.W.N. 78=3 L.W. 34= 32 Ind. Cas. 484.

——S. 28—Scope.

The District Munsif acting as a Small Cause Court Judge is subject to the administrative control of the District Court under S. 28, but he is not bound by an order of the District Judge, holding that a certain suit is not triable by a revenue Court, and passed in his judicial capacity on an appeal from the revenue Court. 92 Ind. Cas. 621 =23 M.L.W. 99=1926 M.W.N. 123=1926 M. W.N. 178=A.I.R. 1926 Mad. 365.

——S. 32—Where a Judicial Officer invested with Small Cause Court jurisdiction tries a suit which he might have tried under the summary procedure, in the ordinary manner, the character of the suit is not thereby altered, and his decree is not appealable. A.I.R. 1937 Cal. 631=65 C.L.J. 303=173 Ind. Cas. 598.

——S. 32 (1)—Suit instituted in Small Cause Court — Court subsequently abolished — Case to be sent to ordinary Civil Court having jurisdiction under S. 35—Latter Court acquiring before date of trial power to deal with suit as Small Cause suit—S. 32 (1), held was applicable. A.I.R. 1935 Cal. 556=61 C. L. J. 137=157 Ind. Cas. 1026.

——S. 32 (1) (2)—Suit of small cause nature, starting as a regular suit—Subsequent transfer to Court of Small Cause jurisdiction—Whether can be tried as Small Cause suit.

If a suit of a small cause nature is instituted or proceedings are commenced in a Court which had not at that time Small Cause Court powers, the case cannot afterwards be tried as a Small Cause Court suit; if it starts as a regular suit, it must continue as a regular suit. If it starts as a regular suit and then is transferred to a Court with Small Cause Court jurisdiction, it cannot afterwards be tried as a Small Cause suit, and an appeal will lie. A.I.R. 1937 Nag. 200=I.L.R. (1937) Nag. 399 =170 Ind. Cas. 45.

——S. 32 (2)—Suit filed as original suit—Court subsequently getting small cause powers—Effect.

A suit which is filed as an original suit must remain so until it is concluded, and once a suit has been filed as an original suit, the party against whom the decree is passed must retain a right of appeal.

A suit was filed as an original suit but at the time of the trial, the officer presiding over the Court got small cause powers to try such suits. The suit, however, was tried as the original suit and a decree was passed:

Held, that the decree was appealable. A.I.R. 1943 Mad. 503=(1943) 1 M.L.J. 421=56 L.W. 300=1943 M.W.N. 427=209 Ind. Cas. 630.

——S. 32—Trial as regular suit—Right of appeal conferred.

A suit which according to the frame of it was Small Cause Court suit was filed in the Court and was registered as regular money suit as the Court was not then invested with Small Cause Court powers to the extent of the value of the suit. Before the suit came for hearing a Munsif's Court was established at the place with Small Cause Court powers to the extent of the suit and the case transferred to him. The Munsif tried the suit as an ordinary suit and not as a Small Cause Court suit.

Held, that an appeal lay from the decision of the Munsif. 126 Ind. Cas. 863=A. I. R. 1930 Pat. 270.

——S. 32—Institution as regular suit — Date of filing is the test.

The plaintiff sued to recover Rs. 100 as balance

due for Mulgeni rent in the Court of the Subordinate Judge of Honawar. The Judge then presiding in that Court had no Small Cause Court powers, but when the suit came on for trial, it was decided by a Judge who had Small Cause Court powers up to Rs. 100.

Held, that the suit was a regular and not Small Cause suit and therefore an appeal lay to the Dt. Court. 73 Ind. Cas. 1020=25 Bom.L.R. 516=A.I.R. 1923 Bom. 454.

——S. 32 (2)—Procedure — Court not invested with Small Cause powers — Suit of small cause nature.

A suit of a Small Cause nature was filed in the Munsif's Court at a time when the presiding officer was not invested with Small Cause powers. The permanent incumbent who was invested with such powers took charge and tried the suit as a regular suit.

Held, that the Munsif was right in trying the suit as a regular suit and an appeal therefore lay to the Subordinate Judge. 18 A.L.J. 89=1 U.P.L.R. (H.C.) 170=54 Ind. Cas. 428.

——Ss. 32 and 33—Small cause suit tried on regular side—Appeal.

The character of small cause suit though tried in the ordinary manner as a regular suit is not altered and the decree therein is therefore not appealable. 40 Cal. 537=21 Ind. Cas. 120.

——S. 32 (2) Scope of.

Suit instituted as original suit in Court having both small cause and original jurisdiction—Transfer under S. 24, C. P. Code by District Judge to small cause side owing to increase of small cause jurisdiction—Trial of suit as small cause:

Held, that the suit still retained character of original suit in view of S. 32 (2). The trial was, therefore, irregular and the case should be retried as original suit. A.I.R. 1935 Mad. 284=41 L.W. 446=68 M.L.J. 274=1935 M.W.N. 614=157 Ind. Cas. 612.

——S. 32 (2)—Powers conferred during trial—Applicability.

Sub-S. (2) of S. 32 is applicable to the case where the same officer who originally entertained the suit is subsequently vested with Small Cause Court powers or with increased powers. 101 Ind. Cas. 688=45 C.L.J. 218=A.I.R. 1927 Cal. 388.

——S. 32—Continuation of original suit as small cause.

Where on the date of the filing of the suit, the presiding officer has no pecuniary jurisdiction to try a suit as a Small Cause Court, which however is conferred during trial, he cannot try the suit as a Small Cause suit. The trial is void. 12 Cal. W.N. 167, Foll. 66 Ind. Cas. 816=20 A.L.J. 257=A.I.R. 1922 All. 112.

——S. 32, Cl. (2)—Small cause suit in Court not invested with Small Cause powers—Trial of—Procedure—Subsequent investment — Effect.

If a small cause suit is instituted in the Court of a Munsif not then vested with the powers of a Small cause Court it should be tried as a regular suit and not as a small cause even though after its institution the former Munsif is replaced by another invested with small Cause powers. 4 Pat.L.J. 13=49 Ind. Cas. 208.

——S. 32 (1) and (2)—Small Cause suit instituted in Court of Munsif without Small Cause powers—Subsequent investment of Small Cause powers—Effect on suit.

By virtue of the express provisions of sub-Ss. (1) and (2) of S. 32 taken together, a small cause suit instituted in the Court of a Munsif without any Small Cause powers at the time of the institution but in whom such powers are subsequently vested can only be tried as an ordinary suit. 94 P.R. 1911=145 P.W.R. 1911=227 P.L.R. 1911=11 Ind. Cas. 431.

——S. 32 (2)—Small Cause Suit instituted in court not having Small Cause powers—Trial by court having such powers.

Where a small Cause suit instituted in a Munsif's court having no small cause court powers was registered as a regular suit and that by a new Munsif having such powers it was held that the suit having been originally instituted in Munsif's Court having no small cause powers and registered as a regular suit could only have been tried as such by the new Munsif unless it had been transferred to the small cause side by a regular order. 9 Ind. Cas. 264 (All.).

——S. 32 (2) — Applicability of, to a case where the pecuniary jurisdiction is only extended and not freshly conferred—Transfer of cases filed on the Regular Side—Transfer to Small Cause Side by reason of the extension—Legality of.

S. 33, Cl. (2), applies to a case where at the time a suit is filed on the Regular Side the court has Small Cause jurisdiction over some cases, and before the decision, gets a higher pecuniary Small Cause jurisdiction. Any transfer of a case filed on the Regular Side before the extension to the Small Cause Side is illegal. 26 M. 212 (F.B.); Also (1903) 5 Bom.L.R. 1008=28 Bom. 244.

——Ss. 33 and 6—Case held, should be tried as a small cause suit and not on regular side.

A suit of a small value was instituted is the Small Cause Court side of the Munsif's Court. As there was an Honorary Munsif, the case was transferred to his Court, a decree was made and in appeal, the Subordinate Judge set aside the decree and placed the record before the District Judge with a request that the case might be transferred to the Munsif:

Held, that the case should be tried by the Munsif as a Judge of a Small Cause Court and not on the regular side. A.I.R. 1933 All. 662=1933 A.L.J. 1196=145 Ind. Cas. 701 (2).

——S. 33—A Small Cause Court acting as such cannot attach immovable property in execution of its decree. This is so even though the Small Cause Court is also an ordinary Court, unless the decree has been formally transferred to the ordinary side. (1931) 132 Ind. Cas. 208 (Lah.).

——S. 33—Trial as regular suit—Interference by High Court.

Where a suit for less than Rs. 500 was of a small cause nature and was tried by the Munsif on the Original Side and the decision was confirmed in appeal, the High Court refused to interfere in revision and to remand the suit for retrial on the Small Cause Side.

Held also that no second appeal lies. 56 Ind. Cas. 207=14 M.L.W. 349=A.I.R. 1922 Mad. 352=42 M.L.J. 118.

——S. 33—Suit filed on Small Cause Side—Judge dealing with it as regular suit—Appeal.

A suit filed on the small cause side does not cease to be such merely because the Judge at a later stage deals with it as if it were a regular suit; nor does it change the character as a small course suit by the mere fact that the defendant had made a counterclaim by way of set-off for an amount exceeding the small cause jurisdiction of the presiding judge; and no appeal lies from the decision of the judge in the case. (1903) 5 Bom. L.R. 398.

——S. 35.

Synopsis.

1. Appeal.
2. Execution Proceedings.
3. Scope of section.
4. Successor without Small Cause powers.
5. Transfer of suit.

1. Appeal.

——S. 35—No appeal lies against decision in suit which was filed as small cause suit and decided by Small Cause Court even though the suit was numbered as original suit. A.I.R. 1941 Mad. 867=54 L.W. 324=1941 M.W.N. 829=(1941) 2 M.L.J. 537.

——S. 35—Subordinate Judge passing ex parte decree in small cause suit—Application by defendant to set it aside—In the meanwhile Court of Subordinate Judge ceasing to exist and application sent to file of District Munsif—Suit beyond Small Cause jurisdiction of District Munsif—Application dismissed by District Munsif:

Held, that order was passed in exercise of civil jurisdiction and therefore, appeal lay. A.I.R. 1941 Mad. 103=52 L.W. 598=1940 M.W.N. 1073=(1940) 2 M.L.J. 700.

——S. 35—Suit begun as small cause but decreed as regular—Appeal.

When the Court of Small Cause Judge ceases to have jurisdiction with respect to a case on account of that officer's transfer and all proceedings in the case are under S. 35 taken in the Court of Munsif, which is the Court in which the suit would have been filed on the regular side if brought after the transfer of the previous Small Cause Court Judge and the Munsif tries the suit on the regular side and not as a Judge of a Court of Small Causes, there is no reason why an appeal should not lie against his decree. A.I.R. 1937 Oudh 398=13 Luck. 369=1937 O.W.N. 801=168 Ind. Cas. 785.

——Ss. 35, 32 (1)—Suit instituted in Small Cause Court — Transfer to regular Court — Latter Court invested with Small Cause powers—Effect.

If a suit is instituted in a Court of Small Causes and if that Court is subsequently abolished, the case will have to be sent to the ordinary Civil Court having jurisdiction under the provisions of S. 35. If the Court to which the case is sent under the provisions of S. 35 acquires, before the date of the trial, the powers to deal with the said suit as a Small Cause Court suit, the provisions of sub-S. (1) of S. 32 would be applicable, and the decision of the Court must be taken to be a decision of a Small Cause Court Judge and final under the law and only open to revision under S. 35. A.I.R. 1935 Cal. 556=61 C.L.J. 137=157 Ind. Cas. 1026.

——S. 35—Scope and Effect.

S. 35 does not operate to change in any way a Small Cause suit into an original suit. What S. 35 does is to invest a Court which otherwise would be incompetent to hear any or certain small cause suits with power to hear certain of such suits, viz., those pending in that Court at the time that Court's jurisdiction is changed. This is a provision that is manifestly desirable seeing that the same judicial chair is occupied by Judges some of whom are invested with higher powers than others. But S. 35 does not purport to turn a small cause suit into an original suit with all kinds of changes in procedure and in rights of appeal. A. I. R. 1935 Mad. 919=69 M.L.J. 443=42 L.W. 619=1935 M.W.N. 837=159 Ind. Cas. 958.

——S. 35—Transfer of Munsif having small cause powers—Successor without small cause powers—Order by District Judge for trial of small cause suit by successor as regular suit—Decree.

While a small cause suit was pending before a Munsif who had small cause powers, he was transferred and succeeded by a gentleman who was not invested with the powers of a Judge, Small Cause Court, at the date. The Additional District Judge thereupon made the following order: "The Small Cause Court cases pending in the Court of the Munsif of Basti will be tried by the present incumbent of the office as regular suits, as he has not got the Small Cause Court powers. The attention of the said learned Munsif be drawn to S. 35, Small Cause Courts Act, and these cases should be dealt with as provided by the Small Cause Courts Act." In pursuance of this order or direction, the successor took cognizance of the case and tried it as a regular suit. He decreed the claim of the plaintiffs, and the defendant filed an appeal which was rejected on the ground that no appeal lay:

Held, (i) that the order of the Additional District Judge was not an order of transfer within the meaning of S. 24, C. P. Code, but was merely drawing the attention of the Munsif to the fact that there was a provision in the Small Cause Courts Act in S. 35 to the effect that the successor of the Judge, Small Cause Court, should try the suit;

(ii) that the Munsif had no jurisdiction to try the case under S. 35 and his decree was appealable,

Held, further, when an officer who has no Small Cause Court jurisdiction, hears a case which was pending before his predecessor-in-office who had Small Cause Court jurisdiction, and makes a decree, the decree is appealable. A.I.R. 1931 All. 574=1931 A. L. J. 953=54 All. 171=136 Ind. Cas. 357 (F.B.). [Overrules (1891) 13 All. 324.].

——S. 35—Trial as regular suit—Right of appeal.

A suit cognizable by Small Cause Court was instituted before a Subordinate Judge invested with Small Cause powers. He was succeeded by another who had no Small Cause powers then. He was afterwards invested with Small Cause powers, but all the evidence in the case had been

finished and arguments addressed to him before his investiture with the powers of a Small Cause Court and so,

Held, that the decree passed by him was appealable. 37 All. 450, Foll. 117 Ind. Cas. 370 =A.I.R. 1930 Lah. 44.

——S. 35—Transfer of case—To Original Side—Appeal lies.

Where a Judge having Small Cause powers was transferred and the successor had no such powers, who therefore transferred all Small Causes pending on his file to the regular side as ordered by the District Judge,

Held, that the order was one under S. 35 and the trial was as a regular suit and the decision appealable. 37 All. 450, Foll. 98 Ind. Cas. 512 =48 All. 818=24 A.L.J. 968=A.I.R. 1927 All. 95.

——S. 35—Decision by—Invalidity—Procedure.

When the Munsif, who is invested with the jurisdiction of a Court of Small Causes, is transferred and his **locum tenens** is not possessed of the same jurisdiction, the suit must be tried by a Court in which it might have been instituted in the absence of the Court in which it was as a matter of fact instituted, and where in such a case a Small Cause Court having local jurisdiction over the suit in question is in existence, the decree by the Court in which the suit was actually instituted is **ultra vires** and the appeal from such a decree is equally incompetent. 80 Ind. Cas. 268=27 O.C. 240= 11 O.L.J. 662=A.I.R. 1925 Oudh 101.

——S. 35—Appeal — Decision by Court without Small Cause powers.

A case which is decided under S. 35 by an officer not having Small Cause Court powers must be treated as a regular suit in which an appeal lies. 37 All. 450; 39 All. 357 and A.I.R. 1922 All. 161, Foll. 88 Ind. Cas. 661=47 All. 925=23 A. L. J. 527=6 L.R.A. (Civ.) 478=A.I.R. 1925 All. 569.

——S. 35—Ordinary trial—Appeal lies.

Where a suit for damages for cutting a branch of a tree was instituted in the Court of a Munsif having Small Cause Court powers, but before the suit was heard the Munsif went on leave and was succeeded by a Munsif who was not vested with Small Cause Court powers and who therefore tried the suit as a regular suit,

Held, that under the provisions of S. 35 of the Provincial Small Cause Courts Act, if a Court vested with the powers of a Court of Small Causes ceases to have such powers, the officer who tries the case should try it as a suit which he would have ordinarily tried and an appeal lay from the decree passed. 64 Ind. Cas. 573=44 All. 59= 19 A.L.J. 838=A.I.R. 1922 All. 161.

——S. 35—C. P. Code, S. 24 (4)—Small Cause suit—Transfer of, Court to with no small cause powers—Decision of latter Court, if appealable.

The Court to which a suit of a small cause nature is transferred from a Small Cause Court must under S. 24 (4), C. P. Code be deemed to be a Court of Small Causes as regards that suit and its decision is therefore not appealable. 40 All. 525=16 A.L.J. 548=46 Ind. Cas. 893.

——S. 35—Small Cause Court abolished—Execution of Small Cause decree, in the regular side—Appeal.

An order passed on an application for execution of Small Cause decree presented and filed in the ordinary Court, the Small Cause Court having ceased to exist, is an order passed by the Munsif, Qua Munsif and is therefore appealable unless the right of appeal is taken away by some speciai provision of Law. 39 All. 357=15 A.L.J. 305= 38 Ind. Cas. 105.

——S. 35—Small Cause Suit—Transfer of—Effect—S. P. Code, S. 24.

A suit filed in a Court invested with small cause Court powers, continues to be Small cause suit though the Officer of that Court is transferred and is succeeded by another who has no Small Cause Court powers or the suit is transferred to a Court having no Small cause powers. Therefore no appeal lies to the District Judge from the decision in such suit. 13 All. 325, 38 Mad. 25, Foll. 14 A.L.J. 705=36 Ind. Cas. 317.

2. Execution Proceedings.

——S. 35 (1)—Reduction in the pecuniary jurisdiction of the Judge of Small Cause Court after passing of decree—Application for execution of that decree—Proper forum.

Subsequent to the passing of a decree in a small cause suit on 17th February, 1933, for Rs. 247-14-3 the pecuniary jurisdiction of that Munsiff in Small Cause matters was reduced to Rs. 100.

On the 9th August, 1935, the decree-holder applied under S. 39, C. P. Code, for permission to execute the decree on the original side of Subordinate Court and for an order directing the transmission of the decree to the District Munsiff for execution. On the 30th September, 1935, the Subordinate Judge directed the decree to be transferred as prayed for. As the decree-holder did not take steps to execute the decree it was eventually returned to the Court of Subordinate Judge. Subsequently on 29th August, 1938, the decree-holder filed another application in the Subordinate Judge's Court similar to the one filed on 9th August, 1935, and on the 1st October; 1938, the Subordinate Judge again ordered the transfer of the decree to the District Munsiff. On the 24th September, 1941, the decree-holder applied to the Subordinate Judge's Court for an order in execution. On its rejection, the decree-holder applied to the District Munsiff on Ist October, 1941, for an order of attachment in execution; but as he did not proceed with the matter, the application was closed on 6th January 1942. The decree-holder thereafter filed on 17th November, 1943, in the District Munsiff's Court another petition for execution. It was rejected as barred by limitation inasmuch as the proceedings before the Subordinate Judge were all invalid because the power to execute the decree remained throughout only in the District Munsiff's Court. In revision,

Held, that according to the provisions of S. 35 (1) of the Provincial Small Cause Courts Act which relate to all proceedings, whether before or after the decree, in a small cause suit where the Court has ceased to have jurisdiction in the case, that Court cannot continue to exercise jurisdiction

in the case which came before it when in possession of those powers. All further proceedings in such case must be taken in the Court which would have jurisdiction if the suit were then about to be instituted. There is no justification for reading this section as excluding proceedings in execution. Hence the proceedings taken by the decree-holder in the Subordinate Judge's Court were all valid and the decree-holder was entitled to ask for execution of the decree transferred to the District Munsif for execution. I.L.R. (1947) Mad. 81=228 Ind. Cas. 215=A.I.R. 1947 Mad. 36=59 L. W. 589=1946 M.W.N. 674=(1946) 2 M.L.J. 315 (F.B.).

——S. 35—Small Cause Judge passing decree—His successor having no small cause powers—Execution of decree—Procedure.

Where a Judge having Small Cause powers passes a small cause decree, and is succeeded by another who has no such powers, the execution proceedings of the decree should go to another Court exercising those powers in the same area if there is such Court. If there is no such Court then the proceedings can properly continue in the same Court whether he has Small Cause Court powers or not, though they will be dealt with under the succeeding Judge's ordinary powers. A.I.R. 1941 Lah. 356=43 P.L.R. 488=197 Ind. Cas. 584.

——S. 35—New Small Cause Court Judge having no pecuniary jurisdiction to execute decree of predecessor can transfer it to himself on regular side and deal with it as Sub-Judge—He can order attachment in latter capacity. A.I.R. 1941 Pesh. 18=193 Ind. Cas. 712.

——S. 35—Proceedings after decree—Forum.

Under S. 35 of the Provincial Small Cause Courts Act when the Court ceases to have jurisdiction in relation to the case, all proceedings in relation to it even after the decree have to be taken in the Court which, if the suit out of which the proceeding had arisen was about to be instituted, would have jurisdiction to try the suit. 1930 A. L.J. 997=52 All. 947=A.I.R. 1930 A. 873.

3. Scope of section.

——S. 35—Scope of.

S. 35 should be read subject to the provisions of the C. P. Code such as S. 21. 1930 A.L.J. 997=52 All. 947=A.I.R. 1930 A. 873.

4. Successor without Small Cause powers.

——S. 35—Successor without Small Cause powers—Continuation of suit by—Legality.

The suit was originally instituted before a Munsif having Small Cause Court powers. This Munsif ceased to have jurisdiction, and the case was taken up in the ordinary way by his successor who had no small Cause Court powers. The evidence had been recorded by the first Munsif. His successor proceeded to decide the suit without rehearing the evidence.

Held, that even if it be held that the Munsif who decided the case should have re-heard the evidence and recorded it in full as in a regular suit, his omission to do so was merely an irregularity in procedure to which S. 99 of the C. P. Code applied and which could not be made a ground for setting aside the decree unless it had affected the decision on the merits. 88 Ind. Cas. 661=47 All. 925=23 A.L.J. 527=6 L. R. A. (Civ.) 478=A.I.R. 1925 All. 569.

——S. 35—Ex parte decree by Small Cause Court—Sub-Judge not having Small Cause powers—Power to pass orders—Procedure.

Where pending an application to set aside an **ex parte** small cause decree the judge is transferred and succeeded by another without small cause powers, but there is a munsif's Court with small cause powers, the application should be transferred to that Court

The subordinate Judge's order dismissing the application was **ultra wires** as he had no jurisdiction to hear application. 22 O.C. 152=1 U.P. L.R. (J.C.) 68=52 Ind. Cas. 647.

——S. 35—Transfer of Judge invested with Small Cause powers — Trial of suit instituted on small cause side by successor not invested—C. P. Code, S. 25.

Where a Munsif invested with Small Cause powers is transferred, his successor who is not so invested can try the small cause suits on his original side. No order of transfer under S. 25, C. P. Code by the District Judge is necessary when one Judge succeeds another and takes over the ordinary civil business of that Court and also by its constitution exercises ordinary civil jurisdiction in cases in which an abolished Court invested with the powers of Small Cause Court previously exercised jurisdiction. The jurisdiction is given to the successor by S. 35 of the Provincial Small Cause Courts Act. An order of transfer under S. 25, C. P. Code will not give jurisdiction to the successor to try the suits on the Small Cause Side. 23 B. 352, Foll. (1904) 31 C. 1057.

5. Transfer of suit.

——S. 35—Transfer of suit.

A Small Cause Court is established first and the Judge of that Court is appointed afterwards. Therefore, the Court does not cease to exist if at any time there should be no Judge to preside over it. Suits can be instituted in the Court even if there should be no Judge appointed for the time being. The suits so instituted would remain in the Court until they are withdrawn therefrom.

A Small Cause Court dismissed a suit. The High Court in revision directed the Trial Court to re-entertain the suit. In the meanwhile a new officer came to be the Judge in the Trial Court and he was invested with Small Cause Court powers. But the value of the suit exceeded the limits of his pecuniary jurisdiction. The Dt. Judge transferred the suit to another Court.

Held, that the Court to which the suit was transferred had Small Cause jurisdiction with regard to the suit. 88 Ind. Cas. 139=26 P.L.R. 308=A. I.R. 1925 Lah. 561.

——Sch. I, Art. 43—Scope—Indore Government Notification No. 1567, dated 28th July, 1947—Suit against Railway for damages below Rs. 500—Cognizability by Court of Small Causes.

Ordinarily all suits of a civil nature of which the value does not exceed Rs. 500 (so far as the city of Indore is concerned) are cognizable by the Small Causes Court. The jurisdiction of the Court depends upon the nature of the suit as ori-

ginally brought and not upon the character which it ultimately assumes. The defence raised is not a relevant consideration. The fact that the defendant is a Railway Company or that the defence will be of a complicated nature does not oust the jurisdiction of the Court. There is nothing in the Indore Government Notification No. 1567, dated 28th July, 1948, which ousts the jurisdiction of the Court of Small Causes to try suits against Railway Companies for damages, when the amount claimed is within the pecuniary jurisdiction of the Court. A.I.R. 1950 M.B. 14.

——Sch. II. See also PROVINCIAL SMALL CAUSE COURTS ACT, S. 15.

——Sch. II—Right of Municipality to recover taxes, if excluded.

The old Provincial Small Cause Courts Act gave to the Small Cause Court jurisdiction only in certain specified matters but the present Act proceeds upon another basis, excluding from the jurisdiction of the Courts of Small Causes certain matters and leaving to these Courts a residuary jurisdiction, and there is nothing in Sch. II, to the Small Cause Courts Act, which excludes from the jurisdiction of the Court of Small Causes a suit by the Municipality to recover Municipal taxes due to them. A.I.R. 1939 Sind 35=I.L.R. (1939) Kar. 134=179 Ind. Cas. 927.

——Sch. II—Proceedings after decree—Power to attach—Decision as to ownership of rights.

It is open to the decree-holder, in cases where there are personal covenants in othi deeds for the payment of money debts to attach the money debts secured by such deeds. Not only will the Small Cause Court have jurisdiction to do so but it can also enquire into the question who really is the owner of certain rights under an othi document. 1930 M.W.N. 719=129 Ind. Cas. 255=33 M.L.W. 189=A.I.R. 1931 Mad. 38 (2).

——Sch. II, Art. 1—Local bodies—Suit against President of District Board—No bar under Rr. 1 and 3.

Plaintiff had bought the right to collect tolls on certain roads from the District Board. He had to comply according to this contract with the orders given by the President of the District Board. He received an order from the President of the District Board forbidding him to collect tolls in the District from certain cars carrying fodder for army purposes. The plaintiff complied with the order which the appellant had issued and in due course brought a suit for damages claiming that this order forbidding him to collect these tolls was illegal and alleging that he had suffered damage by reason of that order.

Held, that the President of the District Board not being an officer of Government within the meaning of Arts. 1 and 3 of the Provincial Small Cause Courts Act the suit was triable by Small Cause Court. 74 Ind. Cas. 223=46 Mad. 808=18 M.L.W. 82=32 M.L.T. 378=A.I.R. 1923 Mad. 689=45 M.L.J. 125.

——Sch. II, Art. 1—Suit for refund of—Profession tax illegally levied—Small Cause Court.

A suit for refund of profession tax illegally levied is not one concerning an act purporting to be done by any person by order of the local Government and is not, therefore, excluded from the jurisdiction of a Court of Small Causes. 74 P.L.R. 1918=74 P.W.R. 1918=44 Ind. Cas. 910.

——Sch. II, Art. 2 and C. P. Code, S. 102—Acts contemplated by Art. 2 of Sch. II—Suit to recover amount of court-fee paid to Government under a decree in a pauper suit which was later superseded — Second appeal—Competency, when value does not exceed Rs. 500.

Art. 2 of Sch. II of the Provincial Small Cause Courts Act refers to acts done by persons not acting as suitors in pursuance of a judgment or order which gives permission so to act, but as ministerial officers or otherwise obeying the order of the Court.

Where the essence of an action relates to the recovery of the amount paid by the plaintiff himself as a mere suitor, i.e., as the defendant in a former pauper suit of a certain sum representing the court-fee payable to Government under a decree later superseded, the suit is not outside the jurisdiction of the Court of Small Causes and where its value does not exceed Rs. 500, a second appeal is incompetent. 1949 M.W.N. 657=A.I.R. 1950 Mad. 33=62 L.W. 663=(1949) 2 M.L.J. 400.

——Sch. II, Art. 2—Suit for damages for money paid.

A suit for damages for money paid by the plaintiff for which the defendant was liable, is not barred by Art. 2. A.I.R. 1933 Oudh 146=10 O.W.N. 52=143 Ind. Cas. 843.

——Sch. II, Art. 2—Suit by auction-purchaser—For refund—Bar.

A claim by an auction-purchaser for refund of the purchase-money by reason of the dispossession under the orders of the Collector falls under Art. 2. 98 Ind. Cas. 726=A.I.R. 1927 Mad. 253.

——Sch. II, Arts. 2, 26—For refund of money paid under orders of Court.

After **A** brought a property to sale **B** applied for rateable distribution and it was granted. **A** then was allowed to bid on satisfying **B's** decree. When he had brought the property, the sale was set aside at the instance of a third party. **A** sued **B** to recover from him Rs. 270 paid in satisfaction of his decree.

Held, that the suit does not fall either under clause 2 or 26 of Provincial Small Cause Courts Act. 74 Ind. Cas. 836=45 All. 359=21 A.L.J. 248=4 L.R.A. (Civ.) 146=A.I.R. 1923 All. 310.

——Sch. II, Art. 2—Suit by purchaser of stolen goods under S. 23—For price paid—No bar.

A suit for refund of the money paid as price for the goods by a purchaser of stolen goods, who has been deprived of the goods by the police under the orders of the Sessions Judge for returning them to their owner, can be tried by a Court of Small Causes. 108 Ind. Cas. 609=A. I. R. 1928 Lah. 515.

——Sch. II, Art. 2—Suit by Supratdar—For recovery of money deposited under orders of Court—Is excepted.

In executing a decree certain crops were attached and made over to the Supratdar. Supratdar handed over the crops to the judgment-debtor in good faith on being informed that a compromise had been come to between decree-holder and

judgment-debtor whereunder the judgment-debtor had paid Rs. 75 to the decree-holder. The Supratdar was ordered to deposit Rs. 75 for his misconduct in having released the crops without Court's permission. Supratdar brought a suit in Small Cause Court to recover the amount from the decree holder.

Held, that the suit was excepted from the cognizance of the Small Cause Court under Cl. (2), Sch. II. 98 Ind. Cas. 976=24 A.L.J. 886=A. I.R. 1927 All. 27.

——Sch. II, Arts. 2, 3—Applicability.

A suit brought to recover moneys alleged to have been wrongly made over by a Magistrate purporting, to act under the provisions of S. 517, Cr. P. Code, does not fall within the second of third exceptions to the second schedule. (1905) 9 C.W.N. 495=1 C.L.J. 355.

——Sch. II, Art. 3—Scope.

Art. 3, Sch. II, operates to take out of the purview of Small Cause Courts claims arising out of an act or order purporting to be done by an officer of Government in his official capacity, and no distinction arises from the fact that such an order, which is actually made by an officer of Government in his official capacity, might have been made by a private person in his private capacity.

Where the essence of the suit is that it is a claim founded on the allegations that the head of the Government Department concerned was not entitled to cancel the acceptance or, at any rate, to forfeit the security money and that the security money and that the Government is liable for damages arising out of the other consequences of that act, the suit is excepted from the cognizance of Court of Small Causes. A.I.R. 1940 Oudh 245=1940 A.W.R. 155=1940 O.W.N. 347=187 Ind. Cas. 209.

——Sch. II, Art. 3—Rent—Service—Damages.

A suit for damages for non-performance of the service which a tenant undertakes to perform as the consideration for his tenancy is in the nature of a rent suit over which the Small Cause Court has no jurisdiction. 12 C.L.J. 480=8 Ind. Cas. 96.

——Sch. II, Art. 3—Act done by Officer of Government—Suits relating to—Nature of.

Art. 3 of the Provincial Small Cause Courts Act applies to suits relating to some distinct act done by an officer of Government. A mere failure to carry out a contract cannot be regarded as such an act. A suit for recovery of the contract amount due from the Government for the repair of a tank by a contractor is a suit of a Small Cause nature. 35 B. 42, Expl. 37 Mad. 533=23 M.L.J. 732=12 M.L.T. 299=(1912) M.W.N. 954=16 Ind. Cas. 400.

——Sch. II, Art. 3—Contract cases.

Art. 3 does not apply to cases of liability incurred on contract, but covers only cases of tort. A suit against the Secretary of State for damages for delivery of a V. P. insured parcel without taking the money is cognizable by a Court of Small Causes. (1904) 28 M. 213=15 M.L.J. 226.

——Sch. II, Art. 4—(As amended by Bombay Acts 1 of 1930 and 9 of 1932)—Ejectment suit—Defence under S. 11, Bombay Rent Restriction Act (16 of 1939)—Suit is not cognizable by Small Cause Court.

Where in an ejectment suit with a prayer for the recovery of possession of property or any interest in it, a defence based on the Bombay Rent Restriction Act, is raised, there is a substantial issue arising for decision, and the suit is not cognizable by a Small Cause Court under Provincial Small Cause Act, Sch. II, Art. 4, as amended by Bombay Acts (4 of 1930 and 9 of 1932). A.I.R. 1945 Bom. 470=47 Bom.L.R. 410.

——Sch. II, Art. 4—Amendment by Bombay Act (6 of 1930)—Ejectment suit — Bombay Rent Restriction Act applicable — Jurisdiction of Small Cause Courts.

Where, in an ejectment suit, a plea under Bombay Rent Restriction Act is taken, a substantial issue arises as to the liability of the tenant to be evicted and in particular, whether the landlord **bona fide** requires the property for his own use. Such a suit is not covered by the Bombay Amendment of 1930 made to the Provincial Small Cause Courts Act, which has given limited power to Small Cause Courts to try suits for possession. Small Cause Court, therefore, has no jurisdiction to try such a suit. A.I.R. 1945 Bom. 469=47 Bom.L.R. 344 =I.L.R. (1945) Bom. 437.

——Sch. II, Art. 4—(As amended by Bombay Act 6 of 1930)—Suit to recover possession and rent on strength of lease.

'Substantial issue' means an issue arising, not only upon the allegations in the plaint, but upon those allegations combined with the allegations made in the written statement. There can be no question at issue unless there is a difference between the parties, and in order to determine what the issue is, the allegations of both sides must be considered. A substantial issue is an issue which goes to the root of the case, other issues being merely incidental or concerned with matters of the detail.

In a suit to recover possession and rent on the strength of a lease, the question of the hollowness of the lease is a matter which goes to the root of the whole case. If the lease is hollow, then the defendant is not a tenant, and the plaintiff cannot succeed upon the basis of tenancy. The Small Cause Court has, therefore, no jurisdiction to try such a suit. A.I.R. 1939 Bom. 353=41 Bom. L.R. 755=186 Ind. Cas. 841.

——Sch. II, Art. 4—Applicability.

A suit for the value of fruit removed from trees is not governed by Art. 4. A.I.R. 1938 Lah. 759=40 P.L.R. 720=I.L.R. (1939) Lah. 100= 179 Ind. Cas. 144.

——Sch. II, Art. 4—(As amended by Bombay Act 6 of 1930)—Determination of jurisdiction.

Where, in a case under Art. 4, an issue presupposes the assertion of a claim by one party and the denial of it by the opposite party, the substantial issue being one of title, the determining factor as to the jurisdiction of the Court to entertain the suit is not the one sided version in the plaint; but the assertion of a claim in the plaint and the denial of it in defence. A.I.R. 1938 Sind 122=I.L.R. (1939) Kar. 60=175 Ind. Cas. 732.

——Sch. II, Art. 4—Mango trees cut down and sold as fact.

Where the mango trees had been cut down and sold as fuel before the suit for recovery for damages thereof is instituted, they are no longer attached to the earth or permanently fastend to it and consequently, they are not immovable property at the time of the institution of the suit. Therefore, the suit is one triable by summary procedure and where the Munsif having Small Cause Court powers tries it, there is no appeal from his decision. A.I.R. 1937 Cal. 631=65 C.L.J. 303=173 Ind. Cas. 598.

——Sch. II, Art. 4, sub-Cl (c) (as amended by Bombay Act (6 of 1930)—Tenancy-at-will—Suit for ejectment based on tenancy-at-will.

A tenancy-at-will is a tenancy so long as both parties are willing to continue it. If one party gives notice of his desire to determine the lease, then the lease has been determined either by efflux of the time limited thereby, namely, the duration of the will of the parties, or under Cl. (*h*), S. 111, T. P. Act. A suit for ejectment of a tenant under such terms falls within sub-Cl. (*c*), inserted by Bombay Act (6 of 1930), in Cl. (4), Sch. II, Provincial Small Cause Courts Act, and is cognizable in the Small Cause Court. A.I.R. 1936 Bom. 98=37 Bom. L.R. 965=161 Ind. Cas. 210 (1).

——Sch. II, Art. 4—Suit for ground rent.

Suit for ground rent of site in town—Land neither revenue paying nor agricultural land is cognisable by Small Cause Court. A.I.R. 1933 Nag. 382=147 Ind. Cas. 839 (1).

——Sch. II, Art. 4—Grazing dues — Suit to recover.

A claim to grazing rights under a village custom is a claim to an interest in immoveable property not to be *mooted* in a small cause Court, and it admits of second appeal. 12 N.L.R. 83=34 Ind. Cas. 695.

——Sch. II, Art. 4—Immovable property, what is—Growing palm trees.

The definition of immovable property given in the Burma General Clauses Act applies to the Provincial Small Cause Courts Act and as growing palm tree is immovable property for the purposes of the former Act, it is also immovable property for the purposes of the latter Act. 120 Ind. Cas. 689=7 Rang. 706=A.I.R. 1929 Rang. 200.

——Sch. II, Art. 4—Recovery of document concerning land—Suit is not small cause.

A document, though it may be evidence of an interest in land, is not itself an interest in land. A suit for recovery of the document is not necessarily a land suit. 88 Ind. Cas. 574=6 Lah. 33=26 P.L.R. 156=A. I. R. 1925 Lah. 335.

——Sch. II, Art. 4—Recovery of price of crops due—Suit for—Excepted.

Where the plaintiff sued the defendant for recovery of the price of some crops on the ground that defendants were labourers and had agreed to pay a share of the crops, and the defendants contended that they were settled raiyats, *held*, that the suit was not cognizable by the Court of Small Causes. 34 C.W.N. 845=A.I.R. 1931 Cal. 91.

——Sch. II, Art. 4 — Recovery of price of manure—Suit for on ground of custom—Excepted.

Suit by a zamindar for the recovery of the price of manure which he alleged belong to him because of his interest in the village and by reason of a particular custom is expected from the cognizance of the Court of Small Causes under Cl. (4) of the Second Schedule of Act 9 of 1887, and is in essence one for the recovery of an interest in immovable property. 81 Ind. Cas. 740=A.I.R. 1925 Oudh 318.

——Sch. II, Art. 4—Suit for price of skins of animals belonging by custom to plaintiff—Jurisdiction.

A suit to recover the price of skins of certain animals alleged to belong by custom to the plaintiff is not excepted from the cognisance of a Small Cause Court. 159 P.L.R. 1911=174 P. W. R. 1911=10 Ind. Cas. 35.

——Sch. II, Art. 4—Title — Suit inolving question of—Jurisdiction.

A suit for damages for the illegal removal of a goat's head by a shebait lies in the S.C. Court even if the title of the shebait is incidentally in issue. 15 C.W.N. 666=14 C.L.J. 118=10 Ind. Cas. 8.

——Sch. II, Arts. 4, 11 and 31—Incidental determination of title—Second appeal.

The plaintiff sued to recover from the defendants Rs. 120 as the value of his share in the produce of certain lands alleged to belong jointly to him and the defendants. This right was denied in the written statement. The lower Courts dismissed the suits. On second appeal, a preliminary objection was taken that no second appeal lay, as the suit was of a Small Cause Court nature.

Held, upholding the objection that no second appeal lay. The question of title arose incidentally and did not therefore remove the suit from the cognizance of the Court of Small Causes. (1908) 10 Bom.L.R. 733=32 B. 560.

——Sch. II, Arts. 4 and 31—Suit for recovering share in the produce of immoveable property, if cognizable by Small Cause Court.

A suit for recovering a share in the produce of immovable property lawfully collected by the defendant is not a suit for possession of immovable property or for recovery of interest in such property, but it is a suit for moneys had and received to the plaintiff's use and as such it is cognizable by the Court of Small Causes. 17 B. 42 foll. 11 Bom.L.R. 1330=34 B. 171=4 Ind. Cas. 830.

——Sch. II, Art. 6—Mortgage bond executed in lieu of rent due to landlord.

Where the tenants execute a *rehan* bond in lieu of rent due to the landlord, the relationship of landlord and tenant gives place to the relationship of creditor and debtor in respect of the money and Art. 6, Provincial Small Cause Courts Act, does not apply to the suit for the recovery of the sum. A suit by the plaintiff merely to recover the mortgage debt personally from the mortgagor is a Small Cause suit. A.I.R. 1934 Pat. 43=147 Ind. Cas. 341.

——Sch. II, Art. 6—Hypothecation bond—Suit on for money only—Not excepted.

Where the amount in dispute was Rs. 252-10-0 and the claim was based on hypothecation bond but all claim against the mortgaged property had been abandoned and the suit was framed purely

as a money suit and the question was whether second appeal lay,

Held, that neither Art. 6 nor Art. 11 of the Sch. II of the Provincial Small Cause Courts Act applied. 78 Ind. Cas. 652=5 L.R.A. (Civ.) 293= A.I.R. 1925 All. 205.

——Sch. II, Art. 7, S. 23 — Applicability and scope—Sit for rent of Small Cause nature—Plaintiff's co-sharers added as defendants—Question of title as sharers of co-sharers coming up for determination—Suit, held ceased to be of Small Cause nature and fell under Sch. II, Art. 7. A. I.R. 1940 Mad. 507=1940 M.W.N. 60=191 Ind. Cas. 496.

——Sch. II, Art. 7—Apportionment of Rent — Suit for recovery of a fraction of rent paid by reason of dispossession of immoveable property—Small Cause nature.

A suit by a lessee for recovery of fraction of the rent paid owing to his dispossession from a portion of the lands demised is not a suit of a Small Cause nature and there is a second appeal from the decision in such a suit. 41 Mad. 370=33 M.L.J. 618=43 Ind. Cas. 78. [On appeal from 40 Ind. Cas. 655.]

——Sch. II, Art. 7—Apportionment of rent suit for.

Per *Sadasiva Iyer, J.*—(*Spencer, J.*, Contra) A suit for arrears of rent due under a lease after apportionment in consequence of transfer in portions of the demised premises is not a 'suit for apportionment' coming under Cl. (7) of Sch. II as the prayer is for the recovery of a definite sum. The fact that the Court will have to give findings as to proper apportionment does not alter its character. 6 L.W. 80=40 Ind. Cas. 655. [On appeal, *see* 41 Mad. 370.]

——Sch. II, Art. 7—"Suit for enhanced Kattubadi"—Not one under Cl. 7 of Sch. II.

Claim for an enhanced kattubadi below Rs. 500 on the ground of defendant's default in the payment of the money rate is excluded under Cl. (7) of Sch. II. 19 Mad. 329, Foll. 31 Ind. Cas. 871.

——Sch. II, Arts. 7, 13—Claim for 'poruppu' and kulavettu.

A claim for *poruppu* does not fail within the prohibition in Art. 7 as claim for apportionment of rent.

Semble:—The claim for *kulavettu* does not fall within the prohibition enacted in Art. 13. (1907) 17 M.L.J. 487.

——Sch. II, Art. 8.

Synopsis.

1. Damages for use and occupation.
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8. Suit for rent of site.
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1. Damages for use and occupation.

——Sch. II, Art. 8—Claim for use and occupation—If one in respect of rent — Jurisdiction of Small Cause Court.

A claim for use and occupation upon the footing that the defendants had no rights whatsoever in the land and were trespassers pure and simple, is not a claim in respect of rent falling within Art. 8 of Sch. II of the Provincial Small Cause Courts Act. It can therefore be the subject-matter of a suit triable by the Court of Small Causes and so cannot be tried by any other Court. A. I. R. 1947 Cal. 407.

——Sch. II, Art. 8, S. 23—Damages for use and occupation against trespasser.

A suit which is not one for recovery of rent within Art. 8, Sch. II, Provincial Small Cause Courts Act, but is rather a suit for use and occupation against an alleged trespasser is cognizable by the Small Cause Court. Section 23 of the Act leaves a discretion with the Judge in such a case and no ground for revision exists on the ground that a question of title is raised in the suit. A. I. R. 1934 Lah. 355=150 Ind. Cas. 980 (1).

——Sch. II, Art. 8—Damages for use and occupation.

A suit by a landlord for damages for use and occupation on the footing that the defendants are tenants holding over and are trespassers in the eye of the law is cognizable by a Small Cause Court and if the value of the suit does not exceed Rs. 500, a second appeal does not lie in the suit. 90 Ind. Cas. 401=22 M.L.W. 528=A.I.R. 1925 Mad. 890= 48 M.L.J. 701.

——Sch. II, Art. 8—Damages for use and occupation.

Where suits for compensation for use and occupation of land are treated not as suits for damages for occupation of the excess land but as suits for assessment and realization of rent for the excess land, the suits are not cognizable by Small Cause Court. 91 Ind. Cas. 846=A.I.R. 1926 Cal. 541.

——Sch. II, Art. 8—Damages for use and occupation—Suit for, against trespasser—Not excepted.

A suit for damages for use and occupation of the land held by a trespasser is not within the purview of the article and so can be maintained in a Small Cause Court. 78 Ind. Cas. 383=A.I.R. 1925 Lah. 196.

2. Effect.

——Sch. II, Art. 8—Effect.

Suits for recovery of rent other than house rent being excepted from the cognizance of a Court of Small Causes the provisions of S. 102, C. P. Code, do not apply to them. 1922 P.H.C.C. 154 =A.I.R. 1922 Pat. 184.

3. Ferry and fishery dues.

——Sch. II, Art. 8—Fishery suit for fee due catching fish—Nature of—Rent, meaning of.

There is no definition of rent in the Smalll Cause Courts Act. It is therefore to be taken in the ordinary sense as including compensation paid to the owner of immoveable property for its use and occupation. A suit for the recovery of the amount

agreed to be paid to the plaintiff by the defendants in consideration of their being allowed to catch fish in the village river is not cognizable by a Small Cause Court. 14 N.L.R. 35=43 Ind. Cas. 962.

——Sch. II, Art. 8—Fishery — Suit for fee due under theka—Small Cause nature—'Theka'—Lease.

A *Theka* of a right to fish and collect a produce is not a lease, and the money payable by the *Thekadar* is not rent but fee, and hence a suit for the fee due under the Theka is not exempted from the cognizance of a Small Cause Court. 25 Ind. Cas. 666 (Oudh).

——Sch. II, Art. 8—Ferry, suit for rent of, not within article.

A suit to recover a sum payable under a contract by the defendant for plying boats in a private ferry is not a suit for rent under Art. 8 and therefore cognizable by a Small Cause Court. 14 C. W.N. 994=7 Ind. Cas. 553.

4. Interpretation

——Sch. II, Art. 8—Interpretation.

The mere fact that a building could be used to shelter refugees from fire or earthquake in a pressing emergency does not make it a house within the meaning of Cl. (8), Sch. II. A.I.R. 1941 Rang. 36=1940 Rang.L.R. 820=192 Ind. Cas. 127.

——Sch. II, Art. 8—Interpretation.

It is not necessary in a notification under Art. 8, Sch. II, Provincial Small Cause Courts Act to confer powers by reference to the name of a particular Judge of a Court of Small Causes to enable him to try suits for the recovery of rent of homestead land under the Small Cause Court procedure.

The words "the Judge of the Court of Small Causes" in Cl. (8) are not used to emphasize any distinction between those words and the words, "Court of Small Causes" but only as a compendious form of expression which would include not merely Courts of Small Causes as defined in S. 4 but also officers invested with Small Cause Court powers under S. 25, Bengal, N.-W.P. and Assam Civil Courts Act (12 of 1887). There is nothing which can legitimately from the foundation for the view that in vesting a Judge with authority to exercise special jurisdiction under that clause, it is necessary to confer such authority by reference to the name of the particular Judge. A.I.R. 1936 Cal. 497=40 C.W.N. 942=63 C.L.J. 455=I.L.R. (1937) 1 Cal. 1=164 Ind. Cas. 226 (F.B.).

[Overruling A.I.R. 1916 Cal. 574=19 C. W. N. 1236=22 C.L.J. 249=31 Ind. Cas. 171.]

——Sch. II, Art. 8—Interpretation—S. 15 (1)—Judge of the Court of Small Causes.

Reading Cl. (1) of S. 15 with Cl. (8), Sch. II of the Act, the expression "the Judge of the Court of Small Causes" in Cl. (8), Sch. II must be taken to apply either to a Court of Small Causes constituted under the Act or to a Court invested with the jurisdiction of a Court of Small Causes; and the "Judge" in Cl. (8) means a Court invested with the jurisdiction of a Court of Small Causes. It is not necessary to invest the powers by reference to the name of the particular Judge. 35 Cal. 677, Foll. 111 Ind. Cas. 911=30 Bom.L.R. 741 =A.I.R. 1928 Bom. 265.

——Sch. II, Art. 8—Interpretation — Payment for enjoyment of trees—Not rent.

What is paid in return for the enjoyment of the trees is not rent within the meaning of Art. 8. 39 Mad. 883, Rel. on. 99 Ind. Cas. 996=4 Rang. 503=A.I.R. 1927 Rang. 94.

——Sch. II, Art. 8 — Interpretation — "Rent", meaning.

The word "rent" in the section is intended to be understood in the ordinary sense of a return in money or kind for the enjoyment of specific property held by one person from or under another. 22 Mad. 149, Foll. 78 Ind. Cas. 383=A.I.R. 1925 Lah. 196.

——Sch. II, Art. 8—Interpretation.

A suit for half share of paddy and straw grown under settlement from plaintiff with stipulation to deliver half share of the produce is cognizable by the Small Cause Court as there was nothing in the plaint suggesting that the defendant was a tenant. The words "Settlement and holding the land" are consistent with the status of tenancy or partnership. The words "promise and stipulation" on the other hand indicate more a contract than creation of tenancy. 82 Ind. Cas. 94=28 C.W.N. 848=A. I.R. 1924 Cal. 837.

——Sch. II, Art. 8—Interpretation—"Judge of the Court of Small Causes," meaning of—If it means and includes Munsifs and other judicial officers vested with Small Cause Court powers.

The expression "Judge of the Court of Small Causes" in Art. (8) must be taken to apply either to the Judge of the Court of Small Causes constituted under the Act or to a Court invested with jurisdiction of a Court of Small Causes. Where, therefore, the local Government purporting to act under Art. (8), by notification in the Official Gazette invested in general terms the Munsif of a certain place with authority to exercise jurisdiction with respect to suits for the recovery of rent of homestead lands up to a certain value and empowered such Munsif to try such suits under Small Cause Court Procedure, such Munsif, if invested with the jurisdiction of a Court of Small Causes, is competent to entertain and try such suits as a Court of Small Causes. (1908) 7 C.L.J. 407= 35 C. 677.

5. Jurisdiction.

——Sch. II, Art. 8—Applicability — "Rent" — Meaning of — Suit for share in fruits of mango trees under agreement of parties—Absence of lease —Jurisdiction of Small Cause Court—Arts. 13 and 35 (2)—Transfer of Property Act, S. 105.

A suit to recover a half-share of the produce of fruit trees (mango trees) on a piece of land of the plaintiff on the basis of a contract between him and the defendant, not in the nature of lease, is not a suit for "rent" within the meaning of Art. 8 of Sch. II to the Provincial Small Cause Courts Act. The payment not being for the use and occupation of any land cannot be regarded as rent within the meaning of either the Bihar Tenancy Act or the Transfer of Property Act. The suit is therefore cognizable by the Small Cause Court and not excluded from its jurisdiction.

The payment being neither *malikhana, hakk,* cess or other dues payable by reason of any interest in

immovable property, Art. 13 also would not apply. Nor would Art. 35 (11) govern the suit as there is no wrongful removal within the meaning of Art. 35 (11). A.I.R. 1950 Pat. 284.

——Sch. II, Art. 8—Jurisdiction—Suit for damages for crops misappropriated by tenant without payment of share due to landlord.

Where a landlord sues his tenant for damages for the crops misappropriated by the tenant without payment of the share of the crops due to the landlord, the suit though described as one for damages is in essence one for the value of the share of crops misappropriated (*i.e.*) for rent which the defendant has refused to pay. It is really a suit for rent and as such excluded from the cognizance of a Court of Small Causes. A. I. R. 1950 Kut. 61.

——Sch. II, Art. 8—Jurisdiction—Suit for recovery of rent for water meter by Municipality.

The charge for the use of a water meter is a part of water-tax and the person taking water is liable to pay that charge under the rules for the assessment of water rate under S. 68 (1) (*k*), C. P. Municipalities Act, and it is not a rent within Art. 8, Sch. II, Provincial Small Cause Courts Act, and, therefore, the jurisdiction of the Small Cause Court is not barred to entertain the suit for recovery of such tax. A.I.R. 1937 Nag. 209=170 Ind. Cas. 241.

——Sch. II, Arts. 8, 31—Jurisdiction — Two or three co-sharers transferring their right to recover rent to plaintiff—Suit to recover from third cosharer rent realised by him on behalf of others—Maintainability in Small Cause Court.

A, *B* and *C* were co-owners of land which was under cultivation of tenants who paid rent to the landlords. *A* and *B* transferred their right to recover their share of rent to the plaintiff who filed a suit against *C* for a decree for the amount alleged to be due on account of *A's* and *B's* share in the produce recovered by *C* from the tenants. *C* pleaded that *A* and *B* had no share in the land:

Held, that the suit was not for recovery of rent and was not also a suit such as is mentioned in Art. 31, as the plaintiff did not claim the immovable property in dispute, and the suit was cognizable in the Small Cause Court. A.I.R. 1936 Lah. 377=38 P.L.R. 1084=162 Ind. Cas. 389 (1).

——Sch. II, Arts. 8, 31, S. 16—Jurisdiction.

The plaintiff was the purchaser of arrears of payment under a *kabuliyat*; he released a part of his *sarpeshgi* lease and then agreed to pay as profits on account of *raiyati* right the sum of Rs. 28; he was paying as mortgagee and not as a tenant (there being no relationship of landlord and tenant between the parties), and the relationship of mortgagee and mortgagor existed. The suit was not for accounts but to recover surplus collections received by the mortgagee after the mortgage had been satisfied:

Held, that it was impossible to hold that it was a payment of rent. Neither the agreement of the parties nor the will of the Judge could make this anything other than a Small Cause Court suit and not excluded by the Art. 8 or 31 and whether the Judge trying the suit announced that he was trying as a Munsif or not made no difference, as S. 16 excluded Munsif's jurisdiction and gave jurisdiction as a Small Cause Court and Small Cause Courts only, consequently an appeal against his decision did not lies. A.I.R. 1936 Pat. 406=2 B.R. 315=161 Ind. Cas. 102.

——Sch. II, Arts. 8, 13—Jurisdiction.

A person who occupies a site in a market does not have such an interest in land as would give rise to an action for rent for which he is liable for occupation of that site. He will not be liable for anything other than market toll or a sum of money in respect of a license by which license he is allowed to occupy a small portion of a market place for the sale of his goods. It is not rent and hence will not come under Art. 8.

Dues payable by such a person are payable by reason of the existence of the market and by reason of the statute which enabled that market to be brought into existence, that is to say S. 275, Bihar and Orissa Municipal Act, and the Municipality to charge such dues. Consequently, such dues are not rent within Art. 8 and are not dues which are payable to the plaintiffs by reason of their interest in the immovable property, and, therefore, the Small Cause Court has jurisdiction to try a suit in respect of such dues. A. I. R. 1935 Pat. 184=16 P.L.T. 175=1 B.R. 357=154 Ind. Cas. 877.

——Sch. II, Art. 8—Jurisdiction.

Suit for rent of agricultural land is not cognisable by Small Cause Court. A.I.R. 1935 Rang. 386=13 Rang. 633=158 Ind. Cas. 804 (F.B.).

[Overrules A.I.R. 1926 Rang. 19=91 Ind. Cas. 639].

——Sch. II, Art. 8—Jurisdiction—Suit for rent in respect of khattis.

The circumstance that certain '*khattis*' happen to be situate within the ambit of residential houses will not alter the character of the '*khattis*' themselves. '*Khattis*,' whether situate within the limits of a residential house or otherwise are meant for storage of grain, and when let apart from the houses in which they are situate cannot be considered to be places meant for human habitation. A suit for rent in respect of the *khattis* is not one for recovery of rent of a house and hence is not cognizable by a Court of Small Causes. A.I.R. 1933 All. 918=1934 A.L.J. 73=56 All. 261 =3 A.W.R. 128=146 Ind. Cas. 594.

——Sch. II, Art. 8—Jurisdiction—Arrears of Kattubadi.

A suit to recover arrears of *Kattubadi* is of a small cause nature. 66 Ind. Cas. 207=14 M.L. W. 349=A.I.R. 1922 Mad. 352=42 M.L.J. 118.

——Sch. II, Art. 8—Jurisdiction—Arrears of rents.

A Small Cause Court cannot entertain a suit for arrears of rent of land under Art. 8 of Sch. II of the Act. 4 Ind. Cas. 493 (Cal.).

——Sch. II, Art. 8—Jurisdiction—Burgadar—Stipulation that burgadar would keep half the produce—Suit against burgadar—Small Cause.

A *Burgadar* stipulating that in return for his labour in cultivating the land of the owner, he would keep half the produce, the remaining half being payable to the owner is not a tenant, and a suit for the price of the share of the produce by the owner against the *Burgadar* will lie in the Small Cause Court. 14 C.W.N. 629=6 Ind. Cas. 594.

——Sch.. II, Art. 8—Civil Court, jurisdiction of—Bengal Tenancy Act, S. 193—Money payable for forest rights.

Money payable in respect of forest right is rent and a suit for its recovery is not cognizable by a Small Cause Court. 20 C.L.J. 227=19 C.W.N. 415=26 Ind. Cas. 380.

——Sch. II, Art. 8—Jurisdiction—Decree against defendant's landlord — Attachment of Rent due by defendant to his landlord—Suit for recovery of the money attached—Nature of.

Plaintiff attached defendant's rent due in execution of his decree against defendant's landlord. He then brought a suit for recovery of the money.

Held, that the suit was not a suit for rent and the Small Cause Court had jurisdiction to try it. 10 Ind. Cas. 569 (Cal.).

——Sch. II, Art. 8—Jurisdiction—Grazing dues.

Suit for recovery of rent of a grazing area is excluded under Cl. 8. 78 Ind. Cas. 345=46 All. 369=22 A.L.J. 339=5 L.R.A. (Civ.) 217=A.I.R. 1924 All. 557.

——Sch. II, Art. 8—Jurisdiction—Suit at enhanced rate of rent after demand.

A suit by a landlord against a tenant for rent at an enhanced rate, on the allegation that he had served the defendant with notice, to vacate by a certain date and in default he would be charged with an enhanced rate, is cognizable by the Small Cause Court. 9 N.L.R. 72=19 Ind. Cas. 858.

——Sch. II, Art. 8—Jurisdiction—Money due under Kabuliat.

A suit to recover money on the basis of Kabuliat showing no tenancy is cognisable by Small Cause Court. In such cases the Small Cause Court has power to decide the question of the status of the defendant in spite of the decisions of the Revenue Courts passed without jurisdiction. 23 C. W. N. 614=50 Ind. Cas. 285.

——Sch. II, Art. 8—Jurisdiction—Murtafa—Rent—Suit for—Small Cause Court.

Whether rent is ground rent or house rent depends upon the contract between the lessor and the lessee. If a lessee takes a parcel of land and then builds a house upon it, the rent he pays is a ground rent. If the lessor builds the house and then lets house and land together, the rent is a house rent. A suit for the former is not cognizable by a Small Cause Court; a suit for the latter whether regarded at a suit for rent or for a tax is cognizable by a Small Cause Court. An objection to jurisdiction must be decided by the Court itself. 4 Pat.L.W. 218=44 Ind. Cas. 887.

——Sch. II, Art. 8—Murtafa—Suit for—Jurisdiction.

A suit to recover *murtafa* (a tax or rent in the nature of house rent) for the occupation of houses, is cognisable by a Court of Small Causes. (1919) P.H.C.C. 439=51 Ind. Cas. 961.

——Sch. II, Art. 8—Jurisdiction—Nazrana—Rent—C. P. Tenancy Act, S. 117.

A suit by a landlord against the tenant for realisation of Nazrana paid or agreed to be paid as price for the grant of a lease is not cognizable by a Small Cause Court, being a suit for rent. 9 N.L.R. 94=20 Ind. Cas. 261.

——Sch. II, Art. 8—Jurisdiction—Note executed for rent—Suit on—Not excepted.

The defendant took a lease of a filed for Rs. 150 for a year from the plaintiffs, and at the beginning of the year paid Rs. 75 promising to pay interest on the balance.

Held, that a demand note or a bond does not cease to be an ordinary demand note or bond just because a part or the whole of its consideration is made up of rent whether in arrears or in advance. The suit on the note is not a suit for rent and was cognizable by Small Cause Court. 73 Ind. Cas. 7 =A.I.R. 1923 Nag. 285.

——Sch. II, Art. 8—Jurisdiction—"Rent", in kind.

A Suit for price of rent in kind is not triable by Small Cause Court. 68 Ind. Cas. 985=20 A. L. J. 771=45 All. 7=A.I.R. 1923 All. 50.

——Sch. II, Art. 8—Jurisdiction—Rent of homestead land.

A suit for rent of homestead land is excluded from the jurisdiction of the Small Cause Court. 42 Cal. 638, Foll. 79 Ind. Cas. 557=A.I.R. 1925 Cal. 423.

——Sch. II, Art. 8—Jurisdiction — Suit against partner for share of rent.

A suit for rent by any one partner in the tenancy against another partner in the tenancy is not a suit for rent under Art. 8 and is maintainable in a Court of Small Causes. 40 All. 51=15 A. L. J. 862=45 Ind. Cas. 323.

——Sch. II, Art. 8—Jurisdiction—Suit for Jodi—Small Cause.

A suit for jodi by Zamindary or Mittadar from Inamdar is cognizable by Small Cause Court. 40 Mad. 93=(1916) 1 M.W.N. 216=3 L.W. 278 =30 M.L.J. 387=32 Ind. Cas. 971.

——Sch. II, Art. 8—Jurisdiction — Suit for rent other than rouse rent—Small cause nature—Second Appeal.

A suit for rent other than house rent is not cognizable by a Small Cause Court and in the absence of a Government notification to the contrary, a second appeal in such a suit will lie and is not barred by S. 102, C.P.C. although the value thereof does not exceed Rs. 500. 42 Cal. 638= 20 C.L.J. 494=19 C.W.N. 1030=27 Ind. Cas. 258.

——Sch. II, Art. 8—Jurisdiction—Suit to recover arrears of rent under Agra Tenancy Act, 1901—Jurisdiction.

A provincial Small Cause Court has no jurisdiction to try suits for arrears of rent under the Agra Tenancy Act, 1901. 12 A.L.J. 36=22 Ind. Cas. 16.

——Sch. II, Arts. 8 and 11—Jurisdiction—Rent, suit for—Lease of — Right to collect rent from shop-keepers—If lease of immoveable property.

A mortgagee in possession and entitled to receive rents from the shopkeepers, let out this right to defendant for Rs. 24 a month. *Held*, that the lease was a lease of immovable property and a suit by the lessor to recover the said sum from the lessee did not lie in a Small Cause Court. 9 A.L.J. 766=15 Ind. Cas. 32.

——Sch. II, Art. 8—Jurisdiction — Rent suit by landlord to recover rent out of improvements effected by tenant, nature of.

A landlord's suit for arrears of rent due from

the tenant to be realized from the improvements effected by tenant is not a Small Cause suit and is triable only as an ordinary suit. 9 M. L. T. 158=8 Ind. Cas. 864.

——Sch. II, Art. 8—Jurisdiction—Damages, suit for—Land given in lieu of service—Rent suit, if cognizable in Small Cause Court.

A service rendered by a tenant to his landlord is in the nature of rent, and a suit for damages for non-performance of such service is not cognisable in the Court of Small Causes under Art. 8. (1910) 12 C.L.J. 480=8 Ind. Cas. 96.

——Sch. II, Art. 8—Jurisdiction.

A suit against the defendants who had executed a bond in favour of the plaintiff, undertaking to pay a debt due from the landlord, is not a suit for rent and is therefore cognizable by a Court of Small Causes. (1905) 4 C.L.J. 402.

——Sch. II, Art. 8—Jurisdiction—Suit for burga rent cognizable by Small Cause Court—"Rent".

Settlement with a *burgadar* under which he undertakes to cultivate the land for a half share of the produce, the remaining half going to the owner, does not by itself create the relation of landlord and tenant between the parties. A suit for recovery of the price of his share of the produce by the owner is maintainable in the Small Cause Court. 6 Ind. Cas. 594=14 C.W.N. 629.

6. Scope.

——Sch. II, Art. 8—Scope — Suit by proprietor for recovery of cesses from tenure-holder.

Cesses are, by virtue of statute, made part of the rent payable by a tenure-holder or a *rayat* and realizable as such and a decree passed therefor has the effect of a 'rent-decree'. Such a suit is, therefore, excepted under the provisions of Art. 8. A.I.R. 1945 Pat. 417=24 Pat. 307.

——Sch. II, Arts. 8, 13—Scope.

Where the plaintiff does not sue for enforcement of payment of any "*malikana*", *haq*", or cesses and defendant did not occupy the bazar and was not liable for payment of any rent, *malikana, haq* or cesses but was sued on the basis of the contract under which he agreed to pay a sum of money every year in consideration of the being given the *theka* of the bazar:

Held, that Cls. (8) and (13) refer to suits against persons who actually occupy or use the land or other property for which they are liable to pay rent of "*malikana*" and "*haq*", etc., but have no application to the case of a person in the position of a defendant who holds an intermediate position between the owner and the occupier of the land:

Held, also that such a '*theka*' means only a right to realize the "*tah bazari*" and other dues from the shop-keepers who attend the bazar. A. I. R. 1936 Oudh 223=1936 O.W.N. 349=12 Luck. 124 =161 Ind. Cas. 408.

——Sch. II, Art. 8—Scope — Counter-claim for rent—Art. 21—No bar.

The plaintiffs who were living for rent in defendant's premises sued the defendant for price of goods sold to the latter, giving credit to the rent due by themselves to him. The defendant made a counter-claim for rent over and above the plaint claim.

Held, the counter-claim would in any case not be barred by Art. 8, Sch. II, because that article only relates to suits for the recovery of rent other than house rent. The suit in question could not fairly be described as a suit "for an account." 83 Ind. Cas. 745=4 L.R.A. (Civ.) 75=A.I.R. 1923 All. 202.

——Sch. II, Art. 8—Scope of.

The authorisation under Cl. 8 is entirely personal to the presiding Judge. 19 C.W.N. 1236=22 C. L.J. 249=31 Ind. Cas. 177.

7. Suit by assignee or transferee.

——Sch. II, Art. 8—Suit by assignee — Suit by assignee of landlord to recover arrears of rent.

A suit by the assignee of a landlord for the recovery of arrears of rent of agricultural land, after they had fallen due is one for rent, and is excepted from the jurisdiction of the Court of Small Causes by Art. 8.

Hence, the suit is an unclassed suit. A. I. R. 1941 Lah. 313=43 P.L.R. 432=196 Ind. Cas. 396.

——Sch. II, Art. 8—Suit by assignee.

Suit by the assignee from the land-holder of rent for arrears of rent under S. 132, Agra Tenancy Act, is not cognizable by the Small Cause Court but by the revenue Court under S. 230, Agra Tenancy Act. A.I.R. 1934 All. 893=18 R.D. 389=1934 A.L.J. 848=4 A.W.R. 88=57 All. 230=150 Ind. Cas. 767.

——Sch. II, Art. 8—Suit by transferee.

Suit for rent by transferee of a right to claim rent is not triable by Small Cause Court. A. I. R. 1935 Lah. 976.

8. Suit for rent of site.

——Sch. II, Art. 8—Suit for rent of house site.

A suit for rent of a site is different from a suit for house rent and is not cognizable by a Small Cause Court unless that Court has been expressly invested with jurisdiction in that behalf. A. I. R. 1942 Oudh 145=1941 O.W.N. 1179=1941 A. W.R. 1005=1941 R.D. 980=197 Ind. Cas. 158.

——Sch. II, Art. 8—Suit for rent of site.

An open site on which fuel is stacked and containing a *chhappar* used for shelter and for carrying on business cannot be regarded as a house and a suit for recovery of its rent is not cognizable by a Court of Small Causes. A. I. R. 1933 Lah. 306=34 P. L. R. 106=149 Ind. Cas. 233 (1).

——Sch. II, Art. 8—Suit for ground rent of site in town—Land neither revenue paying nor agricultural land—Suit is triable by Small Cause Court. A. I. R. 1933 Nag. 32=147 Ind. Cas. 839 (1).

9. Suit for shop rent.

——Sch. II, Art. 8—Suit for rent of shop, if triable as small cause.

A shop is a house within the meaning of Art. 8. A suit for rent, therefore, of a shop, is triable as

Small Cause suit. A.I.R. 1939 Pesh. 14=181 Ind. Cas. 241.

——Sch. II, Art. 8—Suit for shop rent—Building actually used as shop but capable of being used as residence—Whether a 'house'—Suit for arrears of rent of such building.

A building actually used as a shop but capable of use as a residence is a house for the purposes of Art. 8. Consequently, a suit for arrears of rent of such a building is a Small Cause Court suit. A.I.R. 1936 Pesh. 55=161 Ind. Cas. 207.

——Sch. II, Art. 8—Suit for shop rent—Motor garage.

There is no reason for making a distinction between a garage and a shop. A shop is normally used for keeping goods, a garage is normally used for keeping a motor car, but both of them are suitable for residential purposes and are within Art. 8. A.I.R. 1935 Pesh. 192=160 Ind. Cas. 175 (1).

——Sch. II, Art. 8—Suit for shop rent.

A suit for rent of shop is cognizable by Small Cause Court. 65 Ind. Cas. 966=5 N.L.J. 241=A.I.R. 1922 Nag. 15.

——Sch. II, Art. 8—Shop rent.

The words "house rent" as used in para. 8, Sch. II, Act 9 of 1887 cover and include shop rent. 107 Ind. Cas. 273=A.I.R. 1928 Lah. 284.

——Sch. II, Art. 8—Suit for shop rent.

A suit for the recovery of rent for the occupation of a shop is a suit for the recovery of house rent within the meaning of Act VIII. The word "house" is used in its widest possible sense as meaning a building that is adopted, or may be adopted for residential purposes. 98 Ind. Cas. 848=49 All. 134=25 A.L.J. 131=A. I. R. 1927 All. 194.

——Sch. II, Art. 8—Suit for shop rent.

A stall in a market is a house or a part of a house and a suit to recover rent for the occupation of a stall is a suit for the recovery of house rent within the meaning of Cl. (8) of Sch. II of the Act, and is therefore cognizable by a Court of Small Cause. 4 Ind. Cas. 822 (U.B.).

——Sch. II, Art. 11—Applicability.

Suit by mortgagee claiming share of co-sharer, in offerings of temple against *thekadar*:

Held, Art. 11 did not apply. A.I.R. 1926 Lah. 100=162 Ind. Cas. 692.

——Sch. II, Art. 11—Charge on property.

A suit to recover money from the property belonging to the defendants is not a suit of the nature specified in Cl. (11), even though the property includes immovable property. 97 Ind. Cas. 184=A.I.R. 1926 All. 753.

——Sch. II, Art. 11—Incidental question of title—No bar in going into.

Although a Small Cause Court has no jurisdiction to decide questions involving a right to immovable property it is not bound to refuse to consider any question of title which is raised before it. If the question of title is only incidental and not the main relief, it can be gone into.

L sued to recover a certain amount as rent under a rent-note passed in his favour by *A* in the Small Cause Court. The defendant *A* pleaded that the lands demised were of his ownership and that the rent-note sued upon was taken from him under a fraud practised upon him.

Held, that refusal to consider the question of title, even incidentally, prejudiced the defendant, who has not been allowed to make out the plea on which his defence depended, and consequently the decree must be set aside. 15 Bom. 400 and 37 Bom. 675, Rel. on. 117 Ind. Cas. 447=31 Bom.L.R. 430=A.I.R. 1929 Bom. 228.

——Sch. II, Art. 11—Lac Produce.

A suit by lessees of lac produce, to recover value of lac illegally removed is cognizable by a Small Cause Court. 50 Ind. Cas. 629 (Nag.).

——Sch. II, Art. 11—Recovery of mortgage consideration.

A suit by a mortgagor to recover part of mortgage consideration from the mortgagee is not cognizable by the Provincial Small Causes Court. 21 C.L.J. 532, Foll. 76 Ind. Cas. 766=A. I. R. 1923 Cal. 567.

——Sch. II, Art. 11—Refund of purchase money—Suit is Small Cause.

Where a contract of sale of immovable property falls through (or the sale is set aside or is otherwise incomplete) and the vendee sues to recover back the purchase money from the vendor, such suit is small cause, and neither Art. 11 nor 15 of the Provincial Small Cause Courts Act prevents the suit being tried in such Courts. 89 Ind. Cas. 933=A.I.R. 1926 Nag. 65.

——Sch. II, Art. 11—Scope—Suit for rent—Dispute about extent of tenancy—Jurisdiction of Small Cause Court.

In a suit for recovery of rent of a plot of land, being the fraction of a khathan number, governed by the T. P. Act, the Small Cause Court has no jurisdiction to decide a disputed question as to the extent of the tenancy, if it is raised by the defendant-tenant. Such a question is outside the scope of a suit for rent and should be left open for adjudication between the parties in future proceedings. A.I.R. 1951 Cal. 302.

——Sch. II, Art. 11—Scope of.

To bring suit within Art. 11 it must be one brought expressly for determination of endorsement of right to or interest in immovable property. 109 Ind. Cas. 247=55 Cal. 1193=A.I.R. 1928 Cal. 593.

——Sch. II, Art. 11—Suit by charge-holder—As for money—General prayer—No bar.

Where a suit is framed by the charge-holder as a suit for money, the fact that there is a general prayer in the plaint asking for such other or further reliefs as the Court may in justice and equity consider the plaintiff to be entitled to the suit cannot convert the suit into one under Art. 11. 109 Ind. Cas. 247=55 Cal. 1193=A.I.R. 1928 Cal. 593.

——Sch. II, Art. 11—Suit for damages for cutting trees.

A suit for damages for cutting trees against a person who alleges that the trees did not exist and no trees were cut down, does not involve the determination of any right to immovable property; hence it is cognizable by Small Cause Court. 5 Ind. Cas. 322 (All.).

——Sch. II, Arts. 11 and 35, L. and C. P. Code Act (V of 1908), S. 102—Suit for damages for trespass.

A suit for damages for trespass committed by the defendant is within the cognizance of the Small Cause suit and the real nature of a suit must be ascertained from the plaint. And no second appeal lies. 12 M.L.J. 349 Followed. 10 C. L.J. 198=1 Ind. Cas. 592.

——Sch. II, Arts. 11, 12 and 13—Suit for share of income of Durbar Sahib.

A suit for a share of the income of a Durbar Sahib as well as for a share of Jaghir attached thereto is cognizable by the Court of Small Causes. 20 P.R. 1911=93 P.L.R. 1911=54 P.W.R. 1911=9 Ind. Cas. 579.

——Sch. II, Arts. 11 and 15 — Unpaid purchase money, suit for—Nature of.

A suit by a vendor for the unpaid purchase money against the vendee where the sale deed has been executed and registered and the vendee placed in possession of the lands sold is not a suit for the determination or enforcement of any right to or interest in immovable property or suit for specific performance of a contract within Arts. 11 and 15. 11 L.W. 211=55 Ind. Cas. 541.

——Sch. II, Art. 11—Unpaid purchase money, suit for—Small cause.

A suit to recover unpaid purchase money of land is not a suit for the determination of a right to or interest in immovable property and is cognisable by a Small Cause Court. 9 M.L.T. 372=10 Ind. Cas. 267.

——Sch. II, Arts. 11, 38—Junior member of a tarwad—Claim against Karnavan to enforce right of tarwad property — Suit cognizable by Small Cause Court.

A claim by the junior members of a tarwad against the karnavan to enforce their rights to participate in the joint enjoyment in the tarwad property according to family karar is not "a suit relating to maintenance" within the meaning of Art. 38 but is "a suit for the enforcement of a right to or interest in the immovable property" of the tarwad and is not cognizable by a Court of Small Causes under Art. 11. (1903) 13 M.L.J. 499.

——Sch. II, Arts. 11, 31—Profits of land wrongly received by defendant—Small Cause suit. 3 Bom. L.R. 239=25 B. 625.

——Sch. II, Art. 13.

Synopsis.

1. Applicability and scope.
2. "By reason of interest in immovable property".
3. Cess and haq dues.
4. Interest in hereditary office.
5. Interest in temple and religious endowments.
6. Interpretation.
7. Miscellaneous.

1. Applicability and scope.

——Sch. II, Art. 13—Applicability — Share of fruits of mango trees payable under agreement—Jurisdiction of Small Cause Court. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 8. A.I.R. 1950 Pat. 284.

——Sch. II, Art. 13 and S. 15—Suit by Municipality to recover arrears of taxes—Jurisdiction of Small Cause Court. *See* PROVINCIAL SMALL CAUSE COURTS ACT, S. 15 AND SCH. II, ART. 13. 54 C.W.N. 416=A.I.R. 1950 Cal. 415.

——Sch. II, Art. 13—Applicability and scope—Suit by landlord for price of manure of defendant's cattle grazing on his banjar land—Jurisdiction of Small Cause Court—C. P. Land Revenue Act, Ss. 78 and 79.

A suit by the landlord of a village for the price of manure of defendant's cattle grazing on his *banjar* land on the ground that the defendant is a *Thalwa* (*i.e.*) non-agriculturist resident of the village and according to the *wajib-ul-arz* of the village the landlord is entitled to the manure from the cattle of a *Thalwa* in the village, falls directly within Art. 13 of the Second Schedule to the Provincial Small Cause Courts Act, and is therefore excepted from the jurisdiction of the Court of Small Causes. The *wajib-ul-arz* of a village is a record not only of customs but of rights and customs, and the landlord's claim for manure under its terms is one for dues payable to him by reason of his interest in immovable property. I.L.R. (1947) Nag. 776=A. I. R. 1948 Nag. 145=1947 N.L.J. 486.

——Sch. II, Art. 13—Applicability and scope.

Suit by *lambardar* against cobblers of the village for dues in return of skin of dead cattle is not triable by Small Cause Court. A.I.R. 1944 Nag. 310=1944 N.L.J. 309=I.L.R. (1944) Nag. 825.

——Sch. II, Art. 13—Applicability and scope.

The suit pro-note recited that the executor had to pay the amount for which the note was executed to the executee "on account of *rusum of Deshpandeship* for the two years". It was contended that the suit was of the kind referred to in Art. 13.

Held, that in the circumstances of this case, it was not barred by Art. 13 because the suit was not to recover the dues but to recover money on a negotiable instrument. A.I.R. 1941 Nag. 271 =1941 N.L.J. 388=I.L.R. (1942) Nag. 498 =196 Ind. Cas. 493.

——Sch. II, Art. 13—Applicability and scope.

Article 13 has no application to the case of a person who holds an intermediate position between the owner and occupier of land. A.I.R. 1936 Oudh 223=1936 O.W.N. 349=12 Luck. 124=161 Ind. Cas. 408.

——Sch. II, Art. 13—Applicability and scope—Suit for cash payment fixed in lieu of meras or resums.

A suit by a *zemindar* against the *agraharamdars* of a village for recovery of *jodi* or *meras* which is really not rent but a cash payment fixed in lieu of certain customary dues payable to a *zemindar* in consideration of certain things done by him or certain expenses borne by the *zemindari*, *e.g.*, per-

forming *ubhayams* in a temple, visiting the village, employing a *diwan*, employing a *karnam*, etc., falls within Art. 13 and is not cognisable by a Small Cause Court.

The intention of Art. 13 is to exclude claims to the somewhat arbitrary dues designated as *meras* and *resums* from the cognisance of the Small Cause Court. A.I.R. 1935 Mad. 554=1935 M. W. N. 519=42 L.W. 203=156 Ind. Cas. 600.

——Sch. II, Art. 13—Applicability and scope.

Suit for recovery of arrears of certain Municipal taxes such as house and latrine tax does not fall within Art. 13. A.I.R. 1932 Pat. 220=13 P.L. T. 277=139 Ind. Cas. 104.

——Sch. II, Art. 13—Applicability and scope—Choutarji dues.

A suit to recover choutarji dues which are in the nature of a jodi is a suit of a Small Cause nature. There is no difference in principle between inam jodi paid to a zamindar and sub-inam jodi paid to an inamdar as would make Art. 13 applicable to the latter while not applicable to the former. 21 Mad. 243, Foll. 103 Ind. Cas. 120=38 M.L.T. 315=1927 M.W.N. 748=A.I.R. 1927 Mad. 670 =52 M.L.J. 706.

——Sch. II, Art. 13—Applicability—Condition.

To apply Art. 13 the claim should be directly against the person who is primarily liable to pay the cesses or dues and by whom they are originally payable and a suit against a person who has improperly collected the dues from the party primarily liable is not within the scope of Art. 13, so there is no second appeal in such a suit. 92 Ind. Cas. 779=A.I.R. 1926 Lah. 276.

——Sch. II, Art. 13—Applicability and scope—Kulkarni allowance.

A suit by a co-sharer to recover his share in a commotation allowance of a Kulkarni Watan is a suit for money had and received, and does not fall under Art. 13. 88 Ind. Cas. 668=28 Bom.L.R. 627=A.I.R. 1925 Bom. 439.

——Sch. II, Art. 13—Scope.

The clause covers a case when dues are claimed as customary dues. 71 Ind. Cas. 432=A. I. R. 1923 All. 378.

——Sch. II, Art. 13—Applicability and scope

A suit by a Zamindar to recover the price of oil, due by an oil man resident in the village when under the terms of a Wajib-ul-arz is within Sch. II, Art. 13 of the Act. 40 All. 663=16 A.L.J. 644 =46 Ind. Cas. 563.

——Sch. II, Art. 13—Applicability and scope.

Article 13 applies only to dues claimed from the persons liable to pay them as such and does not cover a suit against a person who has improperly collected dues from persons liable to pay them. 26 A. 358, Foll. 12 N.L.R. 47=32 Ind. Cas. 998.

——Sch. II, Art. 13—Applicability and scope.

A suit for recovery by an inamdar of sums payable by a *Khatidar* in respect of certain immovable property held by him under the Inamdar as his superior holder is not cognisable by a Court of Small Causes. 39 Bom. 131=16 Bom.L.R. 74 =27 Ind. Cas. 350.

——Sch. II, Art. 13—Applicability and scope—Suit to recover Kalavettu.

A suit to recover Kalavettu (*i.e.*) price paid for the plaintiff's water used for irrigation by the defendant, is cognizable by a Small Cause Court. 22 Ind. Cas. 144 (Mad.).

——Sch. II, Art. 13—Applicability and scope—Ferry toll, Suit for—Small Cause nature.

A suit to rec over ferry toll is not cognisable by the Small Cause Court. 35 All. 156=11 A. L. J. 133=18 Ind. Cas. 282.

——Sch. II, Art. 13—Applicability and scope—Trees sold by tenant—Suit for, price of.

A suit by a Zamindar to half the price of trees sold by his tenant based on the terms of the village of *wajib-ul-arz* is cognisable by a Small Cause Court. 18 A.L.J. 561=55 Ind. Cas. 950.

——Sch. II, Art. 13—Applicability and scope.

The plaintiff claimed as landowner to be entitled to receive the rents or fees paid by shopkeepers for the temporary occupation during a fair of a piece of land, which the plaintiff alleged belonged to his mahal. He further alleged that the defendant, claiming that the land was his, had wrongfully received those dues or rents,

Held, that this was a suit which fell within the provisions of the latter part of Art. 31 and was not within the cognizance of a Court of Small Causes. 1901 A.W.N. 128=23 A. 437.

2. "By reason of interest in immovable property".

——Sch. II, Art. 13—By reason of interest in immovable property".

A claim for arrears of interest due because of non-payment of rent is not a claim for rent and it cannot also come under the definition of a claim for other dues "payable to a person by reason of interest in immovable property" within the meaning of Art. 13. Article 13 bars a claim for cesses and other dues payable to a person by reason of his interest in immovable property. *Prima facie*, it would appear that the other dues referred to in Art. 13 must be *ejusdem generis* with cesses referred to immediately before, that is to say, charges arising from the immovable property itself. The claim for arrears of interest cannot be said to flow from an interest in the immovable property. It is by way of penalty for default in the payment of rent or by way of damages for breach of an implied contract to pay rent in due time but it is not a sum payable to a person directly by reason of his interest in immovable property. A claim for such an interest, therefore, is recoverable in a small cause suit. A.I.R. 1938 Cal. 320=42 C.W.N. 284=I. L. R. (1938) 2 Cal. 60 =176 Ind. Cas. 712.

——Sch II, Art. 13—"By reason of interest in immovable property."

Suit for recovery of *mitta* payable to *inamdar* under compromise deed:

Held, that the suit was one for a claim in respect of an interest in immovable property within Art. 13 of Sch. II and was not one of Small Cause nature. (1935) 154 Ind. Cas. 619=A.I.R. 1935 Mad. 41=1934 M.W.N. 1119=41 M.L.W. 641= 68 M.L.J. 172.

——Sch. II, Art. 13—"By reason of interest in immovable property"—Cess of voluntary nature—Not covered.

A suit to claim a cess "sivunimera" which was shown to be a voluntary payment by a holder of the inam to his zamindar, and not one to which the zamindar was entitled by reason of his interest in immovable property, does not come within the purview of Art. 13. 117 Ind. Cas. 295=A. I. R. 1929 Mad. 694.

——Sch. II, Art. 13—"By reason of interest in immovable property."

The words "by reason of his interest in immovable property" in Art. 13 contemplates payments which a person is entitled to, as representing his interest in immovable property and not because he possesses some interest in such property. 36 Mad. 18 and 11 N.L.R. 100, Rel. on.

Certain dues and cesses were being claimed in a suit only by a reason of the interest in immovable property which plaintiffs, notwithstanding the sale, claimed to have retained in a mouza and which in their view was still continuing in their favour.

Held, (per *Mukherji, J.*) notwithstanding the legal or judicial relation subsisting between the parties such a suit was covered by Art. 13. 109 Ind. Cas. 277=47 C.L.J. 595=A.I.R. 1928 Cal. 709.

——Sch. II, Art. 13—"By reason of interest in immovable property" — Swatantarams—Not covered.

Article 13 relates only to payments of money due to a person in consideration of his interest in the property, and accordingly Swatantarams do not fall within its scope. 21 M.L.J. 819, Rel. on. 106 Ind. Cas. 5=39 M. L. T. 490=26 M. L. W. 676=1927 M.W.N. 826=A.I.R. 1928 Mad. 21=53 M.L.J. 727.

3. Cess and haq dues.

——Sch. II, Art. 13—Suit for share of desaigiri received by defendant.

A suit to recover plaintiff's share in *desaigiri* allowance received by the defendant, is not a suit to enforce payment of any *malikana, hakk* or cess. This is a simple suit for money had and received and does not fall under Art. 13 of Sch. II. A. I.R. 1945 Bom. 496=47 Bom.L.R. 360.

——Sch. II, Art. 13—Suit by proprietor for recovery of cesses from tenure-holder.

In view of the provisions of S. 41, Bengal Cess Act, the cesses being payable to the proprietor by reason of his interest in immovable property by tenure-holder or *raiyats*, a suit for cesses is excepted from the cognizance of the Small Cause Courts by virtue of Art. 13. A.I.R. 1945 Pat. 417=24 Pat. 307.

——Sch. II, Art. 13—Suit for poruppu and cesses.

A suit for *poruppu* and cesses by the *zemindar* against the tenants is cognizable by the Small Cause Court; *poruppu* not being a class of allowance or fee contemplated by Art. 13. A.I.R. 1932 Mad. 224=1932 M.W.N. 55=35 L.W. 144=137 Ind. Cas. 564 (1).

——Sch. II, Art. 13—Fees for occupation of municipal site—Not covered.

The Lucknow Municipality instead of collecting fees called Tahe Bazaree fees, which are levied by them under bye-laws, through their servants, gave a contract to a third person to collect such fees. The latter instituted a suit to recover certain of these fees in the Small Cause Court.

Held, that the suit was cognizable by a Small Cause Court as the fees are not of the nature of malikana or haq under Cl. (13), but they are fees payable for the privilege of doing certain acts. 106 Ind. Cas. 491=3 Luck. 282=1 L.C. 663=A.I.R. 1928 Oudh 99.

——Sch. II, Art. 13—Jodi and road cess—Not covered.

A claim for *jodi, russums* and road cess is similar to a claim for rent, which is not of the nature of the cesses mentioned in Cl. (13), and no second appeal lies if the value of the claim is less than Rs. 500. 90 Ind. Cas. 496=A. I. R. 1925 Mad. 1196=49 M.L.J. 185.

——Sch. II, Art. 13—Sums due under contract—Suit to recover—Small Cause.

The defendants entered into a contract with the Collector to pay him a sum of Rs. 210 for the right to collect weighment dues they only paid a portion of the amount due from them and a sum of Rs. 61-7-0 including interest was still due.

Held, the suit to recover the amount is not to enforce payment of cesses or dues from persons by whom these dues were payable but is one in respect of a right to recover a sum due under a contract entered into between the defendants and the plaintiff and is thus of a small cause nature. 73 Ind. Cas. 217=21 A.L.J. 312=4 L.R.A. (Civ.) 539=A.I.R. 1923 All. 420.

——Sch. II, Art. 13—Haq chaharum.

A suit for a *haq chaharum* is not cognizable by a Small Cause Court. 63 Ind. Cas. 292=43 All. 681=19 A.L.J. 719=A.I.R. 1921 All. 68.

——Sch. II, Art. 13—"Cesses and dues."

The cesses and dues referred to in Art. 13 are those which are claimed *qua* cesses or dues and apparently from the person liable to pay them. The article is not applicable to a case where the plaintiff claims it as money due ultimately to him from the landlord. (1904) A.W.N. 50=26 A. 358.

——Sch. II, Art. 13—Suit for cess—Small Cause nature — Second appeal — Rent Recovery Act, S. 4.

A suit for recovery of land-cess is not governed by Art. 13 and is therefore a suit of a small cause nature, and no second appeal will lie from a decree passed therein if the value is less than Rs. 500, Land cess can be included as rent under S. 4 of the Rent Recovery Act. (1902) 13 M.L.J. 211.

——Sch. II, Art. 13—Local or Village cess, suit for.

Art. 13 does not apply to a suit for local cess or village cess. 36 Mad. 126=10 M.L.T. 282 =(1912) M.W.N. 251=12 Ind. Cas. 17.

——Sch. II, Art. 13—Suit for land cess—If of small cause nature—Second Appeal.

Suit for the recovery of land cess is of a small cause nature and no second appeal lies from a decree in such a suit. 36 Mad. 18=10 M.L.T. 167 =(1911) 2 M.W.N. 139=21 M.L.J. 819=11 Ind. Cas. 760.

4. Interest in hereditary office.

——Sch. II, Art. 13—Suit by Archaka.

A Court of small causes is debarred from taking

cognizance of a suit by an archaka to receive the dues of his hereditary office under Provincial Small Cause Courts Act, Sch. II, Art. 13. (1915) M.W.N. 846=31 Ind. Cas. 206.

——Sch. II, Art. 13—Hereditary allowance—Suit for arrears of—Second appeal.

A suit for payment of the dues accruing to plaintiff by reason of his hereditary office as purveyor of ghee to a temple for a fixed annual allowance is not of a small cause nature and a second appeal lies therein even when the amount or value of the subject-matter does not exceed Rs. 500. 18 M. L.T. 163=(1915) M.W.N. 640=30 Ind. Cas. 351.

5. Interest in temple and religious endowments.

——Sch. II, Arts. 13 and 11—Suit by mortgagee claiming share of co-sharers in offerings of temple against thekadar.

All the *hisedars* of a village common were entitled to share in the offerings of a temple situated on *shamilat deh*. As there were a very large number of claimants to the offerings, the Government, in order to avoid disputes, had been farming the offerings to the highest bidder in each year with the consent of the co-sharers. The *thekadar* had to provide a surety. The plaintiffs as mortgages of the share of one of them sued for his share as the *thekadar* refused to pay the same to them:

Held, that the real contest was between a mortgagor and a mortgagee and the *thekadar* would get a valid discharge by making the payment to whichever person (whether the mortgagor or the mortgagee) was held by the Courts to be entitled to receive the offerings, and the suit did not fall within the purview of Art. 13 and that Art. 11 did not apply and hence no second appeal lay. A. I.R. 1936 Lah. 100=162 Ind. Cas. 692.

——Sch. II, Art. 13—Offerings at temple—Not covered.

A suit for the recovery of a share of offerings at a temple is not barred from the cognizance of a Court of Small Causes by Art. 13 which relates to claims against a person who is primarily liable to pay the cesses or due. 19 Ind. Cas. 628 and A.I.R. 1922 Lah. 451, Foll. 113 Ind. Cas. 750.

——Sch. II, Art. 13—C. P. Code (1908), S. 102—Endowment suit for income of.

A suit for participation in the income of an endowment, though a part of the regular income is cognizable by a Small Cause Court. Therefore no second appeal lies when the value of the suit is Rs. 100 or less. 27 A. 200, Foll. 18 M. 202, Diss. 19 Ind. Cas. 628 (All.).

——Sch. II, Arts. 13 and 18—A suit for temple emoluments secured to the plaintiff by a *Takid* by the author of the trust and registered on the same day as the trust deed forming the same transaction, is not cognizable by the Small Cause Court and so also a claim for rice allowance when sued along with a claim for such emoluments. (1911) 2 M.W.N. 589=13 Ind. Cas. 183.

——Sch. II, Art. 13—Shrine — Claim to share of offerings—Small Cause Court.

A Court of Small Causes has jurisdiction to try a suit to recover a share of the offerings of a shrine. 92 P.W.R. 1911=11 Ind. Cas. 410.

6. Interpretation.

——Sch. II, Art. 13—Suit by malguzar to recover value of manure—Nature of—Dues meaning of.

Plaintiff's *malguzar*, of a certain *mouza* sued to recover from the defendant Rs. 34 for wrongful removal of manure to which they set up title under a clause of the *wajib-ul-arz*:.

Held, that the suit was one of Small Cause nature and a second appeal will be barred under S. 102, C. P. Code (1908). This amount will not be dues within Art. 13. The dues contemplated by Art. 13 are payments to which a person is entitled as representing his interest in certain immovable properties and not because he possesses some interest in immoveable property. 11 N.L.R. 100=29 Ind. Cas. 815.

——Sch. II, Art. 13—Interpretation.

'Dues' includes even voluntary contributions made to a religious institution, in which its members are entitled to share: consequently a suit to recover a share of such voluntary contributions is not cognizable by a Small Cause Court. (1904) 28 M. 202.

7. Miscellaneous.

——Sch. II, Art. 13—Amount payable annually, suit for baluttar, nature of—Second appeal.

If money is payable annually to the plaintiff as *baluttar*, he must show that the suit comes within one of the articles of the first schedule to the Act. Otherwise it will be treated as a suit of Small Cause nature, and no second appeal, is competent. (1912) M.W.N. 537=16 Ind. Cas. 107.

——Sch. II, Art. 15.

Synopsis.

1. Alternative relief.
2. Scope.
3. Suit on award.
4. Suit for recovery and refund.
5. Suit for specific performance.

1. Alternative relief.

——Sch. II, Art. 15—Suit for balance of premium collected by agent—Relief prayed for against agent and lessee in the alternative.

Held, that the suit being for money due under a complete transaction of lease which had been given effect to and not for specific performance, it was cognizable by a Small Cause Court. A.I.R. 1933 All. 147=18 R.D. 403=150 Ind. Cas. 289.

——Sch. II, Art. 15—Alternative relief.

A suit for redemption of certain articles pawned by the plaintiff which defendant, and, in the alternative; for recovery of their value, is not a suit for specific performance and thus is not exempted under Art. 15, Sch. II, Provincial Small Cause Courts Act (9 of 1887). A.I.R. 1921 Oudh 124, Diss. from. 18 A.L.J. 354, Foll. 105 Ind. Cas. 896=4 O.W.N. 919=A.I.R. 1927 Oudh 476.

——Sch. II, Art. 15—Alternative relief—Specific performance or damages—Not of Small Cause nature.

In deciding the question whether a suit is of a

small cause nature or not, attention has to be paid to the nature of the suit, as it was presented to the first Court and not to the subsequent shape that it may have taken as a result of the findings of the lower Courts. Where the suit was for the specific performance of a contract or in the alternative for damages:

Held, that such a suit is not of a Small Cause nature. 82 Ind. Cas. 123=20 M. L. W. 321 =1924 M.W.N. 691=A. I. R. 1924 Mad. 844.

——Sch. II, Arts. 15 and 35 (ii)—Alternative relief.

A suit for the return of an article lent by the plaintiff to the defendant and for compensation in the alternatives is not cognizable by Small Cause Court. 56 Ind. Cas. 877 (Oudh).

2. Scope.

——Sch. II, Art. 15—Scope.

Art. 15 contemplates cases where rescission of a contract is the relief asked for and does not apply where what the plaintiff desires to obtain from the Court is not so much of the rescission of the contract as the recovery of the money advanced. A. I.R. 1936 Pat. 429=2 B.R. 469=17 P.L.T. 591 =162 Ind. Cas. 553.

3. Suit on award.

——Sch. II, Art. 15—Suit to enforce award — Jurisdiction of Small Cause Court.

A suit to enforce an award, namely, for recovery of money payable under an award, is not a suit for specific performance of a contract and hence is cognizable by a Small Cause Court. 45 B. 318, 4 R. 227 and 13 M. 344, Foll., A.I.R. 1950 Pat. 48=28 Pat. 569.

——Sch. II, Art. 15—Suit on award—Arts. 24—For money due—Not excepted.

A suit for recovery of money due on an award is not a suit for the specific performance of a contract. A.I.R. 1924 Mad. 485; 28 Bom. 1; A. I.R. 1921 Bom. 399 and A.I.R. 1926 Rang. 198, Foll. Nor is such a suit one for contesting an award, though incidentally the validity of the award may have to be considered. A.I.R. 1926 Rang. 198; 42 All. 169 and 6 S.L.R. 85, Foll. Such a suit is maintainable in the Court of Small Causes. 112 Ind. Cas. 11=23 S.L.R. 411=A.I.R. 1929 Sind 43.

——Sch. II, Art. 15—For money due — Is Small Cause nature.

When a reference has been made to arbitrators without the intervention of a Court and the arbitrators have passed thereon an award merely directing a party or parties to that award to pay a sum of money to the other party or parties, a suit to recover that money can be filed in a Court of Small Causes if the pecuniary conditions of S. 15 are satisfied. 13 Mad. 344 and 42 All. 169, Foll., 27 C. L. J. 486 Not foll. 97 Ind. Cas. 1032=4 Rang. 227=5 Bur. L. J. 133=A. I. R. 1926 Rang. 198.

——Sch. II, Art. 15—For money due—Nature.

A suit for enforcement of an award is in essence a suit for specific performance of a contract. But a suit for the recovery of money on an award can in no sense be treated as a suit to enforce a contract. A suit to enforce an award and a suit to enforce a contract are not the same. 33 Cal. 881 and 25 Ind. Cas. 826, Foll. 76 Ind. Cas. 842 =19 M.L.W. 210=1924 M.W.N. 46=A. I. R. 1924 Mad. 485=46 M.L.J. 51.

——Sch. II, Arts. 15 and 35 (f) and (g)—Award —Suit to enforce Small Cause Court, if can try.

A suit to enforce an award is not a suit for specific performance of a contract within Art. 15 of Sch. II of the Act and is not excluded from the cognizance of a Court of Small Causes. 3 U.B. R. (1918) 109=49 Ind. Cas. 62.

——Sch. II, Arts. 15 and 24—Award, suit to enforce—Small Cause Court, if can try.

A suit to enforce an award is in essence a suit for specific performance of a contract and is not therefore cognizable by a small cause Court; Arts. 15 and 24 of the 2nd schedule of the Act should be read together. 22 C.W.N. 66=27 C.L.J. 486 =42 Ind. Cas. 590.

4. Suit for recovery and refund.

——Sch. II, Art. 15—Suit for recovery of money.

Suit for recovery of money advanced which is neither a suit for contribution nor one in respect of payment made by the plaintiff of money to the defendant as a co-sharer does not fall within Art. 41 or Art. 15. A.I.R. 1936 Pat. 429=2 B.R. 469 =17 P.L.T. 591=162 Ind. Cas. 553.

——Sch. II, Art. 15 — Recovery of chattel—Not excepted.

An action for the delivery of a specific chattel, if the right to delivery flowed from contract, differs from an action for specific performance, since it is based on an allegation not that a contract to deliver has not been performed, but that the chattel is the property of the plaintiff and is being wrongfully detained by the defendant, and, therefore, such an action is not excepted from the jurisdiction of a Small Cause Court by virtue of Cl. (15). Such a suit is one for the return of a chattel from the bailee thereof on breach of the conditions on which the bailment took place. 110 Ind. Cas. 316 =A.I.R. 1928 Lah. 535.

——Sch. II, Art. 15—Suit for recovery is Small Cause.

A suit for the recovery of a certain weight of silver and of gold, which the plaintiff alleged that he had given to the defendant goldsmith to make ornaments out of, is one for recovery of money and is cognizable by Small Cause Court. 91 Ind. Cas. 108=A.I.R. 1926 Oudh 272.

——Sch. II, Art. 15—Recovery of price due—Not covered.

A suit by a vendor for recovery of the balance of purchase-money due from the vendee is not a suit for specific performance of a contract. 73 Ind. Cas. 125=A.I.R. 1924 Lah. 314.

——Sch. II, Art. 15—Suit for recovery of purchase money.

Suit by vendee for recovery of purchase money on the failure of a contract by vendor to convey land is of small cause nature. 83 Ind. Cas. 122 =20 M.L.W. 656=35 M.L.T. 116=A.I.R. 1924 Mad. 903.

——Sch. II, Art. 15—Recovery of specific property—Is excepted.

A suit to recover from pawnee a specific property pawned is one for specific performance and is not cognizable by Small Cause Court. 61 Ind. Cas. 803=8 O.L.J. 209=A.I.R. 1921 Oudh 124.

——Sch. II, Arts. 15 and 16—Mortgage money —Suit for recovery of balance of — Cognizability by Small Cause Court.

A suit by the mortgagor for the recovery of the balance of the mortgage-money not paid to him is a suit for the specific performance of so much of the agreement as has not already been performed. Such a suit is not cognizable by the Court of Small Causes. It is however open to the plaintiff in such circumstances to sue in the Small Cause Court for damages for breach of contract. 43 Cal. 59= 19 C.W.N. 1332=21 C.L.J. 532=29 Ind. Cas. 621.

——Sch. II, Art. 15—Claim to recover money on fulfilment of a stipulated condition.

A suit to recover money on the fulfilment of a condition on which it was stipulated to be paid is not a suit for the specific performance of a contract so as to except it from the jurisdiction of a Small Cause Court. 15 Ind. Cas. 352 (Mad.).

——Sch. II, Art. 15—Refund under contract—Is excepted.

A suit for the refund of money under the terms of a contract is undoubtedly a suit for the specific performance of the contract and is not cognizable by a Court of Small Causes. 19 M.L.J. 220, Foll. 118 Ind. Cas. 747=A.I.R. 1929 All. 62.

——Sch. II, Art. 15—Refund of purchase money —Not excepted.

The defendant agreed to sell to plaintiff property for a certain sum which he had received from plaintiff, after buying the property at an auction sale. The defendant brought it but by collusion with a third person put it out of his power to perform his part of the contract. The plaintiff sued for the refund of his money:

Held, that the suit was triable by Small Cause Court. 113 Ind. Cas. 747=A.I.R. 1929 All. 62.

——Sch. II, Art. 15—Refund of purchase money —C. P. Code, S. 313.

A suit brought by an execution purchaser of immoveable property under S. 315, for recovery of purchase money on the ground that the judgment-debtor had no saleable interest therein, is one cognizable by a Court of Small Causes. (1906) 8 Bom. L.R. 369.

5. Suit for specific performance.

——Sch. II, Art. 15—Suit for specific performance.

Where a vendor suing for recovery of the unpaid purchase money expresses his readiness to perform his part of the contract and execute a conveyance the suit is one for specific performance and not cognizable by the Small Cause Court. 35 M.L.J. 89=9 L.W. 19=(1918) M.W.N. 896=49 Ind. Cas. 385.

——Sch. II, Art. 15—Suit for specific performance.

When plaintiff promised to transfer *patta* in favour of the defendant on the latter agreeing to pay Rs. 60 to the plaintiff and when the defendant refused, plaintiff brought a suit on the Small Cause side, it was held that this was a suit for specific performance which ousted the jurisdictions of the Small Cause Court. 5 M.L.T. 296=19 M.L.J. 220=1 Ind. Cas. 552.

——Sch. II, Art. 15—Suit for specific performance —Suit for money due under a contract.

A suit for recovery of a sum of money due to the plaintiff under a contract whereby the defendant is alleged to have agreed to pay the money to plaintiff and take transfer of pattas in consideration therefor, on the allegation that the defendant though asked to pay the money and take the transfer did not do so, is a suit for specific performance of the contract within the meaning of Art. 15. (1908) 19 M.L.J. 220=5 M.L.T. 296.

——Sch. II, Arts. 18 and 35—Applicability.

A and *B* were appointed arbitrators to settle a dispute between the parties, and each side deposited a certain amount with *A* on the agreement that if either of the parties refused to abide by the award, he should forfeit the amount he had deposited. *A* made an award which the plaintiff refused to accept. *A* handed over the amount deposited by the plaintiff to the defendant. The plaintiff then sued to recover the amount from *A* on the ground that as there was no joint and common award, the plaintiff had not become liable to forfeit his deposit. *A* objected that the Judge of the Small Cause Court had no jurisdiction to entertain the suit:

Held (*i*) that Art. 18 did not apply and that the Small Cause Court had jurisdiction to entertain the suit:

(*ii*) that as the plaint did not contain any clear allegation of criminal misappropriation or breach of trust. Art. 35 did not bar the suit. A.I.R. 1933 All. 902=145 Ind. Cas. 970 (2).

——Sch. II, Art. 18—Applicability.

A suit to recover offerings for a shrine from a person wrongfully appropriating them falls under Art. 18 of the Second Schedule, as it relates to a trust; and so probably under Art. 35 (ii), so that it is an unclassed suit, and not a small cause, and a second appeal, therefore, lies. 92 Ind. Cas. 731=A.I.R. 1926 Lah. 228.

——Sch. II, Art. 18—Applicability — Jewels entrusted to goldsmith—Recovery — Not covered.

A suit for recovery of property entrusted by the owner to a goldsmith, for work to be done on it, is not a suit relating to a trust within Art. 18. 72 Ind. Cas. 212=4 U.B.R. 154=A.I.R. 1923 Rang. 129.

——Sch. II, Art. 18—Interpretation.

The word "trust" in the section bears the meaning it has under the Indian Trusts Act. 72 Ind. Cas. 212=4 U.B.R. 154=A. I. R. 1923 Rang. 129.

——Sch. II, Art. 18—Pension, Suit by schoolmaster for—Jurisdiction.

A Small Cause Court has no jurisdiction to entertain a suit for pension by a Schoolmaster as its cognisance is barred under Sch. II, Art. 18 of the Act. 25 Ind. Cas. 41 (Mad.).

——Sch. II, Art. 18—Provision in partition deed for marriage of daughter — "Suit relating to a trust."

A suit for the enforcement of a provision in a partition deed for the performance of the marriage of a daughter is a "suit relating a trust" within Art. 18 of the Act. 18 Mad. 252, Foll. 38 Mad. 788=24 Ind. Cas. 943.

——Sch. II, Art. 18—Suit by trustee—Claim on agreement by defendant to pay a specified sum.

A suit by a trustee for the recovery of a specified amount agreed to be paid to him by the defendant *for being used as a trust*, is not a suit relating to trust within Art. 18. 15 Ind. Cas. 273 (Mad.).

——Sch. II, Art. 18—Trust — Suit for subscription due from.

A suit by a company against its members for subscription due in which members are described as trustees is not "a suit relating to a trust" and hence is cognizable by Small Cause Court. 33 Mad. 494=20 M.L.J. 146=8 M.L.T. 67=(1910) M.W.N. 503=5 Ind. Cas. 912.

——Sch. II, Art. 18 — Trustee appointed under compromise — Suit against—Excepted.

Where a composition is effected between a debtor and his creditors, and a trustee is appointed to collect the outstandings and the trustee fails to carry out the terms of the deed, the only remedy of the creditors against the trustee is to file a suit against him for enforcing the trust. But such a suit is barred by Art. 18 from the cognizance of a Small Cause Court. A suit by the creditors on the original cause of action is incompetent against the trustee. 114 Ind. Cas. 109=A.I.R. 1929 Sind 49.

——Sch. II, Art. 18—Trustees of temple—Suit to recover from—Not covered.

The fact that it may be necessary to determine in a suit whether the trust property is liable cannot have the effect of making a suit one relating to a trust. A suit for recovering money from trustees of temple personally and from temple funds is not one relating to a trust within Art. 18, Sch. II and therefore is one of Small Cause nature. 82 Ind. Cas. 1006=A.I.R. 1925 Mad. 374.

——Sch. II, Art. 18—Trust — Legal Practitioner —Unexpended moneys, suit to recover.

Suit to recover unexpended moneys, in the hands of a legal practitioner to whom monies were paid for institution of proceedings is not a suit relating to trust and is, therefore, cognizable by a Court of Small Causes. (1902) A.W.N. 15=24 A. 208.

——Sch. II, Art. 18—Suit for money lent to one trustee from the trust fund.

A suit to recover money lent to a trustee personally out of the funds of the trust is not one "relating to a trust" within the meaning of Art. 18, and is consequently cognizable by a Small Cause Court. (1902) 26 M. 200.

——Sch. II, Art. 18—Suit for salary provided in trust-deed by officer appointed under trust deed.

A suit for salary due under a trust-deed by the Editor of newspaper appointed as such under the same trust-deed is a suit to enforce the performance of trust and is therefore not cognizable by a Court of Small Causes. (1902) 13 M.L.J. 22=26 M. 368.

——Sch. II, Art. 19—Applicability — Test for—Suit for refund of tax on allegation that it was illegal.

If it appears from the nature of the suit as evidenced by the prayer that the main relief asked for is one for a declaration, then Art. 19 would come into operation and preclude the suit from being tried by the Small Cause Court. Where the plaintiff asserts in the plaint that the recovery of the license fees by the Municipality from him was illegal, that raises an issue upon the decision of which would depend his right for refund of the money recovered from him. The declaration that the tax was *ultra vires* which is asked for is only a subsidiary matter and not the main relief. In fact, even if the relief of declaration is struck out from the plaint, the plaintiff will not lose his right to get a decree for refund of the amount which was illegally recovered from him, if his plea succeeds. That is the test which ought to be applied in such a case and the Small Cause Court has jurisdiction to try such a suit. A. I. R. 1938 Nag. 398=175 Ind. Cas. 691.

——Sch. II, Art. 19—Applicability.

Plaintiff instituted a suit for a declaration that the assessment in respect of his holding in excess of Rs. 18-0-0 per quarter was *ultra vires* and for the recovery of Rs. 54 which had been realized from him by the Municipality which was not entitled to recover anything more than Rs. 18-0-0 per quarter:

Held, that the suit was of a declaratory nature and was covered by Art. 19, and that an appeal could lie. A. I. R. 1937 Pat. 25=3 B.R. 221 (2)=166 Ind. Cas. 743.

——Sch. II, Art. 19—Declaration — Incidental prayer for.

An incidental declaration prefatory to the return of money does not except a suit from the cognizance of a Court of Small Causes. Consequently, a suit for a sum of money below Rs. 500 alleged to have been unlawfully collected from the plaintiff as tax is of a Small Cause nature and no second appeal lies for such a suit. A.I.R. 1932 Mad. 226=35 L.W. 70=1932 M.W.N. 142=139 Ind. Cas. 620.

——Sch. II, Art. 19—Declaration, prayer for.

The mere addition of a prayer for a declaration cannot prevent a suit from being of the nature cognizable by a Court of Small Causes provided it is a suit of that nature. 24 All. 157, Foll. A.I. R. 1927 All. 760=100 Ind. Cas. 315.

——Sch. II, Art. 19—Declaration of right to Insurance policy, suit for.

A suit for declaration of plaintiffs right to an assignment of an insurance policy by her husband is not cognizable by a Small Cause Court. 4 L.W. 389=38 Ind. Cas. 248.

——Sch. II, Art. 19—Declaration — Necessary relief—Effect.

When a plaintiff cannot obtain all the reliefs he seeks, without asking for a declaration the prayer for declaration takes the suit away from the province of Small Cause Court. 8 M.L.T. 199=7 Ind. Cas. 797.

——Sch. II, Art. 19—Declaratory suit, what is.

L died leaving certain ornaments of the value of Rs. 280 claimed by plaintiffs as heirs. Owing to

disputes, the ornaments were handed over by the police to the defendant No. 3 as stake-holder. When the plaintiffs claimed jewels from the defendant No. 3 the latter replied that he would hand over the jewels to them if they satisfied him as to their title thereto. The plaintiffs filed a suit for the recovery of the jewels. Defendants 1, 2 and 4 were included as *pro forma* defendants.

Held, that the suit was of a declaratory nature and cognizable by a Civil Court on the regular side. 80 Ind. Cas. 409=A.I.R. 1925 All. 40.

——Sch. II, Arts. 20 and 35 (j)—Wrongful attachment of crops—Objection to attachment struck off without enquiry—Suit for compensation.

Where certain crops were wrongfully attached in execution of a decree and the owner of the crops made objection, but it was struck off without any adjudication and the objector then filed a suit in the Small Causes Court for recovery of the crops.

Held, that the Small Cause Court could not entertain the suit and that though the suit was limited to a claim for the price or value of the crops which were handed to the decree-holder by the Court executing the decree, yet the suit was a suit for illegal attachment within Art. 35 (*j*). Where an objection to an attachment has been disallowed without adjudication, Art. 20 does not apply to bar a suit for recovery of the price of the property attached. 8 A.L.J. 187=9 Ind. Cas. 537.

——Sch. II, Art. 21—Suit to set aside an auction sale and for refund of the purchase money.

A suit to set aside an auction sale and for refund of purchase money on the ground that the judgment-debtor had no saleable interest in property sold is within Art. 21, if the judgment-debtor had some interest however small, in the property. (1900) 28 C. 235.

——Sch. II, Art. 23—Suit to recover money wrongly paid to rival creditor.

If there is a dispute as regards the paying out of assets realised by a Court which is not as between judgment-debtor and creditor and therefore falling under S. 47, C.P. Code and one of the creditors is dissatisfied with the order passed by the Court and the money is in consequence paid out to a rival creditor he is at liberty to file a suit for its recovery on the basis that it is money had and received without necessarily getting the order refusing payment of the money to himself set aide for the orders of the executing Court are merely summary decisions passed without a final adjudication on the merits of the claims of the rival parties. 128 Ind. Cas. 834=8 Rang. 485 =A.I.R. 1931 Rang. 56.

——Sch. II, Art. 24—Suit for money on award—Is small cause.

Where the award was admitted and the plaintiff only sought to recover what was awarded to him,

Held, that it was not a suit to contest an award and the Small Cause Court had jurisdiction. 91 Ind. Cas. 1032=49 Bom. 693=A. I. R. 1925 Bom. 519.

——Sch. II, Art. 24—Award — Suit on Small Cause Court.

A suit to recover money due under an award made out of Court between the parties, is not barred by Art. 24 of the Provincial Small Cause Court Act. 42 All. 169=18 A.L.J. 70=58 Ind. Cas. 546.

——Sch. II, Art. 24—Award — Suit on—Claim for compensation submitted to arbitration—Merger of claim in award.

If a claim for compensation has been submitted to arbitration and an award made, the claim is merged in the award and the payment of money directed by the award is a simple claim for money cognizable by a Court of Small Causes. The fact that the defendant contests the award is immaterial. 3 U.B.R. (1918) 109=49 Ind. Cas. 62.

——Sch. II, Art. 24—Award — Suit to enforce—Jurisdiction.

A suit to enforce an award is not a suit on contract and is cognizable by a Small Cause Court. The jurisdiction of the Small Cause Court is excluded only in cases excepted in Sch. II of the Act. 33 C. 881; 13 M. 344, Foll. 25 Ind. Cas. 826 (Cal.).

——Sch. II, Art. 24—Suit for money due on an award.

Although under Art. 24 Act the court has no jurisdiction to try a suit contesting an award, yet it can adjudicate on the validity of an award when the suit is to recover money due on the award. The court has jurisdiction to try questions of title that arise incidentally. 6 S.L.R. 85=16 Ind. Cas. 868.

——Sch. II, Art. 26—Suit for balance of decree amount.

Where in execution of a decree certain property is sold subject to a mortgage and out of the sale proceeds the claims of the mortgagee are satisfied first and the surplus is paid to the attaching decree-holder who is left short by Rs. 208, he is at liberty to file a suit against the mortgagee for the recovery of the sum of Rs. 208 on the basis that is "money had and received" without necessarily getting the order refusing payment to him set aside, and such suit being triable by a Court of Small Causes, second appeal is barred under S. 102, C. P. Code. 128 Ind. Cas. 834=8 Rang. 485=A.I.R. 1931 Rang. 56.

——Sch. II, Art. 28—Applicability.

Clause 28, Sch. II contemplates a suit between rival claimants when the relief claimed is to recover a share of the estate and not only an item of the estate as against a third party.

Where plaintiffs claimed as heirs certain jewels worth Rs. 280 left by a deceased person:

Held, that Cl. 28, second schedule, did not apply. 80 Ind. Cas. 409=A.I.R. 1925 All. 40.

——Sch. II, Art. 28—Construction.

On a proper construction of the relevant words of Art. 28, there must be a claim made by an heir as such, which claim is resisted by another person advancing a similar claim; otherwise, the article does not apply.

Where plaintiff sues defendant for the recovery of certain jewels as an heir of his deceased wife alleging that the defendant had wrongfully taken possession of them, and the defendant does not dispute that the plaintiff has succeeded to his wife's property, the case raises no question of disputed succesion and is triable by a Small Cause Court. A.I.R. 1938 Mad. 864= 1938 M.W.N. 833=48 L.W. 290=(1938) 2 M.L. J. 402=I.L.R. (1939) Mad. 78=178 Ind. Cas. 503.

[Overruling A.I.R. 1933 Mad. 346=142 Ind. Cas. 613 (1).]

——Sch. II, Art. 28—Movable property of deceased—Suit by him for denial of plaintiff's title by defendant, if ousts jurisdiction.

A Small Cause Court has jurisdiction to entertain a suit by the heir of a deceased to recover from the defendant certain movable property of the deceased detained by him. The denial of the plaintiff's title by the defendant does not oust the jurisdiction. 19 C.W.N. 614=27 Ind. Cas. 773.

——Sch. II, Art. 28—Suit by executor.

A Court of Small Causes can take cognisance of suit by an executor or administrator for possession of the deceased's moveable property. 11 W.R. 93; 12 B. 573, Fol. 9 Bur.L.T. 201=37 Ind. Cas. 75.

——Sch. II, Art. 28—Suit between representatives.

Held, that the suit being clearly one for a share in property of the father who died intestate, it was excepted from cognizance of Small Cause Courts by Art. 28, Sch. 2. A.I.R. 1934 All. 453=15 R.D. 351=149 Ind. Cas. 323.

——Sch. II, Art. 28—Suit for the return of jewels presented to bride.

A claim for the return of jewels presented to the plaintiff's daughter in her marriage made after the death of the bride and the bridegroom does not fall within Art. 28 of the Act. 37 Mad. 538=23 M.L.J. 282=12 M.L.T. 308=(1912) M.W.N. 887=16 Ind. Cas. 542.

——Sch. II, Art. 28—Suit involving questions of heirship—Excepted.

Suit to recover the price of jewels belonging to plaintiff's deceased daughter which the plaintiff claims as her heir on the ground that the marriage of the deceased was in the Asura form lies on the original side where the subject-matter of the suit forms the whole of the property of the deceased. 27 All. 622 and 11 W.R. 93, Diss. from. 91 Ind. Cas. 561=22 M.L.W. 462=A.I.R. 1926 Mad. 37 =49 M.L.J. 554.

——Sch. II, Art. 28—Suit involving question of heirship.

The plaintiff sued as the heir of his wife. The defendant put forward a will and he relied upon the will for defeating the plaintiff's claim to the property.

Held, that the suit was not cognizable by a Small Cause Court. 87 Ind. Cas. 354=A.I.R. 1925 Mad. 111.

——Sch. II, Art. 28—Suit involving question of heirship.

Where the property claimed belonged to a deceased woman and the claim was with regard to her heirship.

Held, that having regard to Art. 28, it is not a case triable by a Small Cause Court. 70 Ind. Cas. 316=A.I.R. 1924 Cal. 536.

——Sch. II, Art. 28—Suit to recover movable property by right of inheritance.

Held, that a suit to recover moveable property claimed by right of inheritance and alleged to be wrongfully retained by the defendant is a suit within the jurisdiction of a Court of Small Causes and is not excluded by Art. 28. 11 L.R. 93 and 7 C. L. R. 71, foll. (1905) A.W.N. 134=2 A.L.J. 388=27 A. 622.

——Sch. II, Art. 28—What determines jurisdiction.

The question of jurisdiction depends entirely on the allegations made in the plaint and not upon the position of the defendant; it is not material as to whether the defendant is a rival claimant to the estate or merely a person in wrongful possession of the estate. It is the nature of the suit and not the position of the defendant which must govern the question and where the suit is one for the share for the property of the deceased who died intestate, it is not triable by the Small Cause Judge. A.I.R. 1938 Pesh. 79=178 Ind. Cas. 31.

——Sch. II, Art. 29 (c)—Balance struck—Agreement to pay—Whether affords fresh cause of action.

The proviso to Art. 29 (c) contemplates that where a balance has been struck by the parties or their agents a suit can lie on such balance in the Court of Small Causes. Where, besides a balance being struck, there is a definite agreement by the defendant to pay the sum found due, this agreement affords a fresh cause of action to the plaintiff and a suit based on it for recovery of money agreed to be paid is not a suit within the meaning of cl. (a), (b) or (c) of Art. 29. A.I.R. 1933 Sind 324=27 S.L.R. 308=147 Ind. Cas. 432.

——Sch. II, Art. 29—Suit for accounts—What is.

Suit for accounts is a suit for an indeterminate amount which can only be arrived at by taking the regular account between the parties. Where the plaintiff sues for a definite sum and shows clearly how it is to be ascertained, it is not a suit for accounts. A.I.R. 1933 Nag. 82=29 N.L.R. 115= 147 Ind. Cas. 1103.

——Sch. II, Art. 29—Suit for accounts, what is.

A suit for recovery of specific sum of money does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. 26 Cal. 254; 27 C.L.J. 96 and 28 Mad. 394, Foll. 106 Ind. Cas. 843=46 C.L.J. 561=A.I.R. 1928 Cal. 127.

——Sch. II, Art. 29—Partnership—Suit for dissolution and account—Jurisdiction—Revision.

A suit for accounts of a partnership alleging dissolution of the partnership and for an alternative relief, (*i.e.*) to declare its dissolution, is triable in the regular court and not by a Small Cause Court. 13 A.L.J. 58=27 Ind. Cas. 629.

——Sch. II, Art. 29—Settlement of accounts—Suit on—Not excepted.

A suit based on a pro-note executed by the defendant, promising to pay amount found due to plaintiff on settlement of partnership accounts is cognizable by a Small Cause Court. 86 Ind. Cas. 482 =A.I.R. 1925 Oudh 560.

——Sch. II, Art. 29 (c)—Suit for definite sum —Loan to partnership.

A suit for recovery of Rs. 40 advanced by plaintiff to a partnership business and Rs. 9 being the profits arising out of the money so advanced is cognizable by a Small Cause Court not being one for the balance of partnership accounts. 51 Ind. Cas. 435 (Cal.).

——Sch. II, Art. 29—Suit on a book entry after settling accounts of partnership.

A suit on a book entry after settling accounts of a dissolved partnership is cognizable by the Small Cause Court. 140 P.W.R. 1911=195 P.L.R. 1911=11 Ind. Cas. 15.

——Sch. II, Arts. 30 and 31—Applicability—Suit for reimbursement by Hindu widow against kartha of the family of amount spent by her for the marriage of her daughter—Cognizability by a Court of Small Causes.

A suit by the widow of a member of a joint Hindu family against the kartha of the family for reimbursement by the latter in respect of amounts spent by her on the marriage of her daughter, the cost of which is an obligation to be borne by the family and to be discharged by the kartha out of the income from the family properey, is not a suit for an account and is not excluded from the jurisdiction of a Court of Small Causes. Such a suit cannot possibly be included in either Art. 30 or 31 of the Provincial Small Cause Courts Act. 1947 M. W. N. 428=60 L.W. 497=A.I.R. 1947 Mad. 438=(1947) 2 M.L.J. 151.

——Sch. II, Art. 30—Suit for accounts—What is.

Suit for accounts is a suit for an indeterminate amount which can only be arrived at by taking the regular account between the parties. Where the plaintiff sues for a definite sum and shows clearly how it is to be ascertained, it is not a suit for accounts. A.I.R. 1933 Nag. 82=29 N.L.R. 115=147 Ind. Cas. 1103.

——Sch. II, Art. 31.

Synopsis.

1. Applicability and scope.
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1. Applicability and scope.

——Sch. II, Arts. 31, 8—Applicability.

Held, on facts that suit was not for rent and that Art. 8 or 31 did not apply. A.I.R. 1936 Pat. 406=2 B.R. 315=161 Ind. Cas. 102.

——Sch. II, Art. 31—Applicability and scope—Recovery of money wrongfully received.

Unless a decree for accounts is asked for, a suit for money against a person who is alleged to have wrongfully realized moneys due to the plaintiff does not come within the article. 107 Ind. Cas. 722=32 C.W.N. 400=A.I.R. 1928 Cal. 424.

——Sch. II, Art. 31—Applicability and scope.

A suit for an accound within Art. 31 does not mean every case in which accounts have to be looked into in order to ascertain the amount due. It is difficult to lay down a general rule whether a suit comes within Art. 31 or lies outside the scope of that article and therefore whether a suit is for an account within Art. 31, must be considered on its own merits. A suit is not necessarily a suit for an account simply because a claim with regard to certain specified items omitted from an account must be examined. 105 Ind. Cas. 848=A. I. R. 1928 Sind 66.

——Sch. II, Art. 31—Applicability and scope.

The forms of suit described in Art. 31 are included as being of the nature of suits for an account. 23 Cal. 884 (F.B.), Foll. 104 Ind. Cas. 818=5 Rang. 388=A.I.R. 1927 Rang. 262.

——Sch. II, Art. 31—Applicability and scope—Loss caused by wrongful act.

A suit to recover the loss caused to plaintiff by a wrongful act of defendant in respect of immovable property is not a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant, nor as it a suit for accounts, and it is therefore not excluded from the jurisdiction of the Small Cause Court, by Art. 31. 40 All. 142, Diss. from. 88 Ind. Cas. 876=21 N.L.R. 18=A.I.R. 1925 Nag. 327.

——Sch. II, Art. 31—Applicability and scope—Profits of mortgaged land—Suit for—Value of trees cut down—Small causes.

A suit by a mortgagor after redemption, to recover from the mortgagee the profits of the mortgaged property and the value of certain trees alleged to have been cut down by the defendant, is exempted from the cognisance of a Small Cause Court by Art. 31. 54 Ind. Cas. 117 (All.).

——Sch. II, Art. 31—Applicability of.

Art. 31 of Sch. 2 applies only to cases where the relationship is such that one of the parties is bound to render account to the other. So where the plaintiff claimed Rs. 500 from a certain person without alleging that any other defendant was bound, held that the suit was of a Small Cause nature. 11 M.L.T. 13=(1912) M.W.N. 36=13 Ind. Cas. 159.

——Sch. II, Art. 31—Applicability and scope—Trespass—Suit for damages—Small Cause nature.

A Small Cause Court has jurisdiction to entertain a suit for damages for trespass resulting in the carrying away of standing crops as land trespassed, where such damages are capable of being measured by the landholder's share of the standing crops. 35 Mad. 726=21 M.L.J. 442=(1911) 2 M.W.N. 189=11 Ind. Cas. 31.

——Sch. II, Art. 31—Applicability and scope—A suit to recover profits of immovable property.

Art. 31 does not cover a suit to recover money due to plaintiff under a conveyance of immoveable property executed in favour of defendant which is therefore cognizable in Small Cause Court. 12 C. L. J. 599=7 Ind. Cas. 487.

——Sch. II, Art. 31—Applicability and scope—Suit for rent from tenant or in the alternative from the divided co-parcener who received it.

A suit for rent recovered from the tenants and in the alternative for recovery of the amount from the divided co-parcener who might have received it is a suit of small cause nature. (1905) 29 M. 184.

——Sch. II, Arts. 31, 38—Applicability and scope—Suit by Hindu widow to recover income of property assigned by way of maintenance.

Where certain immoveable property was assigned for her maintenance to a Hindu widow by the surviving members of the joine Hindu family to which the widow's late husband had belonged:

Held, that a suit for the recovery of income of such property, then in the possession of the assignors, was not cognizable by a Small Cause Court. (1904) A.W.N. 13=26 A. 321.

2. Cosharers.

——Sch. II, Art. 31—Co-sharers—Joint garden—Fruits sold by one and proceeds appropriated by one—Suit by another for share—Jurisdiction of Small Cause Court.

Art. 31 of the Provincial Small Cause Courts Act has no application to a suit by one co-sharer landlord against another for his share of the proceeds of the fruits of trees in a garden jointly owned by both, which were sold by the defendant co-sharer who appropriated the proceeds himself. Such a suit is not exempted from the cognizance of the Small Cause Court. 25 Pat. 480=13 B.R. 485=231 Ind. Cas. 64=A.I.R. 1947 Pat. 202.

——Sch. II, Art. 31—Cosharer.

Suit by plaintiff co-owner of certain *khudkasht* field against defendant co-owner for his share of profits—Small Cause Court has jurisdiction to try the suit. 1940 N.L.J. 22.

——Sch. II, Art. 31—Cosharers.

Two of three co-sharers transferring their right to recover rent to plaintiff—Suit by plaintiff to recover from the third co-sharer rent realised by him on behalf of others:

Held, suit was neither for rent under Art. 8 nor one under Art. 31, as plaintiff did not claim immovable property in dispute and hence, suit was cognisable by Small Cause Court. A.I.R. 1936 Lah. 377=38 P.L.R. 1084=162 Ind. Cas. 389 (1).

——Sch. II, Art. 31—Suit by joint tenant to recover his proportionate share of rent of tenancy.

A suit by a joint tenant to recover his proportionate share of the rent of a tenancy, both the tenants and the joint owner who was said to have collected the whole rent being impleaded, is not barred by Art. 31. A.I.R. 1935 Lah. 50 (1)=152 Ind. Cas. 570.

——Sch. II, Art. 31—Co-sharers—Suit for share of profits on immovable property.

A suit for the plaintiff's share of the profits of an occupancy-holding, on the allegation that the defendants were in possession of the holding, that the plaintiff was a joint occupancy tenant with them and was entitled to a half share in the profits for the years in suit, is cognizable in the Revenue Court inasmuch as if the suit is to be entertained by the Small Cause Court, the first issue that will have to be decided is whether the plaintiff is a joint tenant with the defendants in the holding and the Civil Court has no authority under S. 273, Agra Tenancy Act to refer an issue of this kind between co-tenants to the Revenue Court. A.I.R. 1934 All. 404=18 R.D. 102=3 A.W.R. 350=148 Ind. Cas. 640.

——Sch. II, Art. 31—Cosharers.

A suit by one of the several joint landlords for recovery of sums which may have been collected by his co-sharers from the tenants in excess of their legitimate share is not cognizable by a Court of Small Causes being essentially a suit for accounts and recovery of the profits of immovable property belonging to the plaintiffs which has been wrongfully received by the defendant in view of the provisions of Art. 31. A.I.R. 1934 Pat. 2 (3)=146 Ind. Cas. 793.

——Sch. II, Art. 31—Suit by cosharers inter se—Not covered.

The possession of one co-sharer is deemed to be on behalf of all in law and neither such possession nor receipt of profits can be considered wrongful. Failure of the co-sharers to give other co-sharers their share of the profits is, however, wrongful. Art. 31, therefore, does not apply to suits by certain co-sharers for recovery of the value of their share of the produce realized by other co-sharers in possession of their joint land, there being no "wrongful" receipt of profits. Such a suit if its value for jurisdiction is less than Rs. 500 is a suit of a small cause nature and no second appeal from it is competent. 31 P.L.R. 699=129 Ind. Cas. 124=A.I.R. 1930 Lah. 613 (1).

——Sch. II, Art. 31—Cosharer—Suit for share of rent.

A suit to recover a share of rent realised by a joint co-owner, is a suit for money had and received and is in the nature of a Small Cause suit. 40 All. 666=16 A.L.J. 679=46 Ind. Cas. 627.

——Sch. II, Art. 31—Suit for rent by one co-sharer landlord.

A Small Cause Court cannot entertain a suit by one of several joint landlords for recovery of sums collected by other co-sharers from a tenant in excess of their shares. 37 Ind. Cas. 671 (Cal.).

——Sch. II, Art. 31—Produce received by deft. suit for share of co-sharers.

A suit for a share of the value of produce realised by Defendants from property common to both plaintiff is not excepted by Art. 31 and is thus cognizable by Small Cause Court. (1910) M.W.N. 399=8 M.L.T. 281=7 Ind. Cas. 390.

3. Damages for breach of covenant.

——Sch. II, Art. 31—Damages for breach of covenant.

The Small Cause Court can take cognizance of a suit for damages for breach of a covenant. 70 Ind. Cas. 153=15 M.L.W. 35=A.I.R. 1922 Mad. 300.

——Sch. II, Art. 31—Suit by landlord for breach of covenant in lease—Suit of small cause nature. See S. 16. 12 M.L.J. 264=26 M. 176.

4. Damages for use and occupation.

——Sch. II, Art. 31—Suit for damages for use and occupation.

A suit by the landlord against the tenant who took the land on lease for one year, but on the expiry of the period continued to be in possession for another year, refusing to surrender it claiming damages for use and occupation, is not excluded from the jurisdiction of the Small Cause Court by Art. 31. A. I. R. 1935 Mad. 307=68 M.L.J. 196=1935 M. W. N. 195=41 L.W. 426=157 Ind. Cas. 246.

——Sch. II, Art. 31—Declaration and damages for use and occupation.

Where the plaintiff sued for a declaration of his title to certain articles hired and also claimed damages for use and occupation,

Held, that the suit cannot be tried by the Small Cause Court. 1930 M.W.N. 654.

——Sch. II, Art. 31—Damages for use of land —Not excluded.

A suit by a municipality for damages for the use and occupation of certain land is not one which can properly be described as a suit for profits derived from immovable property but is a suit against a trespasser for damages for the use and occupation of land and as such is not excluded from the jurisdiction of the Small Cause Court. 106 Ind. Cas. 495=A.I.R. 1928 Nag. 118.

——Sch. II, Art. 31—Damages for use and occupation.

A claim founded on an allegation of permissive occupation is a claim for damages for use and occupation and is a suit of a small cause nature. 94 Ind. Cas. 77=23 M.L.W. 518=A.I.R. 1926 Mad. 622.

——Sch. II, Art. 31—Damages for use and occupation—If question of title could not be avoided —Suit is excepted.

The plaintiff had leased the land to the defendant's son. After expiration of the term of the lease the defendant's son continued as a tenant holding over. After him (the defendant) his mother continued to cultivate without any notice to quit or any protest from the plaintiff. The plaintiff sued for damages for use and occupation. In her written statement the defendant definitely challenged the plaintiff's title and set up title in herself. The defendant also pleaded in the alternative payment of maktha cist to the plaintiff yearly but it was not the plaintiff's case that there was any kabuliyat between himself and defendant on which such maktha became payable.

Held, that as there was no contractual relationship between the plaintiff and the defendants on the footing of which the suit was based the question of title could not be avoided. Plaintiff had first of all to establish that he was the lawful owner of the land before he could sue for damages for use and occupation. The case was one in which the defendant had received *mesne profits* under a claim of title and one who claimed to be the rightful owner was seeking to recover the same after having an account taken of the *mesne profits*. Hence the suit was not cognizable by the Small Cause Court. 25 Mad. 103 (F.B.), Foll. 87 Ind. Cas. 695=A.I.R. 1925 Mad. 884=48 M.L.J. 685.

——Sch. II, Art. 31 and S. 23—Mortgagee keeping mortgagor out of possession after mortgage amount was paid—Suit for damages.

A suit for damages on the allegation that the plaintiff was kept out of possession of the property for a year from the date of depositing the amount under a decree for redemption is not cognisable under the article by the Small Cause Court. 11 A.L.J. 238=19 Ind. Cas. 427.

5. Interpretation.

——Sch. II, Art. 31—"Wrongfully received"—Meaning of—Annulment of sale under S. 53, Provincial Insolvency Act, 1920—Sums received by vendee, whether wrongfully received within meaning of Art. 31.

The effect of an annulment of a sale under S. 53, Provincial Insolvency Act, is to hold that no transaction had taken place at all, and this being so, any sum that the vendee receives by virtue of that transaction is received by him wrongfully within the meaning of Art. 31, Sch. 2, Provincial Small Cause Courts Act. A.I.R. 1938 Lah. 219=40 P.L.R. 196=I.L.R. (1938) Lah. 341=177 Ind. Cas. 408.

——Sch. II, Art. 31—Interpretation.

The expression "belonging to the plaintiff," as used in Art. 31 applies to immovable property and not to profits. A.I.R. 1936 Lah. 377=38 P.L.R. 1084=162 Ind. Cas. 389 (1).

——Sch. II, Art. 31—Interpretation—"Immovable property".

A suit to recover the usufruct of growing trees is not a suit of a Small Cause nature, inasmuch as trees 'standing on land' are immovable property and the usufruct of growing trees is also immovable property. A.I.R. 1932 Mad. 554=140 Ind. Cas. 92.

6. Mesne profits.

——Sch. II, Art. 31—Suit for mesne profits even though sum ascertained.

A suit for recovery of *mesne profits* even though for a sum ascertained, comes within the purview of Art. 31 Sch. 2, and is excepted from cognizance of Small Cause Court. A.I.R. 1938 Lah. 219=40 P.L.R. 196=I.L.R. (1938) Lah. 341=177 Ind. Cas. 408.

——Sch. II, Art. 31—Suit for mesne profits.

A suit for *mesne profits* in which the plaintiff alleged that defendant had actually received some profits is one calling for an account and falls within Art. 31, and so, is not cognizable by a Small Cause Court. A.I.R. 1936 Nag. 42=31 N.L.R. 180=156 Ind. Cas. 68.

——Sch. II, Art. 31—Claim for mesne profits.

Although suits for *mesne profits* are in the nature of suits for damages, as such suits often involve the taking of very complicated accounts, it was not the intention of the Legislature that such suits should be cognizable by a Court of Small Causes.

The defendant had agreed to sell some fields to the plaintiff but having failed to execute a sale deed, a suit was filed in which a decree was passed and in pursuance of it and in compliance with the original agreement of August 17, 1928, the defendant, on October 24, 1931, executed a sale-deed and the plaintiff was put in possession in December, 1931; early in 1932, the plaintiff brought a suit for *mesne profits* for the years 1929-30, 1930-31 and 1931-32:

Held, that the plaintiff did not sue for damages but did sue for *mesne profits* and that the suit was one falling under Art. 31. A second appeal, therefore, was maintainable. (1935) 158 Ind. Cas. 1119 =18 N.L.J. 76.

——Sch. II, Art. 31—Suit for mesne profits.

A suit for *mesne profits* is not cognizable by a Court of Small Causes if the plaintiff, by alleging that the defendant has actually received profits, asks for an account of the profits received.

Quaere.—Whether or not a suit for *mesne profits* in which there is no allegation that the defendant received any profits is triable by a Small Cause Court. A.I.R. 1933 Nag. 87=29 N.L.R. 61=141 Ind. Cas. 825 (2).

——Sch. II, Art. 31—Suit for mesne profits—Not of small cause nature.

A suit for *mesne profits* is not of a nature cognizable by a Small Cause Court under the Provincial Small Cause Courts Act. 25 Mad. 103 and 40 All.

142, Foll. 105 Ind. Cas. 689=6 Rang. 60=A. I. R. 1928 Rang. 102 (F.B.).

——Sch. II, Art. 31—Mesne profits—Suit for.

A suit for *mesne profits* is not cognizable by a Small Cause Court. 23 Cal. 884 (F.B.), Diss. from. 25 Bom. 85; 25 Mad. 103 and 34 Mad. 802, Foll. 66 Ind. Cas. 368=4 U.B.R. 83=A.I.R. 1921 U.B. 8.

——Sch. II, Art. 31—Mesne profits—Suit for.

A suit for recovery of the *mesne profits* from which the plaintiff has been wrongfully dispossessed is not a suit of a Small Cause nature and the Small Cause Court cannot take cognizance of such a suit. 11 A.L.J. 238, Foll. 40 All. 142=16 A.L.J. 55=44 Ind. Cas. 689.

——Sch. II, Art. 31—Mesne profits, suit for—Redemption decree for—Decretal amount paid off—Possession not delivered — Suit—Maintainability.

A suit for *mesne profits* for the period intervening between the date fixed for redemption in the decree and the date of actual delivery of possession is maintainable in a Court of Small Causes. 31 B. 527; 5 C.L.J. 192; 34 C. 323 expl. As soon as the mortgagor deposits in court the amount determined as due under the redemption decree, the relation of mortgagor and mortgagee ceases. (1910) 12 C.L.J. 620=14 C.W.N. 1001=6 Ind. Cas. 336.

——Sch. II, Art. 31—Mesne profits—Suit on contract by vendor to vendee before vesting of title to pay mesne profits not a suit for mesne profits. See (1910) 12 C.L.J. 599=7 Ind. Cas. 487.

——Sch. II, Arts. 31 and 35—Mesne profits, suit for.

Plaintiff who obtained an ejectment decree against defendant sued him for *mesne profits*. The first Court dismissed the suit as barred but on appeal the District Judge held it as not barred and remanded it for disposal on the merits. On second appeal the High Court held, that as the claim for *mesne profits* was exempted from the cognizance of the Small Cause Court under cl. 31 of the Provincial Small Cause Court Act, and an appeal would have lain if the suit was decided on the merits, an appeal to the High Court against the order of remand was competent, that the suit was not governed by Art. 100 of the Limitation Act, but that, being in the nature of an action for damages for trepass, Art. 35 applied. 34 Mad. 502=9 M.L.T. 35=(1910) M. W. N. 614=8 Ind. Cas. 162.

——Sch. II, Art. 31—Mesne profits.

Art. 31 is not applicable to a case where the immoveable property from which the amount claimed was realized admittedly belonged to the defendant. 1904 A.W.N. 50=26 A. 358.

7. Suit for accounts.

——Sch. II, Art. 31—Suit involving taking of accounts.

A suit for an account is a special form of suit. It does not embrace every case in which accounts have to be looked into to ascertain the amount due to the plaintiff. A special process is required to take an account and Small Cause Courts have no means of dealing fith such an action. A suit for an account implies that the plaintiff is entitled under the substantive law to demand an account from the defendant.

An agent appointed to collect rent to meet all proper expenses in connection with the estate was dismissed. He instituted a suit against the principal to recover certain amount. His case was that after taking into account what he had collected by way of rent and what he had expended, and the salary due to him during his period of suspension together with the peon's salary which he had himself met, the principal was liable in the sum mentioned.

Held, that the agent was, in effect suing for an indemnity against his principal. It was not a suit for accounts within the meaning of Art. 31. It was not, therefore, excluded from the jurisdiction of the Small Cause Courts. A.I.R. 1940 Mad. 504=51 L.W. 171=(1940) 1 M.L.J. 173=I.L.R. (1940) Mad. 296=1940 M.W.N. 507=191 Ind. Cas. 598.

——Sch. II, Art. 31—Suit for accounts.

It is not every suit by principal against agent and *vice versa* that is excluded from the cognizance of a Small Cause Court. For instance, if the accounts had been settled and the account taking in the technical sense would not become necessary the Small Cause Court would be competent to deal with the matter. But whoever figures as the plaintiff (principal or agent, it makes no difference), whereas the essence of the action is that no relief can be granted without accounts being taken, the suit must be deemed one 'for an account.' What is known as a suit for an account is a special form of suit—a special process being required to take an account. The expression "suit for account" in Art. 31, is used in the well known technical sense of the term. The bare fact that some sort of arithmetical process is involved in the decision does not render the suit a suit for account. While this is undoubtedly true, care must be taken to distinguish this class of suits from those where account taking in the strict sense is of the very essence of the claim. A.I.R. 1938 Mad. 799 =1938 M.W.N. 707=(1938) 2 M.L.J. 76=47 L. W. 793=176 Ind. Cas. 806.

——Sch. II, Art. 31—Suit for accounts—Suit by one firm against another for recovery of sum of money being price of goods supplied—No previous dealings—No credit and debit entries.

A firm sued another firm for recovery of sum of money being the price of goods supplied. There had been no previous dealings between the firms and thus there were no credit and debit entries in their accounts which had to be mutually adjusted against each other.

Held, that it was not a suit for account within the meaning of Art. 31 and no second appeal lay when the subject-matter of suit did not exceed Rs. 500. A.I.R. 1937 All. 23=1936 A.L.J. 1174=1936 A. W. R. 1003=166 Ind. Cas. 533.

——Sch. II, Art. 31—Suit against agent for value of goods—If suit for account.

A suit against an agent for the value of goods received and not accounted for by him is not a suit for account and is cognizable by a Small Cause Court. A.I.R. 1931 Lah. 271=32 P.L.R. 103=135 Ind. Cas. 64.

——Sch. II, Art. 31—'Suit for accounts'.

In a suit for a fixed sum of money, the plaintiff alleged that there was a settlement between the parties in February, 1924, under which the 1st defendant acknowledged a certain amount due in paddy, cash and hay. Subsequently, the dealings continued

between the parties and the actual amount claimed in the plaint was something different from that shown in the settlement, the paddy being less and the cash being slightly more. The defendant, in his written statement, entirely denied the truth of the transactions that he executed any settlement, or that any balance whatever was due from him:

Held, that the suit was not one for an account within the meaning of Art. 31. A.I.R. 1931 Mad. 789=1931 M.W.N. 975=135 Ind. Cas. 343.

——Sch. II, Art. 31—Suit for produce of land—If suit for accounts.

A suit for the produce which defendant "had taken from the land which he had entered and forcibly worked, or its value," is not one for accounts and is of a small cause nature. 104 Ind. Cas. 818=5 Rang. 388=A.I.R. 1927 Rang. 262.

——Sch. II. Art. 31—Suit for accounts.

The plaintiffs' father purchased certain property and entrusted the management of the same to the defendant, the maternal uncle of the plaintiffs. The father advanced certain sums of money from time to time to the defendant in order that the same might be lent to the tenants. The father died in September 1918. The defendant refused to render an account of the monies that he received and realised some time in 1921. Plaintiffs then filed the suit.

Held, the suit was one for accounts and was, therefore, exempted from the cognizance of the Small Cause Court by Art. 31 of the Provincial Small Cause Courts Act. 85 Ind. Cas. 704=6 L.R.A. (Civ.) 273=A.I.R. 1925 All. 682.

——Sch. II, Art. 31—Crops harvested before and after delivery of possession, claim for—When suit for accounts.

Per *Seshagiri Aiyar, J.*—The claim for the crops harvested and removed before delivery of possession is one for an account and therefore not cognizable by Small Cause Courts. The claim for subsequent cutting and carrying away of the crops is a claim for damages and thus cognizable by a Small Cause Court. 31 M.L.J. 839=20 M.L.T. 512=5 L. W. 443=38 Ind. Cas. 1.

——Sch. II, Art. 31—Suit against agent for value of goods not accounted for—If suit for accounts.

A suit against an agent for the value of goods not accounted for is not a "suit for account" and is cognizable by the Court of Small Causes. 1 L. W. 180=24 Ind. Cas. 764.

——Sch. II, Art. 31—Suit for accounts—Suit for recovery of money based on accounts—Amount not precisely ascertained.

Suit for recovery of money not precisely ascertainable unless the accounts are ascertained is cognizable by a Small Cause Court, as it is not a suit for accounts. 12 A.L.J. 230=23 Ind. Cas. 424.

——Sch. II, Art. 31—Suit for accounts, what is.

A suit for a specific sum of money cannot be regarded as a suit for an account, within the meaning of Art. 31, because accounts have to be taken incidentally to arrive at the finding whether the amount claimed by the plaintiff is really due to him.

Where the plaintiff sued for a specific sum of money on the allegation that the defendants who were commission agents had sold certain cattle belonging to the plaintiff and had withheld the sale proceeds:

Held, that the suit was not one for an account though it was necessary to ascertain the price recovered by the defendants from the customers to whom cattle were sold, their own commission and the incidental charges and the balance to be paid to the plaintiff. 132 Ind. Cas. 30=1931 A.L.J. 5.

——Sch. II, Art. 31—Suit for accounts—What is.

A suit does not become one for accounts simply because accounts have to be taken before a balance due from the defendant to the plaintiff can be discovered. A suit for accounts will be one where a preliminary decree for accounts will be necessary, and it will be necessary for the Court to call upon the defendant to render accounts. 116 Ind. Cas. 85=26 A.L.J. 808=A.I.R. 1928 All. 332.

——Sch. II, Art. 31—Suit for account—What is.

Per *Fawcett* and *Baker, JJ.*—The character of a suit is determined by the cause of action and the relief actually sought, and not by any side issues that the defendant may raise. Wrere a commission agent does not ask for any accounts to be taken, and sues for a definite sum of money to be paid by the defendant the suit is a suit for money; and the fact that the record of the suit transactions in the form of a written acaunot, which is not a settled or stated account, may have to be gone into, does not turn it into suit for an account. A. I. R. 1927 Bom. 278 (F.B.), Cons. A.I.R. 1922 Bom. 376 (F.B.), Rel. on 115 Ind. Cas. 391=52 Bom. 904=30 Bom. L.R. 1284=A.I.R. 1928 Bom. 476.

——Sch. II, Art. 31—Suit for accounts—What is.

A suit for an account within the meaning of the article is a special form of suit. The distinguishing feature of these suits is the defendant's duty to furnish detailed accounts.

The plaintiff advanced money to defendant upon the security of yarn which the defendant agreed to sell to plaintiff for sale as commission agent. The yarn was sold by plaintiff and the price credited to defendant. A suit by plaintiff for recovery of certain sum due from defendant is not covered by Art. 31. 34 P.R. 1917=109 P.W.R. 1917=41 Ind. Cas. 46.

——Sch. II, Art. 31—Suit for accounts—What is.

Where the relation between the parties to the suit is such that one of them is bound to give accounts to the other the suit is one for accounts. The mere fact that accounts are taken in a suit does not make it a suit for accounts 57 Ind. Cas. 951 (Cal.).

——Sch. II, Art. 31—Accounts, suit for—What is.

If in order to grant proper relief to the plaintiff it is necessary to take accounts, the suit is one for accounts and the Small Cause Court has no jurisdiction to try it as it comes under Art. 31, Sch. II of the Act. 24 C.L.J. 187=10 Ind. Cas. 883.

——Sch. II, Art. 31—Suit for accounts—What is.

A suit is one for accounts only when the relationship of parties is such that one is bound to account to the other. 8 Ind. Cas. 955 (Mad.).

——Sch. II, Art. 31—"Suit including a suit for profits".

"Tre suit for profits" should be a "suit for account". (1908) 10 Bom.L.R. 733=32 B. 560.

——Sch. II, Art. 31—Suit for account—Test for.

The mere fact that accounts may have to be taken for the purpose of ascertaining the amount due to the plaintiff cannot give the suit the character of being a suit for account. (1904) A.W.N. 227=27 A. 200.

——Sch. II, Art. 31—Suit for account.

Every suit in which accounts may have to be looked into in order to arrive at the sum to be awarded is not a suit for account within the meaning of the article. The pharse as used in the article only means a suit for account, in its technical sense. (1904) 28 M. 394.

8. Suit for definite or specific amount.

——Sch. II, Art. 31—Claim for definite sum of money—Reference to account necessary—If makes suit not cognizable by the Court of small causes.

A suit for an account is a special form of suit, and does not mean every form of suit in which accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by the plaintiff. Where a plaintiff claims a definite sum of money, the mere fact that the accounts have to be looked into to verify the figure claimed would not make the suit one for account and such a suit would be cognizable by the Court of Small Causes. 1947 O. W. N. 286=1947 O. A. (C. C.) 207= 1947 A. W. R. (C. C.) 207=A. I. R. 1948 Oudh 80.

——Sch. II, Art. 31—Suit by agent against principal for specific amount alleged to be due to him.

A suit for accounts is a special form of suit. It does not mean that whenever accounts have to be looked into in order to ascertain the amount due by one party to the other, that the suit should be technically called a suit for accounts. Where an agent files a suit against principal for specific sum of money alleged to be due to him in regard to certain dealings, the suit is not one for accounts with in the meaning of Art. 31 of Sch. II. It is only in exceptional cases where his remuneration depends on the extent of dealings which are not known to him or where he cannot be aware of the extent of the amount due to him unless the accounts of his principal are gone into that a suit by an agent for accounts against his principal might be competent. But where the exact sum of money which the agent claims from his principal is known to him the only form in which a suit can be filed is the one for specific amount. A.I.R. 1938 Mad. 707=47 L.W. 654=1938 M.W.N. 613=(1938) 2 M.L.J. 112= 177 Ind. Cas. 631.

——Sch. II, Art. 31—Suit for specific amount.

The question whether the suit for the recovery of a specific sum is a "suit for an account" within the meaning of Art. 31 depends upon the nature of the investigation which is required in order to afford relief to the plaintiff; if in order to grant relief to the plaintiff it is necessary to take accounts, the suit will be one for an account within the meaning of Art. 31. A.I.R. 1937 All. 23=1936 A.L.J. 1174=1936 A.W.R. 1003=166 Ind. Cas. 533.

——Sch. II, Art. 31—Suit to recover specific quantities of paddy or their value.

Suits for the recovery of specific quantities of paddy or their value from the appellant on the ground that this amount of paddy belonging to the respondant firm had, in each case, been wrongfully seized by the defendant are suits in tort for conversion, *i.e.*, for the recovery of property which had been wrongfully seized or for the value thereof. Such suits are cognizable by the Small Cause Court and consequently, no second appeal lies. Such suits are not in any way similar to suits for accounts. A.I.R. 1934 Rang. 218 (219)=151 Ind. Cas. 405.

——Sch. II, Art. 31—Suit for definite sum—Not one for account.

Where in a suit for money the claim was for a specific amount in respect of one transaction as the result of the purchase and sale of goods under one agreement,

Held, that the suit was not an account suit so as to take it out of the cognizance of a Court of Small Causes. 110 Ind. Cas. 373=50 All. 862=26 A.L.J. 837=A.I.R. 1928 All. 626.

——Sch. II, Art. 31—Suit for definite amount—Out of advances—Is cognizable.

A suit was brought by a plaintiff to recover a fixed amount in excess of the value of the goods supplied by the defendant to him, and for which he had made payments in advance. Every transaction between the parties was separately dealt with, and the defendant became liable to repay the sum which he had received in excess of the price ultimately fetched by any one consignment delivered by the defendant to the plaintiff.

Held, that the suit was cognizable by a Small Cause Court. 116 Ind. Cas. 85=26 A.L.J. 808= A.I.R. 1928 All 332.

——Sch. II, Art. 31—Suit for specific amount.

Art. 31 contemplates that a suit in order to be exempted must be a suit for account, which will include a suit for the profits of immovable properties belonging to the plaintiffs but which have been wrongfully received by the defendant. Where the suit is not for an account but for a specified sum representing the price of fruits wrongfully retained by the defendant Art. 31 cannot be held to apply. 102 Ind. Cas. 128=45 C.L.J. 230=A.I.R. 1927 Cal. 375.

——Sch. II, Art. 31—Suit for specific sum.

A suit for a specific sum as a half share of the profits of land in which no accounts are asked for is a suit of a Small Cause nature. 26 M.L.T. 245= 52 Ind. Cas. 631.

——Sch. II, Art. 31—Definite sum—Suit for—Small Cause.

The mere fact that accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by the plaintiff would not render the suit one for accounts under Art. 31 of the Provincial Small Cause Courts Act. 24 M.L.T. 453=(1918) M.W.N. 717=48 Ind. Cas. 94.

——Sch. II, Art. 31—Suit for definite amount.

Plaintiff's suit for a sum alleged to be the profits of property received by defendant under an arrangement is cognizable by Small Cause Court. A suit for an ascertained sum is not excluded from the cognizance of the Court of Small Cause under Art. 31 of the Act by reason of the defendant raising a plea of accounts. Every case in which accounts may have to be looked into is not a suit for accounts. The question whether a suit is cognizable by a Court of Small Cause or not must be determined only by reference to the plaint. 3 Pat.L.

J. 423=(1918) P.H.C.C. 56=4 Pat.L.W. 70=43 Ind. Cas. 755.

——Sch. II, Art. 31—Jurisdiction—Small Cause Court—Suit for specific sum.

Suit for specific sum between Principal and agent when the accounts between them have yet to be settled is a suit for an account within Cl. 31. 3 L.W. 143=(1916) 1 M.W.N. 162=33 Ind. Cas. 16.

——Sch. II, Art. 31—Specific sum of money—Suit for account—Agency—Jurisdiction—Test of.

Article 31 of the Act applies to cases where the relationship of the parties is such that one of them is bound to render accounts to the other notwithstanding the fact that the plaintiff might have put a definite money value upon his claim. 1912 M. W. N. 36, Foll. The mere fact that a question of agency arises is not enough to take the suit out of the cognizance of a Small Cause Court. A suit to recover a specific sum of money would often be entertainable by it. 14 M.L.T. 46=24 M.L.J. 693=(1913) M.W.N. 879=20 Ind. Cas. 518.

——Sch. II, Art. 31—Suit for definite amount.

Suit for definite sums of profits of immoveable property are not cognizable for by Small Cause Court even though no question of accounts is involved. 23 A. 437; 26 A. 231, Foll. 8 Ind. Cas. 270 (All.).

——Sch. II, Art. 31—Suit for specific items of money due—Suit for account.

A suit for specific items of money due from the defendant is not a "suit for account" within Art. 31, though the accounts have to be looked into for the decision of the suit. 19 M.L.J. 113=4 Ind. Cas. 618.

——Sch. II, Art. 31—Suit for definite or specific amount.

A suit to recover his share of profits of immoveable property which the plaintiff alleges the defendant to have wrongfully received, but as to which the claim is a definite sum is a suit falling within the cognizance of the Court of Small Causes. (1905) 7 Bom.L.R. 741=30 Bom. 147.

9. Suit on agreement.

——Art. 31—Suit on agreement—And not on account—Instance of.

A suit based on an agreement between the plaintiff company and the defendant whereby "the plaintiff company was to supply raw materials and the defendant was to execute moulding and casting work to be paid for at certain stipulated rates, subject to deduction for bad workmanship and subject also to the return at the end of each month of all such materials or metals as the defendant did not use for the work he had to perform" is not a suit for account and is not exempted from the cognizance of a Small Cause Court. 21 C.W.N. 784, Foll. 64 Ind. Cas. 327 (Cal.).

——Sch. II, Art. 31—Suit on agreement to pay share.

A suit upon an agreement between plaintiff and defendant that the latter would pay plaintiff half of what he realized from a tenancy granted to him by Government is cognizable by Small Cause Court. 67 Ind. Cas. 841=3 L.L.J. 419=A.I.R. 1921 Lah. 173.

10. Miscellaneous.

——Sch. II, Art. 31—Title, suit involving question of—Jurisdiction.

A Small Cause Court is not deprived of its jurisdiction merely because a question of title is involved in a suit. 20 Ind. Cas. 974; 37 B. 675, Foll. 11 N.L.R. 160=31 Ind. Cas. 5.

——Sch. II, Art. 32—Salvage, suit for—Small cause nature.

A suit for services rendered in saving cargo from a leaky boat is not a suit for salvage and is thus cognizable by Small Cause Court. 9 Bur.L.T. 163 =36 Ind. Cas. 10.

——Sch. II, Art. 34—Applicability.

The suit was brought by the plaintiff for recovery of the price of a certain statue which he purchased from the defendant No. 1 and the ground on which he based his claim was that when he purchased the statue the defendant No. 1 gave a warranty that the said statue was perfect in every respect, that there was no joint or defect in it nor was it broken in any part thereof. The shop of defendant No. 1 was in Calcutta. The defendant No. 1 was asked to send the statue to Dacca by rail and steamer. It was alleged that on opening the package it was found that portions of the statue were damaged. Upon that, eventually, the plaintiff brought this suit against the defendant No. 1. The Secretary of State for India in Council was also joined as a defendant in the alternative on the supposition that the article might have been damaged during transit.

Held, that the suit was really a suit for damages against the Secretary of State in the alternative for failure to insure safe carriage of the article and so was not covered by Art. 34. 86 Ind. Cas. 1046= A.I.R. 1926 Cal. 100.

——Sch. II, Art. 34—Contract of Insurance—Suit on.

A suit on a contract of Insurance is not maintainable in a Small Cause Court under Art. 34, Sch. II of the Act. *Held*, that the contract in question was one of life insurance. 20 Ind. Cas. 155 (Cal.).

——Sch. II, Art. 34—Jurisdiction.

Mutual Insurance Company insuring to its members money for ceremonies under Articles of Association—Suit by Company for refund of amount overpaid is not triable by Small Cause Court. A.I.R. 1939 Lah. 220=41 P.L.R. 551=183 Ind. Cas. 843.

——Sch. II, Art. 34—Suit on policy of insurance—Jurisdiction.

A suit on policy of insurance means a suit arising out of a contract of insurance.

The plaintiff was a Mutual Life Insurance Company which had various classes of business. According to the Articles of Association, the monthly subscriptions obtained from members of a certain class were divided among the members who had a ceremony after deducting 20 per cent. for the reserve. The Articles of Association, however, permitted twice as much to be paid in advance to any member on the occasion of the ceremony. The plaintiff, alleging that a larger amount was paid to a member than he was entitled to receive under a clause in the Articles of Association brought a suit against the member for the refund of the amount overpaid:

Held, that the suit was on a policy of insurance and therefore, was not cognizable by a Court of Small Causes. A.I.R. 1939 Lah. 200=41 P.L.R. 551=183 Ind. Cas. 843.

——Sch. II, Art. 35.

Synopsis.

1. Applicability—Test.
2. Breach of marriage contract.
3. Damages for mischief.
4. Damages for wrongful injunction.
5. Diversion of water course.
6. Fraud.
7. Illegal or improper attachment or distress, etc.
8. Injury to person.
9. Misappropriation.
10. Procedure.
11. Removal of fruits—Suit for damages.
12. Wrongful cutting of trees.
13. Wrongful seizure and removal.
14. Miscellaneous.

1. Applicability—Test.

——Sch. II, Art. 35 (ii) —Right to collect toll at public ferry—Suit for damages against defendant setting up rival ferry is not barred by Art. 35 (ii).

A right to collect toll at a public ferry cannot be deemed to be 'property' within the meaning of S. 425, Penal Code. Hence a suit by the plaintiff for damages against the defendant on the ground that the rival ferry set up by the defendant had injuriously affected the plaintiff's right to collect toll at a public ferry is not barred by Art. 35 (*ii*) of Sch. II, Small Cause Courts Act and is cognizable by a Small Cause Court. A.I.R. 1944 All. 60=1944 A.L.J. 6=1944 O.W.N. 9=1944 A.W.R. 6=I.L.R. (1944) All. 189=211 Ind. Cas. 621.

——Sch. II, Art. 35 (ii)—Applicability—Test.

Where the plaint does not disclose that the plaintiff claims any compensation, or that any offence of cheating or any other offence punishable under the Penal Code, was committed by the defendants, the case does not fall under Art. 35. No second appeal will lie in such a case, the suit being cognizable in the Small Cause Court. A.I.R. 1937 Oudh 244=1937 O.W.N. 263=13 Luck. 204=167 Ind. Cas. 557.

——Sch. II, Art. 35 (ii)—Applicability—Test.

Where the property was removed in the assertion of a contested claim or right, the removal would not constitute theft as defined in S. 378, Penal Code. In these circumstances, Art. 35 (*ii*), Prov. Small Cause Courts Act does not apply to a suit for recovery of price of the property. A.I.R. 1938 Lah. 759=40 P.L.R. 720=I.L.R. (1939) Lah. 100=179 Ind. Cas. 144.

——Sch. II, Art. 35 (ii)—Applicability.

A suit for recovery of the money in respect of which an offence under S. 379, Penal Code, had been committed is an unclassed one and is excepted from the jurisdiction of the Small Cause Court. A.I.R. 1936 Lah. 798=165 Ind. Cas. 267.

——Suh. II, Art. 35 (ii)—Applicability.

Clause (*ii*), Art. 35, applies even though the claim is restricted to the value of the property misappropriated or stolen and does not, in so many words, include a claim for compensation. A.I.R. 1936 Lah. 798=165 Ind. Cas. 267.

——Sch. II, Art. 35 (ii)—Applicability—Test—Absence of allegation of criminal act or intent.

Before Art. 35 (*ii*) can be deemed to apply, it must be shown and alleged not merely that there was a cutting or damage done to trees or other objects but that it was done with some criminal intent. Where there is no allegation of criminal act or intent, the suit is cognizable by the Court of Small Causes. S. 102, C. P. Code, applies and no second appeal lies. A.I.R. 1936 Nag. 276=168 Ind. Cas. 596.

——Sch. II, Art. 35 (ii)—Applicability—Test.

When, upon the case laid in the plaint, it is clear beyond any shadow of doubt that the defendant had committed an offence punishable under Ch. 17, Penal Code, the jurisdiction of the Small Cause Court to try such a suit is barred; but where, upon the facts stated in the plaint, the case against the defendant is that his action was wrongful or illegal but not necessarily penal so as to bring him within the purview of the Penal Code, the jurisdiction of the Small Cause Court is not at all barred. In short and without referring to the other circumstances, if, upon the plaint, a question of a *bona fide* claim on behalf of the defendant is obvious, then Art. 35 (*ii*) will have no application. A.I.R. 1936 Pat. 428=2 B.R. 395=161 Ind. Cas. 937.

——Sch. I, Art. 35 (ii)—Applicability—Test—Plaint alleging that defendant by deceit reaped crop belonging to plaintiff.

Where the allegation in a plaint is that certain crops belonged to the plaintiff and the defendant, by deceit, reaped it, the allegation involves that the defendant intended to gain unlawfully by taking possession of the crop and to cause loss unlawfully to the plaintiff by doing so. Therefore, in accordance with the definitions in Ss. 23 and 24, Penal Code, the defendant intended to act dishonestly. Consequently, the facts alleged amount to an offence defined by S. 378, Penal Code, *i.e.*, theft, an offence which comes under Ch. 17, and hence the Small Cause Court does not have jurisdiction to try the suit. A.I.R. 1935 All. 264=1935 A.W.R. 36=1935 A.L.J. 248=153 Ind. Cas. 763.

——Sch. II, Art. 35 (ii)—Applicability—Suit in respect of right to enter on another's land and cut grass.

A suit in respect of a right to enter on another's land and to cut grass falls under Art. 35 (*ii*) and hence, is excluded from cognizance of a Small Cause Court. A.I.R. 1933 Lah. 172=145 Ind. Cas. 155.

——Sch. II, Art. 35 (ii)—Applicability—Test of.

Where *A* sued *B* in the Small Cause Court for recovery of a sum of money on the ground that *B* had cut and taken away a tree belonging to *A* and growing upon his grounds:

Held, that no offence was disclosed on a fair reading of the plaint and that the suit could be entertained by the Court of Small Causes.

The question whether a case is determinable by a Small Cause Court Judge must rest upon an examination of the plaint and a decision by the Judge as to whether or not the language of the plaint on a reasonable construction imports the commission of an offence under Chap. XVII, Penal Code. A.I.R. 1932 All. 472=1932 A.L.J. 306=140 Ind. Cas. 506.

——Sch. II, Art. 35 (ii)—Applicability—Test.

In determining whether a suit falls within the purview of Art. 35 (*ii*), each case must be considered on its own allegations in the plaint and the circumstances in the past history which may help the interpretation of the plaint. One single fact among the varying circumstances of particular cases may alter the whole effect of the allegations made in the plaint. A.I.R. 1931 All. 595=132 Ind. Cas. 564.

——Sch. II, Art. 35 (ii)—Applicability—Test.

Whether a claim falls within Art. 35 (*ii*), Sch. II of the Act is *prima facie* a matter dependent upon the pleadings and particularly upon the plaint, and where the facts stated in the plaint do not clearly fall within the article, the Small Cause Court has jurisdiction to try the suit. 32 Bom.L.R. 181=A.I.R. 1930 Bom. 361.

——Sch. II, Art. 35 (ii)—Applicability.

A suit was brought for money claim. There was an allegation in the plaint that the defendant had got a wrong figure inserted in the acknowledgment, but that was only made a ground for bringing the suit on the previous account and not on the subsequent acknowledgment.

Held, that the case did not fall under Art. 35 (*ii*). 118 Ind. Cas. 880=A.I.R. 1929 Nag. 144.

——Sch. II, Art. 35 (ii)—Applicability—Test—Absence of criminal intent—Not excepted.

A person brought a suit on the Small Cause side of a Court for the recovery of price of certain articles alleged to have been sold and lent to defendants. The plaint set out that the defendants purchased and borrowed articles stipulating to pay by instalments and had even paid a part of the purchase money. Later on, taking advantage of the mother of the plaintiff being a pardanashin lady, the minority of the plaintiff and the mismanagement of the estate, the defendants did neither pay the balance money nor return the articles borrowed. The Judge disbelieved the evidence and dismissed the suit. On this the plaintiffs applied in revision asking the Court to hold that the suit was not cognizable by the Small Cause Court under Art. 35 (*ii*).

Held, that there was nothing in the circumstances defendant taking goods and other things and failing to pay their price to suggest a criminal intent at all and there was no case of offence under Chap. 17 of the Penal Code barring the jurisdiction of the Small Cause Court.

Where at their own instance the plaintiffs chose to move the Small Cause Court they could not ask the revising Court to hold that that Court had no jurisdiction. 118 Ind. Cas. 139=A.I.R. 1929 Pat. 722.

——Sch. II, Art. 35 (ii)—Applicability—Test.

Art. 35 (*ii*) applies only to those acts which by the circumstances of the case are clearly alleged or clearly shown to be punishable by the Penal Code.

Merely because the facts stated in the plaint are ambiguous and are, therefore, consistent with *bona fides* although they are also consistent with *mala fides* according to the correct inference to be drawn, the act is not therefore one necessarily of the kind referred to in cl. 35 (*ii*). 100 Ind. Cas. 38=49 All. 440=25 A.L.J. 287=A.I.R. 1927 All. 288.

——Sch. II, Art. 35 (ii)—Applicability—Test.

Where the plaint discloses no allegation of a crime, Art. 35 (*ii*) does not apply. 100 Ind. Cas. 38=49 All. 440=25 A.L.J. 287=A.I.R. 1927 All. 288.

——Sch. II, Art. 35 (ii)—Test—Allegations in plaint.

In order to decide whether a suit is one of a Small Cause Court nature or not, one should refer to the allegations of the plaintiff contained in the plaint. If those allegations make out a case, which is exempted from cognizance of the Small Cause Court, it is immaterial what the defence raised is and what the actual findings arrived at by the Court are. If the defendants were held to be estopped from contending that the suit was exempted from the cognizance of the Small Cause Court, merely because he had not admitted the commission of any offence, the result would be that the plaintiff would always be entitled to prefer a second appeal if the decision went against him, but the defendant would be estopped from doing so. 97 Ind. Cas. 129=49 All. 85=24 A.L.J. 1017 =A.I.R. 1926 All. 760.

——Sch. II, Art. 35 (ii)—Applicability—Test.

Art. 35 (*ii*) is intended to cover all suits for compensation for loss occasioned by an offence under Chapter 17 of the Indian Penal Code. The object seems to be to take away cases, where serious allegations amounting to the commission of the Courts of Small Causes. 97 Ind. Cas. 129=49 All. 85=24 A.L.J. 1017=A.I.R. 1926 All. 760.

——Sch. II, Art. 35 (ii)—Applicability—Test.

Suit for recovery of the property or the price thereof is not excluded under Art. 35. Thus a suit against borrower who merely detains property lent to him beyond the period within which he was expected to return it is not excluded, because he does not retain the property by committing the offence of criminal breach of trust. 80 Ind. Cas. 627=5 L. R. A. Civ. 432=46 All. 688=A.I.R. 1924 All. 571.

——Sch. II, Art. 35 (ii)—Applicability—Test—Recovery of stolen property—No allegation incriminating defendant—No bar.

Where the plaintiff sued to recover a cow which had been stolen but did not set out anything in his plaint tending to incriminate the defendant and there was no allegation of dishonesty, *held*, that the jurisdiction of the Court of Small Causes was not ousted. 31 P.L.R. 223.

——Sch. II, Art. 35 (ii)—Applicability—Test.

Where in the plaint there is no definite allegation that the defendants had the intention requisite for the commission of the offences mentioned, the suit is not excepted under the article. 77 Ind. Cas. 561= 3 Lah. 369=A.I.R. 1922 Lah. 451.

——Sch. II, Art. 35 (ii)—Applicability—Test—Plaint allegations.

The jurisdiction to try a suit must *prima facie* be determined with reference to the allegations in the plaint. A suit for compensation on account of unlawful acts of the defendants constituting an offence punishable under Ch. 17, I. P. Code, falls under Art. 35 (*ii*) and is not therefore cognizable by Small Cause Court. 65 Ind. Cas. 344=8 O.L.J. 594= A.I.R. 1922 Oudh 161.

——Sch. II, Art. 35 (i) as amended by Act (6 of 1914)—Applicability—Test.

The Small Cause Court has no jurisdiction to try a suit for damages for defendant's tearing and damaging plaintiff's fish-net and allowing the fish therein to escape, as the allegations make out an offence against property under the I. P. Code. 33 Ind. Cas. 728 (Cal.).

2. Breach of marriage contract.

——Sch. II, Art. 35 (g)—Suit for return of bridal gifts on breach of promise of marriage.

A suit for the return of bridal gifts made to a woman and her parents, where the promise of marriage had been broken, and the lower Appellate Court varied the decree of the trial Court is exempted from the cognizance of a Small Cause Court. A. I. R. 1933 Rang. 198=11 Rang. 143=146 Ind. Cas. 724.

——Sch. II, Art. 35 (g)—Breach of marriage contract—Suit for return of specific articles not barred.

Art. 35 (*g*) confines bar to suits or compensation for breach of contract of betrothal or promise of marriage and has very little to do with return on failure of marriage of articles or sums of money advanced by one party to the other for use in connection with marriage celebrations and hence so far as a suit is for return of such articles or money, suit is not excepted from the cognizance of the Small Cause Court. A.I.R. 1929 Pat. 744.

——Sch. II, Art. 35—Breach of marriage contract—What amounts to.

A suit for the recovery of money advanced by one party to another in connection with marriage which subsequently fell through is not one for the mere recovery of a loan or refund of money advanced but is in essence one for damages in respect of the breach of contract of marriage and so is not cognizable in the Court of Small Causes. 15 Cal. 833, Foll. 106 Ind. Cas. 803=10 N.L.J. 258=24 N.L.R. 66= A.I.R. 1928 Nag. 89.

——Sch. II, Art. 35—Breach of marriage contract.

A suit for recovery of specific ornaments presented to the girl's father at the time of betrothal on the ground of breach of contract of promise of marriage is not covered by Art. 35 and is cognizable by a Small Cause Court. 98 Ind. Cas. 1052=49 All. 186=A. I.R. 1927 All. 160.

——Sch. II, Art. 35—Breach of marriage contract—What amounts to.

Plaintiff sued for return of ornaments and for certain money expended. The ornaments were said to have been given and the money was said to have been expended in consequence of a marriage which had been arranged and the suit for recovery was due to the fact of that marriage having fallen through.

Held, that the suit was not cognizable by a Small Cause Court in view of the fact that part of the claim was for money which it was alleged had been expended in preliminary marriage ceremonies. 81 Ind. Cas. 870=5 L.R.A. Civ. 685=A.I.R. 1925 All. 51.

——Sch. II, Art. 35 (i)—Breach of marriage contract—Suit for damages—Jurisdiction.

A suit for compensation for breach of contract of betrothal and loss of provisions, etc., is not cognizable by a Small Cause Court under Art. 35 (*g*) of the Act. 38 Mad. 274=13 M.L.T. 497=(1913) M.W.N. 637=19 Ind. Cas. 700.

3. Damages for mischief.

——Sch. II, Art. 35 (ii)—Trespass by landlord—Damages—Excepted.

Suit by a tenant against landlord for recovering damages by way of compensation for acts of trespass and mischief are exempt from the jurisdiction of the Court of Small Causes. 123 Ind. Cas. 316 =33 C.W.N. 839=57 Cal. 344=A.I.R. 1930 Cal. 240.

——Sch. II, Art. 35 (ii)—Damage caused by mischief—Applicability of Art. 35 (i), (ii).

Where the defendants prevented plaintiffs from irrigating their lands from a well by acts which constituted an offence of mischief, *held*, the suits for compensation for loss sustained by the defendants' act were not cognizable by a Court of Small Causes and the appeals from the decrees passed by the first Court lay to the District Judge and not to the Senior Subordinate Judge.

Art. 35 (*i*) did not apply as the plaintiffs did not allege that they had acquired an easement by prescription, the well having been sunk only recently, and they not having stated what was the ground of their claim to be entitled to irrigate their land from the well. Art. 35 (*ii*) applied as the acts for which compensation was claimed would constitute the offence of mischief. 69 Ind. Cas. 283=5 L.L.J. 91 =A.I.R. 1923 Lah. 38.

——Sch. II, Art. 35 (ii)—Negligence and not mischief—Art. 35 (ii) would not apply.

In a suit for damages against the Railway Company for damages for loss of an animal the allegations were that due to the negligence of the defendant company in not fencing the railway line, and in driving the locomotive to the utter disregard of public safety, life, and property, and the company's servants in charge of the engine not taking proper precautions in frightening away the animal, the plaintiff was put to the unnecessary loss of the animal which was thrown down the embankment, sustaining injuries which resulted in its death,

Held, that the said allegations in the plaint constituted a case of negligence which even, if wilful, fell far short of those requisites which would go to make out any such intent or knowledge as is necessary to satisfy the definition of "mischief" as given in S. 425 and Art. 35 (*ii*) would not apply. 108 Ind. Cas. 37=48 C.L.J. 45=A.I.R. 1928 Cal. 504.

4. Damages for wrongful injunction.

——Sch. II, Art. 35 (k)—Damages for wrongful injunction.

Where a temporary injunction is wrongfully obtained on insufficient grounds a suit for damages is maintainable. 100 Ind. Cas. 318=53 Cal. 1008= A.I.R. 1927 Cal. 247.

5. Diversion of water course.

——Sch. II, Art. 35 (i)—Applicability—Suit for damages caused by defendant's wrongful act in putting up embankment and allowing water to get accumulated.

A suit for damages caused to plaintiff's walls by reason of defendant putting up a *pushta* or embankment and thereby allowing the rain water to get accumulated is cognizable by a Court of Small Causes. 1950 A.L.J. 60=A.I.R. 1950 A. 519.

——Sch. II, Art. 35 (i), (ii)—Suit for compensation for loss due to negligent construction of drain.

Suit for compensation for loss suffered by a person on account of negligent construction of drain by Municipality in front of a person's house is not an unclassed suit and its cognizance by a Small Cause Court is not barred by Art. 35 (*i*) and (*ii*). A.I. R. 1933 Lah. 363=34 P.L.R. 583=143 Ind. Cas. 494.

——Sch. II, Art. 35 (i)—Contract allowing plaintiff to drain land—Breach — Damages—Jurisdiction.

A suit for damages for breach of a contract to allow plaintiff to drain the water from his field into defendants is not within Art. 35 (*i*) of the Act, and is triable by a Small Cause Court. (1914) M.W. N. 497=25 Ind. Cas. 44.

——Sch. II. Art. 35, Cl. (i)—Diversion of water—Suit for damages.

A claim for damages to the plaintiff's wall by the defendant's diversion of his own water course is not

within Art. 35 (i) of Sch. II. (20 B. 283, Foll.). 21 O.C. 138=46 Ind. Cas. 801.

6. Fraud.

——Sch. II, Art. 35 (ii)—Fraud and cheating—Takes away jurisdiction.

Where a suit was filed by the judgment-debtor for recovery of excess of the decretal amount paid to the decree-holder under fraud and cheating.

Held, that the suit is not of a small cause nature and a second appeal is entertainable. 115 Ind. Cas. 581=A.I.R. 1928 Cal. 776.

——Sch. II, Art. 35 (ii)—Fraud and cheating—Damages on account of—Covered by Art. 35 (ii).

The plaintiff gave silver of the weight of Rs. 70 to the defendant to make some bangles. When the bangles were delivered it was found that base metal had been substituted for silver. On these allegations the plaintiff claimed Rs. 50 as damages as the amount of which he had been defrauded by the defendant.

Held, that the case comes within Art. 35 (a) (ii) and the suit was not cognizable by Small Cause Courts. 87 Ind. Cas. 346=12 O.L.J. 358=2 O.W.N. 374=29 O.C. 24=A.I.R. 1925 Oudh 632.

7. Illegal or improper attachment or distress, etc.

——Sch. II, Art. 35 (j)—Amount paid under illegal distress—Suit for refund of amount and interest thereon—Not within Art. 35 (j)—Small Cause Court can take cognizance of.

A suit by a person for the refund of the amount paid by him under illegal distress, is not a suit for compensation for illegal distress or for damage caused by illegal distress within meanings of Art. 35 (*j*) and a claim for interest on the amount so paid is not a claim in the nature of compensation for illegal distress or for damage caused by illegal distress but is interested claimed for wrongful detention of the money and as such does not fall under Art. 35 (*j*). As neither the suit for the refund of the amount paid under illegal distress nor the claim for interest thereon fall within Art. 35 (*j*), Small Cause Court can take cognizance of them. A.I.R. 1945 Bom. 197=I.L.R. (1945) Bom. 382=220 Ind. Cas. 202 =47 Bom.L.R. 38 (F.B.).

[Overruling, A.I.R. 1925 Bom. 419=89 Ind. Cas. 580.]

——Sch. II, Art. 35 (j)—Illegal or Improper attachment, distress, etc.

The concluding words in Cl. (*j*) of Art. 35 are "improper execution of any distress, search or legal process." It is clear from this that the clause is referring to the execution of legal processes as understood in India. Where the cattle are not taken "as a pledge" nor are they taken "for the recovery of rent," their seizure cannot amount to distress either within the meaning of the English Law or within Art. 35 (*j*). Hence, a suit for damages for wrongful seizure and impounding of cattle by a servant is maintainable in Court of Small Causes. (1941) 195 Ind. Cas. 365=1941 N.L.J. 328.

——Sch. II, Art. 35 (j)—Suit for compensation for illegal attachment—Jurisdiction of Small Cause Court to try—Suit, held exempted from jurisdiction of Small Cause Court—Property wrongfully attached, damaged while in custody of *supurdar*—Decree-holder, held liable for compensation. A.I.R. 1941 Oudh 412=1941 O.W.N. 555=1941 A.W.R. 136=193 Ind. Cas. 654.

——Sch. II, Art. 35 (ii)—Illegal or improper attachment.

The plaintiffs had made an application under O. 21, R. 58, C. P. Code, for release of their property which had been attached by the defendants. Having failed in that case, they brought a suit in which they succeeded and the property was released from attachment. Thereupon, the plaintiffs brought an action in Small Cause Court, the substantial portion of their claim being for interest on an amount which, by an order of the Court they had been forced to deposit pending the disposal of their suit under O. 21, R. 63:

Held, that the interest could not be recovered by way of damages.

Held, also, that it was an action for trespass under Art. 35 (*j*), and therefore, the jurisdiction of the Small Cause Court was ousted. A.I.R. 1938 Pat. 378=4 B.R. 385=19 P.L.T. 539=174 Ind. Cas. 144.

——Sch. II, Art. 35 (j)—Suit for damages for wrongful attachment.

A suit for damages for wrongful attachment and negligence is not of small cause nature and jurisdiction of a Small Cause Court to try it is barred by Art. 35, Cl. (*j*). A.I.R. 1936 Nag. 257=I.L.R. (1937) Nag. 19=168 Ind. Cas. 463.

——Sch. II, Art. 35 (j)—Deposit wrongfully attached and drawn out—Suit to recover is cognisable, by Small Cause Court.

A suit to recover a sum of money on the ground that it was improperly attached and drawn out, and that it really belongs to the plaintiffs by whom it was deposited, is clearly not a suit for compensation for illegal attachment but a suit to recover a sum of money received by the defendant which belongs to the plaintiff, and as such it can be properly brought in the Small Cause Court. 93 Ind. Cas. 290=A.I.R. 1926 All. 326.

——Sch. II, Art. 35 (j)—Wrongful attachment and sale—Suit for—Price of goods is excepted.

A suit to recover the price of goods wrongfully attached and sold in execution of decree falls within the purview of Art. 35 (*j*) and is excluded from the cognizance of Small Cause Court. If, therefore, such a case is tried by a Judge having both powers, Small Cause and Regular, the trial should be held as one on regular side though the proceedings as conducted gave room to suspect that it was tried as Small Cause. 89 Ind. Cas. 982=A.I.R. 1926 Lah. 150.

——Sch. II, Art. 35 (j)—Refund of tax paid under distress—Jurisdiction when present and when ousted.

A claim to amount taxed and illegally recovered by the municipality is a suit triable by the Small Cause Court. But if the plaintiff asks also for interest on that sum that is claimable only as damages or compensation for the amount having been illegally recovered from him, and the jurisdiction of the Small Causes Court becomes barred under Art. 35 (*j*). 89 Ind. Cas. 580=27 Bom.L.R. 447=A.I.R. 1925 Bom. 419.

——Sch. II, Art. 35 (j)—Illegal attachment—Suit for damages.

Suit by way of damages arising out of the unlawful attachment and sale in execution of the plaintiff's property is not cognizable by a Court of Small Causes. 78 Ind. Cas. 371=46 All. 233=A.I.R. 1924 All. 537.

——Sch. II, Art. 35 (j)—Illegal attachment—Suit for damages—Jurisdiction.

A suit for damages for illegal attachment is excepted from the cognisance of the Small Cause Court under Art. 35 (*j*) of the Act. 11 A.L.J. 91=18 Ind. Cas. 695.

——Sch. II, Art. 35 (j)—Refund of tax paid under distress.

A payment of new rates imposed by a Municipality though made under pressure of issue of a distress warrant is not made under distress and a suit for refund thereof is cognizable by a Small Cause Court. 3 Ind. Cas. 429 (Cal.).

——Sch. II, Art. 35—Improper distress—Suit for the recovery of money paid to avoid a sale.

A suit for the refund of money paid by a tenant to avoid a sale of the holding in pursuance of an improper or excessive distress is not a suit for compensation and is consequently a suit of a small cause nature; and no second appeal lies therefrom. (1906) 16 M. L.J. 353.

8. Injury to person.

——Sch. II, Art. 35—Injury to person.

A suit by plaintiff for damages for mental and physical worry and the cost of a criminal prosecution in which the defendant was convicted of criminal breach of trust is exempted from the jurisdiction of a Small Cause Court. 59 Ind. Cas. 593=23 O.C. 352.

——Sch. II, Art. 35 (l)—Causing Police search, suit for—Small Cause.

Suit for compensation for maliciously causing one's house to be searched by the police is not a suit for compensation for "injury to the person" within Art. 35 and is therefore cognizable by Small Cause Court. (1910) 1 U.B.R. 40=8 Ind. Cas. 1168.

——Sch. II, Art. 35 (l)—Injury to the person, suit for—Assault with a shoe — Small Cause nature.

A suit to recover damages from the defendant for running after plaintiff with a shoe in his hand, threatening to beat him and using vulgar and abusive language, is a suit for "injury to the person" within Art. 35 (*l*) and is therefore, excluded from the cognizance of the Small Cause Court. The Act complained of amounts to an assault and to an offence affecting the human body. 36 Bom. 443=14 Bom. L.R. 323=15 Ind. Cas. 505.

——Sch. II, Art. 35 (l)—Jurisdiction — Compensation for losing wife.

A suit for the recovery of money as compensation for losing the wife is not cognizable by a Court of Small Causes and a second appeal lies. 58 Ind. Cas. 716 (Lah.).

——Sch. II, Art. 35 (l)—A suit to recover a sum of money from the defendant police officers on the ground that it was a bribe extorted by him from the plaintiff is cognizable by the Small Cause Court. 15 C.L.J. 219=9 Ind. Cas. 623.

——Sch. II, Art. 35 (l)—Personal injury, caused through an animal suit for Qui Facit Per Se—Applicability of maxim.

A suit for damages for personal injury caused through an animal falls within Art. 35 (*l*). To such an act the maxim *Qui Facit Per Se* applies and the position is the same as if the defendants have touched the plaintiff with the substance. 12 N.L.R. 7=32 Ind. Cas. 236.

9. Misappropriation.

——Sch. II, Art. 35 (ii)—Misappropriation—Suit for return of gold and silver for making ornaments.

Where plaintiff sued for return of gold and silver given to defendant for making ornaments and merely alleged that defendant did not return them in bad faith:

Held, that as there was no allegation of dishonest misappropriation or conversion or dishonest use or disposal of property, the suit was not barred from Small Cause Court's jurisdiction. A.I.R. 1935 All. 141.

——Sch. II, Arts. 35, 18—Misappropriation.

Money deposited by plaintiff with arbitrator to be paid to other party if plaintiff refused to abide by award—Money paid to other party — Suit to recover money from arbitrator—Absence of allegation as to breach of trust or criminal misappropriation in plaint —Suit, held, was cognizable in Small Cause Court. A.I.R. 1933 All. 902=145 Ind. Cas. 970 (2).

——Sch. II, Art. 35 (b)—Misappropriation—Suit based on—Not cognizable.

A suit by the judgment-debtor to recover damages for an article retained and lost by the decree-holder after re-delivery order by the Court is a suit based on the allegation of misappropriation and as such excepted from the cognizance of a Court of Small Causes. 120 Ind. Cas. 421=A.I.R. 1929 Lah. 386.

——Art. 35 (ii)—Misappropriation — Applicability.

Where the only allegation of the plaintiff is that he deposited certain money with the defendant as the bailee but the defendant refused to return the same and there is nothing in the plaint charging the defendant with dishonest misappropriation, dishonest conversion, dishonest use or dishonest disposal, and the suit is only for damages for breach of contract. Art. 35 (*ii*) has no application. 113 Ind. Cas. 736=5 O.W.N. 1133=4 Luck. 235=A.I.R. 1929 Oudh 90.

——Sch. II, Art. 35 (ii)—Misappropriation—When excepted.

In a suit to recover certain ornaments and household goods, the value of which was less than Rs. 500 the plaintiff alleged that after his father's death, his mother took away the above articles belonging to the plaintiff and handed them over to defendant 2 whom she had remarried, and both were disposing of these articles to the prejudice of the plaintiff. It was further alleged that the articles were with the mother in trust for the plaintiff.

Held, that the allegations amounted to a charge of criminal misappropriation, if not criminal breach of trust, and the suit was therefore excepted from the cognizance of a Small Cause Court under Art. 35 (*ii*). 109 Ind. Cas. 571=10 L.L.J. 226=A.I.R. 1928 Lah. 887.

——Sch. II, Art. 35 (ii)—Misappropriation—Not amounting to an offence.

A suit for the price of the paddy alleged to be cut and misappropriated by the defendant not amounting to a criminal offence is a suit of a nature cognizable by Courts of Small Causes and if under the value of Rs. 500 no second appeal lies. 97 Ind. Cas. 556 =44 C.L.J. 190=A.I.R. 1926 Cal. 1230.

——Sch. II, Art. 35 (ii)—Misappropriation.

A suit to recover the value of property made over to defendant which the latter failed to return is

cognizable by Small Cause Court. 88 Ind. Cas. 511=A.I.R. 1926 Oudh 49.

——Sch. II, Art. 35 (ii)—Misappropriation—Recovery of value of ornaments.

Plaintiff sued to recover Rs. 60-9-9 with interest being the value of certain silver made over by him to the defendant for conversion into ornaments and misappropriated by the latter. Plaintiff had brought a criminal case under S. 406, Penal Code, and obtained a conviction in the trial Court which was set aside on appeal.

Held, that the Small Cause Court had no jurisdiction to entertain the suit in view of the provisions of Art. 35, cl. (*ii*), though the claim was restricted to the value of the silver and did not include any prayer for damages. 48 Cal. 879; 67 Ind. Cas. 305 and 59 Ind. Cas. 593, Foll. 75 Ind. Cas. 928=A.I.R. 1924 Lah. 668.

——Sch. II, Art. 35—Misappropriation.

When it was alleged in the plaint that the defendant in collusion with the railway officer took the coal and misappropriated it or converted it to his own use, but the claim was on a *chit* passed by the defendant to the plaintiff.

Held, that the plaint was intended to be a claim for a particular sum of money shown by the *chit* and not a claim for damages either for conversion or for compensation for theft. 74 Ind. Cas. 601=27 C. W. N. 549=37 C.L.J. 399=A.I.R. 1923 Cal. 650.

——Sch. II, Art. 35 (ii)—Misappropriation.

A suit to recover back money paid to the defendant and misappropriated by him is a suit for compensation within the meaning of Art. 35 (*ii*). 48 Cal. 879, Foll. 72 Ind. Cas. 916=26 O.C. 200=A.I.R. 1923 Oudh 38.

——Sch. II, Art. 35 (ii)—Misappropriation—Promise of return—Cause of action.

Where there has been misappropriation and the wrong-doer promises to make restitution, the cause of action for a suit for the money is the misappropriation and not the promise and the suit is not cognizable by a Small Cause Court. 62 Ind. Cas. 432 =48 Cal. 879=25 C.W.N. 256=A.I.R. 1921 Cal. 235.

10. Procedure.

——Sch. II, Arts. 35 (ii) and 43 (a)—Suit to recover ornaments pledged — Identification impossible — Procedure.

A Court of Small Causes can take cognisance of a suit to recover pledged ornaments or in the alternative for their value. Neither Art. 35 (*ii*) nor 43 (*a*) applies to such suits.

Where identification of the ornaments in such suits is impossible, the Court should pass a decree for the amount. Compensating plaintiff for the ornaments. 18 A.L.J. 354=58 Ind. Cas. 663.

11. Removal of fruits—Suit for damages.

——Sch. II, Art. 35 (ii)—Applicability—Suit to recover sum representing value of tamarind belonging to plaintiff alleged to have been taken away by the defendants — Not excepted from the cognizance of Small Cause Courts—Likelihood of question of title to immovable property being gone into—If affects jurisdiction of the Small Cause Court.

Where a suit is for the recovery of a sum of Rs. 65 being the value of tamarind belonging to the plaintiff alleged to have been taken away by the defendants, it does not fall within Art. 35 (*ii*) of Sch. II of the Provincial Small Cause Courts Act for it cannot be said that the averment in the plaint discloses the commission of a criminal offence by the defendants. Nor does the suit relate to a right to immovable property because after the tamarind is brought down from the trees, it is certainly movable property. The fact that incidentally the question of title to immovable property may have to be gone into does not take away the jurisdiction of the Small Cause Court. 60 L.W. 170=1947 M.W.N. 174=A.I.R. 1947 Mad. 404=(1947) 1 M.L.J. 182.

——Sch. II, Art. 35 (ii)—Suit for damages for wrongful removal of fruit from trees.

The question whether an act sued upon constituted a crime must depend on the nature of the pleadings, and particularly the plaint. For this purpose, a consideration of the plaint must be confined to what is relevant. If a plaintiff inserts in his plaint irrelevant allegations merely in order to show that the act complained of amounts to crime, those irrelevant assertions might properly be struck out and the Court should pay no regard to them.

Consequently, a suit claiming damages incurred by the plaintiff by reason of the defendant having wrongfully taken fruit from the plaintiff's tree, is triable by the Small Cause Court as it does not fall under Art. 35 (*ii*). A.I.R. 1942 Bom. 316=44 Bom.L. R. 733=I.L.R. (1942) Bom. 755=203 Ind. Cas. 330.

——Sch. II, Art. 35 (ii)—Suit for damages for removing fruits and cutting trees—Criminal intention and alleged—Jurisdiction of Small Cause Court.

The plaintiff sued for damages for cutting Dak jungle and removing fruits of the trees by the defendants and the amount claimed was Rs. 50 on each count the total being Rs. 100. There was nothing in the plaint to allege that the defendants acted with any criminal intention.

Held, that the suit was cognizable by the Small Cause Court and that no second appeal lay. 1930 A. L.J. 1247.

——Sch. II, Art. 35 (ii)—Price of fruit removed.

Suit for the value of fruit removed by defendant from a tree which plaintiff claimed to be his is not triable by a Small Cause Court. 3 L.L.J. 380=76 P.L.R. 1922=A.I.R. 1921 Lah. 72.

12. Wrongful cutting of trees.

——Sch. II, Art. 35 (ii)—Suit by landlord for compensation for trees cut by tenant—Dispute between them as to right to such trees—Jurisdiction of Small Causes Court.

The right of a landlord and a tenant in respect of trees is very often a disputed right depending in some cases upon statutory provisions and in others upon custom or otherwise. A criminal case, either for mischief or misappropriation or for theft, would easily be defeated by the defendant urging that he had a right to appropriate the trees, as also the timber after felling them. The tenant in such a case can very well plead that he *bona fide* believed that he was entitled to cut the trees and if under such *bona fide* belief he had felled the trees and removed the timber, the provisions contained in Ch. 17, Penal Code, cannot at all be attracted. A suit by the landlord for damages for trees so cut and removed by the tenant, is one which is not excluded from the

cognisance of the Court of Small Causes. Where the defendant is admitted to be a tenant of the plaintiff and the trees in question were planted on the land in his possession by the predecessor-in-interest of the defendant who claimed a right to cut and appropriate them under the law, a suit by the plaintiff for compensation for trees so cut and appropriated by the defendant on the allegation that he is a non-permanent thika tenant who has only the right to enjoy the fruits of trees on his land but not to cut them, is cognisable by the Small Causes Court. A.I.R. 1950 Cal. 109.

——Sch. II, Art. 35 (ii)—Suit for damages for wrongful cutting of trees standing on plaintiff's land by defendant.

A suit for damages for cutting of trees standing on plaintiff's land without any legal justification falls under Sch. II, Art. 35 (*ii*), Prov. Small Cause Courts Act, as the wrongful cutting of trees for which damages are claimed amounts to an act of mischief or criminal trespass as defined in the Penal Code. A.I.R. 1942 Cal. 544=46 C.W.N. 943=202 Ind. Cas. 762.

——Sch. II, Art. 35 (ii)—Trees wrongfully cut—Claim for damages.

Plaintiff's suit for recovery of amount of more than Rs. 100 as price of trees wrongfully cut by defendant from plaintiff's land falls under Art. 35 (*ii*)—Appeal lies to District Judge. A.I.R. 1940 Lah. 66 =42 P.L.R. 9.

——Sch. II, Art. 35—Defendant occupied and used land and removed leaves without plaintiff's permission.

Where all that the plaint alleges is that the defendants, without permission and consent, occupied and used plaintiff's land and cut and removed some *dhani* leaves and there is no mention of theft or trespass, the suit is of a small cause nature, and, therefore, no second appeal lies under S. 102, C. P. Code. A.I.R. 1940 Rang. 100=1940 Rang.L.R. 1=189 Ind. Cas. 64.

——Sch. II, Art. 35—Suit for damages for cutting trees.

Where a person wrongfully cuts away certain trees in the fruits of which the plaintiff owns a share, without the plaintiff's consent, the suit for damages against such person falls under Art. 35 (*ii*) and is triable under the ordinary procedure and not as a Small Cause suit. A.I.R. 1938 Pat. 96=18 P.L.T. 758=4 B.R. 294=173 Ind. Cas. 485.

——Sch. II, Art. 35—Suit for recovery of value of tree alleged to have been cut and appropriated by defendants.

Where a suit is for recovery of the value of a *nim* tree alleged to have been cut and appropriated by the defendants, if the allegations of the plaintiff contained in the plaint amount to an averment that the defendants were guilty of criminal misappropriation, then the suit is one which should be instituted in a regular Civil Court and not in a Small Cause Court. The test is whether, if in a Criminal Court, the evidence carried the case no further than what is stated in the plaint a conviction should follow. A.I.R. 1935 All. 33=4 A.W.R. 958=154 Ind. Cas. 1013.

——Sch. II, Art. 35 (h) (ii)—Suit for price of timber removed by defendant from Court's custody under order of Court.

Where the cause of action for a suit for the price of logs of timber removed by the defendants is based, not on the defendants having forcibly removed them from the plaintiff's possession but upon the defendants having wrongfully taken them away from the Court as ordered by the Court, the suit does not fall within Art. 35 (*h*) (ii).

Quare.—Whether the cutting of trees under a mistake of fact does or does not fall under Art. 35 (*h*) (ii). A.I.R. 1933 Mad. 636=145 Ind. Cas. 888.

——Sch. II, Art. 35 (ii)—Cutting of tree—Suit for damages for trespass and mischief.

Where a person had a *bona fide* claim to a piece of land and, therefore, to a tree standing on it and another person instituted a suit for damages for trespass and mischief against him for cutting the tree:

Held, that Art. 35, Cl. (*ii*), did not apply and the suit being one of a small cause nature, no appeal lay. A.I.R. 1933 Rang. 261=146 Ind. Cas. 333 (2).

——Sch. II, Art. 35—Suit for damages for cutting and removing trees.

The plaintiff, as a mortgagee under an usufructuary mortgage which embraced certain jungle land on which trees and *dah* jungle grew, sued for damages for cutting the *dak* jungle and removing fruit of the trees by the defendants, claiming Rs. 100 in all. There was nothing in the plaint to allege that the defendants acted with any criminal intention and it merely set forth that the defendants cut the *dak* and took away the fruits. The written statement pleaded that the plaintiff had no concern with the jungle lands and that the defendants were entitled to act as they did. It was contended that the case was excluded from the jurisdiction of the Small Cause Court because of Art. 35 (*ii*):

Held, that the suit did not fall within the purview of Art. 35 (*ii*) and was cognizable by a Small Cause Court.

Held further, that the Court could not look into the evidence in addition to the pleadings to determine the question of jurisdiction. 1930 A.L.J. 1247=130 Ind. Cas. 481.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees—No criminal intent—Jurisdiction not ousted.

Where the plaintiff alleged that the defendant had wrongfully cut his trees but there was no allegation of any criminal intention or act on the part of the defendant, *held,* that the facts did not fall within Art. 35, Cl. (*ii*) of the Second Schedule of the Provincial Cause Courts Act and the objection to the jurisdiction of the Small Cause Court to try the suit was unsustainable. 32 Bom.L.R. 181=A.I.R. 1930 Bom. 361.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees—Bona fide claim—Jurisdiction not ousted.

In a suit for damages in respect of a portion of tree which had been cut down by the opposite party and removed under the impression that he was *bona fide* purchaser of it and hence entitled in law to remove it, suit does not any the less change its civil nature so as to remove it from the cognizance of the Small Cause Court merely because the plaint described this taking away as illegal. 7 O.W.N. 473=A.I.R. 1930 Oudh 317.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees—No allegation disclosing criminal offence.

Where the cause of action was an action in conversion or detenue, the plaintiff claiming the value of the timber cut by the defendant-tenant and the plaint mentioned the appropriation by the defendant and also went on to allege that the right of cutting the timber still remained in the plaintiff.

Held, that there was not an appropriate allegation to disclose a criminal offence and so the jurisdiction of the Small Cause Court was not ousted. 126 Ind. Cas. 857=A.I.R. 1930 Pat. 335.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees.

A suit for compensation for trees wrongfully cut and appropriated by the tenant is cognizable by a Court of Small Causes. A disputed right to the trees on the land under tenancy depends in some cases on statutory provisions and in others on custom and as such no criminal case is maintainable thereon. Art. 35 (*ii*) is, therefore, inapplicable. Conflict of decisions referred to. 9 Pat. 569=A.I.R. 1930 Pat. 575.

——Sch. II, Art. 35—Price of joint tree cut down.

Where a branch of a joint tree is alleged to have been cut and the plaintiff sue for their share of the price, the case is not one of mischief or theft and therefore not barred from the jurisdiction of the Court of Small Causes under Art. 35 (2). 119 Ind. Cas. 285=A.I.R. 1929 All. 816.

——Sch. II, Art. 35 (ii)—Cutting of trees—Bona fide claim.

A suit by landlord against his tenant for the price of trees cut and appropriated by the latter under a *bona fide* belief of his right to do so, though in fact he had no right, is cognizable by Small Cause Court. 106 Ind. Cas. 859=46 C.L.J. 552=A.I.R. 1928 Cal. 153.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees—Applicability of Article.

Where the allegations in the plaint in a suit for damages for wrongfully cutting and misappropriating a tree amount to an assertion that the defendants have committed acts which, if proved against them in criminal Court, would have rendered them liable to conviction on a charge of mischief, the suit falls within Art. 35 (*ii*). 100 Ind. Cas. 623=A.I.R. 1927 All. 381.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees.

A suit for the value of trees wrongfully cut and misappropriated falls within Art. 35 (*ii*). 102 Ind. Cas. 679=9 L.L.J. 245=28 P.L.R. 311=A.I.R. 1927 Lah. 399.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees—Jurisdiction ousted.

Where the allegations in the plaint are that the defendants unlawfully colluded with each other and forcibly cut and appropriated a tree without any right in spite of remonstrances of the plaintiff's servants.

Held, that these allegations undoubtedly make out an offence of theft and mischief and the suit was therefore excluded from the jurisdiction of a Court of Small Causes. 97 Ind. Cas. 129=49 All. 85=24 A.L.J. 1017=A.I.R. 1926 All. 760.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees—When not a small cause nature.

A suit by Zemindar against occupancy tenant for damages on the allegation that defendant had without right cut and removed trees of spontaneous growth standing upon his occupancy holding and that the defendant's act was contrary to law and justice and amounted to misappropriation falls under Art. 35 (*ii*), and is not a small cause suit. 89 Ind. Cas. 89 =A.I.R. 1926 All. 153.

——Sch. II, Art. 35—Wrongful cutting of trees—Suit for value—Not cognizable.

In a suit where rights to immovable property are in question, it is not desirable that the right of appeal which a party ordinarily has, should be taken away from him, if the suit can be brought directly within the suits included in the 2nd Schedule to the Act. A suit to recover a sum of money as damages from the owner of land for wrongfully cutting trees growing on his land, but belonging to the plaintiff is not cognizable by a Small Cause Court. 95 Ind. Cas. 270=28 Bom.L.R. 540=A.I.R. 1926 Bom. 362.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees.

Plaintiff sued for Rs. 25 for the value of a tree alleged to have been cut and removed by the defendants from plaintiff's land.

Held, the case is one falling under Art. 35 (*ii*), the second Schedule, as the defendants' act for which the plaintiff asks for compensation amounts to mischief or theft. 79 Ind. Cas. 138=A.I.R. 1925 Lah. 174.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees.

Suit for damages for trees belonging to plaintiff and cut by defendants is outside the cognizance of a Court of Small Causes. 78 Ind. Cas. 371=46 All. 233=A.I.R. 1924 All. 537.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees.

Suit for price of timber sold to plaintiff as standing trees but removed by pre-emptor owing to sale by vendor of plaintiff, falls under Art. 35 (*ii*). 73 Ind. Cas. 33=A.I.R. 1924 Lah. 71.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees—Offence against property.

The cutting down of trees belonging to other persons and misappropriating them is an offence against property punishable under Ch. 7 of the Penal Code. The claim for damages for such an act is not maintainable in the Small Cause Court. 73 Ind. Cas. 956=21 A.L.J. 367=4 L.R.A. (Civ.) 215=A.I.R. 1923 All. 543.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees.

Where in a suit by the zemindar-plaintiff to recover the price on the allegation that the defendants who were his tenants had wrongfully cut and carried off a *babul* tree belonging to him, the defence was set up that the tree had been planted by the defendants, was their own property and that they had done no injury to the plaintiff whatever.

Held, that the case does not fall within Art. 35 (*ii*). 71 Ind. Cas. 645=21 A.L.J. 213=4 L.R.A. (Civ.) 172=A.I.R. 1923 All. 428.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees—No dishonest intention—Test.

The defendant was prosecuted by the plaintiffs for the cutting of trees and acquitted. It had been found that the defendants had right for some portion of the trees.

Held, the mere taking of trees by the defendants would not of itself amount to theft or criminal misappropriation unless this was done with dishonest intention. The criminality of the act of the defendants will therefore depend on the intention with which this act was done and not whether the particular act was saved by the provisions of Ch. 4 of the Indian Penal Code. The case does not come within Art. 35 (*ii*) of Second Schedule of the Provincial Small Cause

Courts Act and therefore no second appeal lies. 77 Ind. Cas. 77: 27 C.W.N. 469: A.I.R. 1923 Cal. 568.

——Sch. II, Art. 35 (ii)—Wrongful cutting of trees.

Suit for the value of branches of a tree which had been cut by the defendants, is cognizable by a Court of Small Causes, where the plaint does not disclose any offence punishable under Ch. 17 of the Penal Code. 20 All. 480 and 12 A.L.J. 1032, Foll. 65 Ind. Cas. 7: 8 O.L.J. 391: A.I.R. 1921 Oudh 144.

——Sch. II, Art. 35 (ii)—Suit for damages for cutting and carrying away trees.

A suit for recovery of damages for trees alleged to have been forcibly cut and taken away is not triable by a Small Cause Court. 41 Ind. Cas. 936 (Cal.).

——Sch. II, Art. 35 (1)—Suit for compensation for wrongful cutting and removal of tree.

A suit for compensation for unlawfully cutting and removing a tree and misappropriating crops is excepted from the cognizance of the Small Cause Court. 21 C.W.N. 1109: 27 C.L.J. 594: 41 Ind. Cas. 276.

13. Wrongful seizure and removal.

——Sch. II, Art. 35 (b)—Suit for damages for wrongful seizure of cattle, etc.

The word "arrest" is a technical term and it is used in relation to the arrest of a person. When an animal is taken possession of, the technical term is seizure and not arrest. The word "arrest" in Art. 35 (*b*), Prov. Small Cause Court Act, does not apply to the seizure of animals.

Art. 35 has not effected any change in the law. Wrongful seizure of cattle with their subsequent impounding. (1941) 195 Ind. Cas. 365: 1941 N.L.J. 328.

——Sch. II, Art. 35 (ii) — Wrongful seizure and removal.

A suit for *mesne profits* against a trespasser is cognizable by Small Cause Court and Cl. (*ii*) of Art. 35 has not effected any change in the law.

Plaintiff had obtained as against the defendants delivery of possession of a certain land through the Court. Thereafter litigation went on between the plaintiff and the defendants, and taking advantage of the said litigation the defendants did not give up possession, and continuing in such possession took away the paddy that was standing on the land and appropriated the same to their own use. The plaintiff sued for damages for use and occupation.

Held, that the suit was cognizable by a Small Cause Court as damages that had been claimed were not for any act which amounted to any criminal offence within the meaning of Ch. 17, I.P. Code. 107 Ind. Cas. 721: A.I.R. 1928 Cal. 405.

——Sch. II, Art. 35 (ii) — Wrongful seizure and removal.

There was a dispute between two persons as to the ownership of certain standing crops. So the crops were cut and placed in the custody of trustee until the matter of ownership may be decided by a Court. Before any decision could be arrived at, the defendant took away the crops from the trustee. The plaintiff, therefore, sued the defendant for the price of the crops in the Court of Small Causes.

Held, the defendant could not have been charged of an offence of theft because he acted under a claim of property, as the ownership was doubtful and the crops were therefore handed over to a trustee. As neither party could be charged with theft of or the removal of the crops, the Small Cause Court had jurisdiction. 81 Ind Cas. 1029: 5 L R.A. (Civ.) 648: A.I.R. 1925 All. 130.

——Sch. II, Art. 35—Wrongful seizure and removal.

Owing to a dispute about ownership of certain standing crops they were kept with a trustee, but they were removed by the defendant.

Held, suit by plaintiff is cognizable by Small Cause Court as defendant could not have been charged with theft as title was doubtful. 81 Ind. Cas. 1029: 51 Cal. 992: A.I.R. 1925 Cal. 164.

——Sch. II, Art. 35 (ii)—Suit for paddy wrongfully and forcibly taken away.

A suit to recover the value of paddy wrongfully and maliciously cut and taken away by the defendant from the possession of the plaintiff is not cognizable by a Court of Small Causes. 45 Ind. Cas. 15 (Cal.).

14. Miscellaneous.

——Sch. II, Art. 35 (j)—Miscellaneous.

The mere addition of an idle prayer for declaration as auxiliary to a suit for refund of money does not make the suit the less a suit of a small cause nature, and even though interest is claimed along with refund the suit falls within Sch. II, Art. 35 (*j*). Though no appeal lies from such suit, revision is competent. 1931 M.W.N. 1107.

——Sch. II, Art. 35 (j)—Damages for failure to certify payment.

A suit to recover damages for the breach of an express or implied promise to certify the payment to the Court is cognizable by Small Cause Courts. 70 Ind. Cas. 115: 11 L.B.R. 429: 1 Bur. L.J. 207: A.I.R. 1923 Rang. 88.

——Sch. II, Art. 35 (j)—Interest claimed as damages.

Where in a suit to recover a sum of money, interest is claimed by way of damages for detention of money and not as compensation, cause of action is not one under Sch. II. Art. 35 (*j*). 31 Bom. L.R. 1307: A.I.R. 1930 Bom. 80.

——Sch. II, Art. 35—Price of trees jointly owned.

A suit for recovery of plaintiff's share of price of certain trees sold by defendant and belonging jointly to him and the defendant is of the nature cognizable by a Small Cause Court. 90 Ind. Cas. 603: 7 L.L.J. 285: 26 P.L.R. 584: A.I.R. 1925 Lah. 479.

——Sch. II, Art. 35 – Recovery of ornaments—No allegation of criminal charge—Not covered.

A suit was brought in the Small Cause Court for the recovery of certain ornaments or their value from the defendants who were the sons of a person who kept the ornaments promising to return them. There was no allegation of a criminal charge. The suit was dismissed as barred by Art. 48, Limitation Act.

Held, that criminal charge could not be presumed from the application of Art. 48, Limitation Act, and the suit was not barred under Arts. 35 and 43-A, from cognizance of a Small Cause Court. 116 Ind. Cas. 785: A.I.R. 1929 All. 208.

——Sch. II, Art. 35 (ii)—Suit failing under.

A suit under Art. 35 (*ii*) is not a small cause, and consequently a second appeal lies. 60 Ind. Cas. 330: 5 L.L.J. 92: A.I.R. 1923 Lah. 39.

——Sch. II, Art. 35 (h)—Work done without authority —Not covered.

Where the plaintiff's allegation was merely that the defendants went on doing the work of weighing goods when they had no right to do so, Art. 35 (*h*) has no application The suit is consequently a small cause and no second appeal lies. 69 Ind. Cas. 431: A.I.R. 1923 Lah. 244.

——Sch. II Art. 38. *See* ART. 11. 13 M.L.J. 499.

——Sch. II, Art. 38—Applicability—Suit regarding maintenance.

It was agreed that the plaintiff should look after the mother-in-law and the daughter of the defendant and that the defendant should pay the plaintiff Rs. 10 a month to compensate him for the expenses incurred and the trouble taken in looking after these ladies. The suit was brought to recover the money due under that agreement:

Held, that the basis of the suit was an agreement between the plaintiff and the defendant, neither of whom was the maintenance holder, and the suit was to recover what could not be described as maintenance in the hands of the plaintiff but was really payment for having provided maintenance for the ladies and that such a suit being not a suit relating to maintenance but one for payment for having provided maintenance was not barred by Art. 38 A.I.R. 1937 Nag. 236: I.L.R. (1937) Nag. 517: 171 Ind. Cas. 231.

——Sch. II, Art. 38—Applicability.

Art. 38 applies to all suits relating to maintenance whether based on the personal law or on a contract, bond or decree. 112 Ind. Cas. 256 (Lah.).

——Sch. II, Art 38—Applicability.

A suit to be not cognizable by Small Causes Court under Art. 38 must be both in form and substance a suit for maintenance. 2 A.L.J. 697, Foll. 104 Ind. Cas. 586: A.I.R. 1928 Oudh 47.

——Sch. II, Art. 38—Applicability.

It is not necessary in order to take the case out of the cognizance of the Small Cause Court that the person bound in law to maintain should be one of the parties 40 All. 52, Foll. 96 Ind. Cas. 900: 24 M.L.W. 77: A.I.R. 1926 Mad. 932: 51 M.L.J. 215.

——Sch. II, Art. 38—Jurisdiction—Proceedings under S. 488, Criminal P.C., by wife against husband.

Where the parties are husband and wife and some years ago, the latter took proceedings against the former under S. 488, Criminal P.C., and in the course of that litigation, an agreement was entered into between them whereby the defendant agreed to pay to the plaintiff maintenance at certain specified rates and the plaintiff brings a suit for arrears of maintenance alleged to be due under the agreement, the suit is one "relating to maintenance" and is clearly excluded from the jurisdiction of the Court of Small Causes by Art. 38, Provincial Small Cause Courts Act. A.I.R. 1935 Lah. 101: 155 Ind. Cas. 965.

——Sch. II, Art. 38—Suit for arrears of maintenance—Jurisdiction.

Suit for arrears of maintenance due under a bond or agreement is not cognizable by a Court of Small Causes under Art. 38. A.I.R. 1931 Bom. 286: 33 Bom. L.R. 510: 135 Ind. Cas. 477.

——Sch. II, Art. 38—Jurisdiction.

A suit for the recovery of the value of paddy deliverable for maintenance is cognizable by a Small Cause Court; such a suit does not fall under Art. 38. 38 Mad. 553: 1 L.W. 19: 22 Ind. Cas. 39.

——Sch. II, Art. 38—Maintenance, fixed—Suit for arrears of fixed maintenance—Jurisdiction.

A suit for arrears of fixed maintenance against deceased husband's brother, on the allegation that the defendant took the property by his father's will, subject to a charge of maintenance, is one for maintenance and thus not cognizable by the Small Cause Court. 40 All. 52: 15 A.L.J. 857: 42 Ind. Cas, 903.

——Sch. II, Art. 38—Maintenance—Jurisdiction—Small Cause Courts.

Suit for damages as arrears of maintenance for three years is a suit for maintenance and is not therefore not cognizable by Small Cause Court. Hence a second appeal lies in such suit. 10 A.L.J. 185: 16 Ind. Cas. 13.

——Sch. II, Art. 38—Maintenance—Suit on agreement to pay maintenance to a child—Jurisdiction.

A suit to recover a sum of money agreed to be paid for the maintenance of a child is a suit for maintenance and is, therefore, not cognisable by the Small Cause Court, under Art. 38. 9 L.B.R. 51: 10 Bur. L.T. 239: 38 Ind. Cas. 209.

——Sch. II, Art. 38—Maintenance—Suit for arrears of maintenance by assignee thereof.

A suit for arrears of maintenance due to a member of an Aliyasantana family and assigned to plaintiff is not cognizable by a Small Cause Court. 20 M. 19, Foll. 37 M.L.J. 402: 53 Ind. Cas. 665.

——Sch. II, Art. 38—Maintenance, meaning of.

Maintenance is a sum of money payable by a person under an obligation either by law or specific contract. A suit by the guardian of the person of a minor against the guardian of the property to recover the money ordered by Court is not for maintenance. 32 Ind. Cas. 547 (Mad.).

——Sch. II, Art. 38—Maintenance—Suit on agreement —Jurisdiction.

Where two sons agreed among themselves that their mother should reside with one of them and that the other should pay his brother a certain quantity of paddy by way of maintenance to the mother but fell into arrears and therefore the sons of the brother with whom the mother lived, sued the other brother in the Small Cause Court for arrears due *held* that the suit being by the maintenance holder herself for maintenance but being based on a contract was not one *relating to maintenance* within Art. 38. 2 L.W. 103: 27 Ind. Cas. 824.

——Sch. II, Art. 38—Suit relating to maintenance.

Art. 38 refers to a suit which both in form and in substance is a suit for maintenance. Hence when in settlement of a family dispute as to the possession of Zamindari property a compromise was entered into by which the defendants agreed to pay to the plaintiff's mother a certain sum annually, but this was not stated to be by way of maintenance, it was *held* that a suit by the son of the annuitant to recover arrears of the annuity on the ground that the same was payable to him also was not excluded from the jurisdiction of a Court of Small Causes. (1905) A.W.N. 137: 2 A.L.J. 697.

——Sch. II, Arts. 38, 41—Decree for maintenance against four brothers by payment by a representatives of one—Claim for contribution—Cognizable by a Small Cause Court.

A claim for contribution in respect of sums paid by the representatives of a judgment-debtor to satisfy a decree passed against the latter and his three brothers for maintenance which, however, was not made a charge on property, is one cognizable by the Court of Small Causes and does not fall under Art. 4 and, therefore, no second appeal lies under S. 586, C. P. Code. The anterior liability which led to the decree for maintenance being passed does not affect the question. (1904) 14 M.L. J. 480.

——Sch. II, Art. 38—Suit for maintenance due under an agreement.

A suit to recover arrears of maintenance due under an agreement falls within Art. 38, and is not cognizable by a Court of Small Causes. 16 B. 267, foll. (1901) A.W.N. 155: 23 A. 495.

——Sch. II, Art. 39 — Cultivation begun — Suit involving.

Suits in which cultivation begun to be rendered by a tenant under C. P. Tenancy Act forms part of the claim are not cognizable by a Small Cause Court. 6 N.L.R. 117: 8 Ind. Cas. 276.

——Sch. II, Art. 40—Dharat collections—Suit for—Small Cause Suit.

A suit for a share of *dharat* collections against a share-holder or a person who has wrongfully received it is cognizable by a Civil Court and is in the nature of a Small Cause suit. 120 P.R. 1912: 64 P.W.R. 1913: 103 P.L.R. 1913: 18 Ind. Cas. 532.

——Sch. II, Art. 41.

Synopsis.

1. **Applicability and scope.** *See also* PRO. S.C.C. ACT—JURISDICTION.
2. **Co-judgment debtors.**
3. **Contribution and re-imbursement.**
4. **Decree-holder's suit for contribution.**
5. **Essentials of right to contribution.**
6. **Jurisdiction.** *See also* PRO. S.C.C. ACT—APPLICABILITY AND SCOPE.
7. **"Manager".**
8. **"Money due from a co-sharer."**

1. Applicability and scope.

——Sch. II, Art. 41—Applicability.

Suits for contribution by sharer in joint property are excepted by Art. 41—Properties separate—No apportionment—Owner of one separated piece of land paying him whole *peiskush*—Suit for contribution does not come under Art. 41 and is triable by Small Cause Court. A.I.R. 1940 Mad. 497: 1940 M.W.N. 54: (1940) 1 M.L.J. 175: 51 L.W. 514.

——Sch. II, Art. 41—Applicability and scope.

Article 41 contemplates suits for contribution where in common liability arises at the date of payment. So, where income-tax on joint family income was wrongly recovered from father alone, for the period during which he was living separate from his son and where the son was sued for contribution, it was held, Art. 41 did not apply and the case was cognizable by Small Cause Court. 1938 N.L.J. 125.

——Sch. II, Arts. 41, 15—Suit for recovery of money advanced and not for contribution.

A suit for recovery of money advanced which is neither a suit for contribution nor one in respect of payment made by the plaintiff of money to the defendant as a co-sharer does not fall within Art. 41 or Art. 15. A.I.R. 1936 Pat. 429: 17 P.L.T. 591: 2 B.R. 469: 162 Ind. Cas. 553.

——Sch. II, Art. 41—Suit for contribution by co-sharer after partition.

Article 41 which takes away from the jurisdiction of the Small Cause Court a suit for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer applies only to a suit where the plaintiff, at the time of filing his plaint is a sharer, in joint property.

Where a decree was obtained against the *karnavan* of a *tarwad* and after the *tarwad* had been partitioned into a number of *tavazhies*, the representatives of two of the *tavazhies*, who had discharged the decree amount instituted a suit against the representatives of the remaining *tavazhies* for contribution:

Held, that the suit was not covered by Art. 41 and the Small Cause Court had jurisdiction to try the suit. A.I.R. 1935 Mad. 88: 40 L.W. 856: 1934 M.W.N. 1352: 68 M.L.J. 24: 154 Ind. Cas 447.

——Sch. II, Art. 41—Applicability and scope.

A suit for contribution is ordinarly cognizable by a Small Cause Court. The suits for contribution over which the Small Cause Court has no jurisdiction are those specified in Arts. 41 and 42, or possibly under Art. 44. 15 Cal. 713, Foll. 109 Ind. Cas. 247: 55 Cal. 1193: A.I.R. 1928 Cal. 593.

——Sch. II, Art. 41—Applicability.

It cannot be laid down broadly as a proposition of law that every claim for contribution founded upon a decree is not a claim of the nature specified in Art. 41. The fact that a decree may be furnish the cause of action for a suit for contribution is itself no ground for holding that it cannot be a suit of the nature contemplated by Art. 41. The right test always is the nature of the suit as brought and not the circumstances which constitute the cause of action. 110 Ind. Cas. 119: 3 Luck. 368: 5 O.W.N. 11: A.I.R. 1928 Oudh 237.

——Sch. II, Art. 41—Applicability and scope.

A suit for contribution by a co-owner as regards the sum paid by him to the proprietor on account of all co-owners is covered by Art. 41 and is not cognizable by Small Cause Court. 81 Ind. Cas. 566: A.I.R. 1925 Oudh 88.

——Sch. II, Art. 41—Applicability.

Suit for contribution on account of recovery of arrears of rent and water-cess collected from plaintiff in respect of defendant's land after partition between plaintiff and defendant is not covered by Art. 41 and second appeal will not therefore lie where account in suit was below 500. 80 Ind. Cas. 353: 19 M.L.W. 547: 1924 M.W.N. 478: A.I.R. 1924 Mad. 790.

2. Co-judgment-debtors.

——Sch. II, Art. 41—Joint decree for costs against several persons—Suit for contribution by some persons against whom only execution was levied—Suit does not come under Sch. II, Art. 41—No second appeal lies.

When a joint decree for costs is passed against more persons than one, and execution has been levied against one or some only, a suit by such persons for contribution against others does not come within the terms of Sch. II, Art. 41 and therefore no second appeal lies. A.I.R. 1946 Cal. 63: 49 C.W.N. 711.

——Sch. II, Art. 41—Suit for eontribution—Co-judgment debtors.

When one co-sharer sues his other co-sharers for contribution in respect of payment made by him under a decree passed against all the co-sharers, the suit falls under Art. 41, Sch. II, and hence, is not cognizable by Small Cause Court. A.I.R. 1939 Nag. 64: 1938 N.L.J. 457: 181 Ind. Cas. 123.

——Sch. II, Art. 41—Co-judgment debtors.

Plaintiff bought from the defendant a portion of the holding at the time of his purchase and undertook responsibility for proportionate rent. There was a rent decree for the whole of the holding and it was paid by the plaintiff who subsequently brought a suit in the Court of Small Causes for recovery of this amount from the defendant, excluding the proportionate amount for which he had made himself responsible:

Held, that the suit although one for contribution, did not fall under Art. 41, and consequently, was cognizable by the Court of Small Causes. A.I.R. 1937 Pat. 382: 3 B.R. 630: 18 P.L.T. 637: 169 Ind. Cas. 801.

——Sch. II, Art. 41—Co-judgment debtors—Contribution suit, not excepted.

A suit to recover by way of contribution a share of the decretal amount paid by the plaintiff is a suit of a Small Cause nature and not one falling under Art. 41; and where the value of the suit is less than Rs. 500, no second appeal lies. 94 Ind. Cas. 949: A.I.R. 1926 All. 456.

——Sch. II, Art. 41—Co-judgment debtors—Not governed by Article.

Were the rights of the co-sharers, *inter se*, merge in their rights and liabilities as co-judgment debtors in regard to the decree, a suit for contribution among them being one between judgment-debtors, does not fall under Art. 41. 1 O.L.J. 214. Foll. 90 Ind. Cas. 1036: 2 O.W.N. 660: A.I.R. 1925 Oudh 539.

——Sch. II, Art. 41—Co-judgment debtors—Contribution suit, not excepted.

Two suits, one for damages for breach of contract to deliver land in joint possession of plaintiff and defendants and the other for mesne profits were decreed with costs and the decree-holder recovered the decretal amount from the plaintiffs alone. Plaintiffs filed two suits against defendants for the share of the money *Held*, the suits did not fall within Art. 41 and the subject-matter being less than Rs. 500, no second appeal was competent. 62 Ind. Cas. 651 (Cal.)

——Sch. II, Art. 41—Contribution— Co-judgment debtors.

Where a decree for maintenance has been passed against three brothers and one of them is made to pay the whole amount, and sues his brothers for contribution, the suit is maintainable in the Small Cause Court. 40 All. 135: 16 A.L.J. 44: 45 Ind Cas. 560.

——Sch. II, Art. 41—Co-judgment debtors.

Where a decree for arrears of rent against several tenants occupying separate fields in one and the same *khata* has been realised from one of them, a suit for contribution as against others, at the instance of one who had paid the amount is barred by Art. 41 from the cognizance of a Small Cause Court. 13 A.L.J. 452: 28 Ind. Cas. 587.

——Sch. II, Art. 41—Co-judgment debtors—Suit by one of several joint under-proprietors against others, for contribution.

A suit by one of several joint under proprietors who satisfied the decree for arrears of rent passed jointly against them for contribution against the other joint under-proprietors is not within Art. 41 and so cognizable by a Small Cause Court. 28 A. 292, Foll. 1 O.L.J. 244: 24 Ind. Cas 28.

——Sch. II, Art. 41—Co-judgment debtors—Decree jointly against two—Satisfaction by one.

A decree against certain joint owners was executed against plaintiff alone who sued defendant, the other owner in the Small Cause Court to recover half of the amount which he had to pay, *Held* that the suit being one for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer is not cognizable by a Small Cause Court. The fact of the plaintiff paying a decree against him and the defendant instead of paying the amount before it was sued for, makes no difference 2 Lah. L.J. 387.

——Sch. II, Art. 41—Co-judgment debtors—Appeal—Civil Procedure Code, S. 586.

Held, that a suit brought by one of several co-judgment-debtors for contribution in respect of certain costs which he alone had been compelled to pay was not a suit which was excluded from the jurisdiction of a Court of Small Causes. (1907) A. W.N, 230: 4 A.L.J. 543.

——Sch. II, Art. 41—Co-judgment debtors.

A suit for contribution by a tenant who has paid the entire amount due under a decree for rent obtained against him and his co tenant is excluded from the cognizance of the Small Cause Court by Art. 41, Sch II of the Act. 4 Ind. Cas. 59 (All.).

——Sch. II, Art. 41—Co judgment debtors—Suit for contribution arising out of satisfaction of a joint decree for costs.

A suit by one of several joint judgment-debtors, who had satisfied a joint decree for costs for contributions against the other joint judgment debtors is not a suit exempted from the jurisdiction of a Court of Small Causes 15 C. 713, foll. 1906 A.W.N. 6: 3 A.L J. 6: 28 A. 292.

3. Contribution and re-imbursement.

——Sch. II, Art. 41—Scope—Suit by one co-sharer against another co sharer for money paid to his request.

Where each co-sharer of a certain property is liable for his share of the money payable to a contractor for certain repairs effected by him, a suit brought by one co-sharer against another co-sharer to recover money paid at his request to the contractor is not a suit for contribution in any sense of the word. It is a suit based on contract pure and simple and that being so, it is not covered by Art 41, Provincial Small Cause Courts Act and is therefore not outside the jurisdiction of a Small Cause Court. A.I.R. 1948 Cal. 35

——Sch. II, Art. 41—Imperfect partition under C. P. Land Revenue Act (2 of 1917)—Payment of Land Revenue of lambardar's patti made by Sadar lambardar—Suit by Sadar lambardar to recover same is not one for contribution under Art. 41, Provincial Small Cause Courts Act (1887), but for re-imbursement—Contract Act (1872), S. 70.

Joint ownership of property is the essence of a right of contribution under Art. 41, Provincial Small Cause Courts Act.

In a village which is imperfectly partitioned joint

ownership ceases and each pattidar becomes the full owner of patti owned by him and is liable to pay land revenue allotted to his patti separately, either directly to Government or through the sadar lambardar. A suit by the sadar lambardar to recover the land revenue paid on behalf of the lambardar is not one for contribution to which Art. 41. Provincial Small Cause Courts Act, can apply, but one for reimbursement under S. 70, Contract Act, and is cognizable by the Court of Small Causes. A.I.R. 1946 Nag. 134: I.L.R. (1946) Nag. 226: 1945 N.L.J. 578.

——Sch. II, Art. 41—Contribution and reimbursement.

Where all the co-sharers were jointly liable to pay the rent to the superior proprietor, and it was found that the plaintiff co-sharer had previously paid the amount which was due from him in respect only of his share and that the amount which was subsequently recovered from him by suit was due only from the other co-sharers on a consideration of their separate interest in the land and the plaintiff sued the other co-sharers for recovery of the money paid by him in respect of their shares of the rent:

Held, that it was immaterial that the separate share of the plaintiff had been paid by him to the superior proprietor before he was sued by the latter for the balance. It was not the case that the plaintiff was no longer liable to the superior proprietor after payment of his individual share. The liability was a joint liability and he remained liable for the balance even after payment of his own share. Consequently, a suit of this kind was not a suit for re-imbursement but a suit for contribution. The suit was not, therefore, cognizable by Small Cause Court under Art. 41. Sch. II. A.I.R. 1941 Oudh 578: 1941 O.W.N. 963: 1941 A.W.R. 645: 17 Luck. 67: 195 Ind. Cas. 498.

——Sch, II, Art. 41—Contribution and reimbursement.

A and *B* executed jointly a bond in favour of *C* for a certain sum. *A* made payments towards it. At the time of taking accounts a certain sum was found due on the bond. *A* alone executed a promissory note in full satisfaction of that liability. *B* was asked to join in the execution of the bond. He agreed but did not join in it. *C* instituted a suit on the basis of the promissory note against *A* alone who paid the decretal amount. *A* brought a suit against *B* for his share of the amount paid to *C*.

Held, that suit by *A* was not a suit for contribution and there is nothing in the Provincial Small Cause Courts Act to prevent a suit of this nature being brought in the Small Cause Court. 110 Ind. Cas. 96: 3 Luck. 413: 5 O.W.N. 48: A.I.R. 1928 Oudh 239.

——Sch. II, Art. 41—Contribution and reimbursement.

The parties were joint co-sharers of property in certain villages. Imperfect partition was effected and the liability for the payment of revenue was separately distributed to the co-sharers. The plaintiff was not certain what the exact amount due from him was for the year in suit, and to be on the safe side paid more than was necessary.

Held, that a suit for reimbursement for excess paid by the plaintiff, which had been credited to the defendants, was not a suit for contribution falling under the Provincial Small Cause Courts Act, 2nd Sch., Art. 41, but came within the purview of Contract Act. Ss. 70 and 72. 85 Ind. Cas. 549: A.I.R. 1925 Oudh 625.

——Sch. II, Art. 41—Contribution and reimbursement, suit for—Not excluded.

Apart from a contribution suit amongst co-sharers in a certain property, a claim for reimbursement under Ss. 69 and 70 is not excluded under Sch. II, Art. 41 of the Provincial Small Cause Courts Act. 64 Ind. Cas. 226: 3 Pat. L.T. 122: 1921 P.H.C.C. 298: A.I.R 1922 Pat. 337.

——Sch. II, Art. 41—Contribution and reimbursement —Suit to recover amount paid by purchaser for encumbrance on property sold free of all encumbrances —Compensation.

A suit by the vendee against the vendors for recovery of the money paid by him for an encumbrance on the property sold represented to be free of all encumbrances is a suit for compensation and not for contribution and is cognisable by the Small Cause Court. 12 A.L.J. 1279: 26 Ind. Cas. 909.

——Sch. II, Art. 41—Contribution and reimbursement —Suit for contribution—Suit for money paid by plaintiffs, for the benefit of defendants.

Where the plaintiffs deny that they were liable to satisfy the judgment-debt which they satisfied and which was recoverable only from the defendants, a suit for recovery of money paid by them is not a "suit for contribution" and is therefore cognizable by a Small Cause Court. 20 C.L.J. 196: 18 C.W.N. 1308: 24 Ind. Cas. 259.

4. Decree-holder's suit for contribution.

——Sch. II, Art. 41—Decree-holder's suit for contribution.

Suit by decree-holder for contribution of expenses comes under Art. 41. A.I.R. 1931 Lah. 748: 32 P.L.R. 710.

5. Essentials of right to contribution.

——Sch. II, Art. 41—Essentials of right to contribution—Common liability.

A common liability is the essence of a right of contribution, and an action for contribution is a suit brought by one of several parties who has discharged a liability common to all of them to compel the others to make good their shares. The words "sharer" and "joint property" are to be understood with reference to this common liability that has been discharged and not in the sense of an "undivided sharer in the property" and "property in which the sharers are undivided". 13 A.L.J. 452. Rel. on. 109 Ind. Cas. 247: 55 Cal. 1193: A.I.R. 1928 Cal. 593.

6. Jurisdiction.

See also PROVINCIAL S.C.C. ACT, ART. 41—APPLICABILITY AND SCOPE.

——Sch. II, Art. 41—Suit for contribution.

Where the shares of the plaintiff and the defendant in certain property are divided but they are jointly liable to pay Government revenue and the plaintiff alleges that he paid his share of revenue and that of the defendant also when the defendant committed default in the payment of his share, a suit for contribution against the defendant is not cognizable by the Court of Small Causes. A.I.R. 1941 Pat. 49: 7 B.R. 409: 192 Ind. Cas. 757.

——Sch. II, Art. 41—Suit for contribution after dissolution of partnership—Jurisdiction.

Where a joint decree was passed against the plaintiff and his partner and after the death of the latter the plaintiff instituted a suit in the Small Cause Court for contribution to the extent of Rs. 200 against the legal representatives of the deceased partner in respect of the amount paid by the plaintiff to satisfy the joint decree but the plaint was returned to be presented to the proper Court on the ground that no suit for contribution but only a suit for accounts lay:

Held, that a suit for contribution on the Small Cause side was maintainable as the partnership had ceased to exist and the order returning the plaint was erroneous. A.I.R. 1934 Mad. 699: 68 M.L.J. 405: 41 L.W. 580: 1935 M.W.N. 597: 153 Ind. Cas. 451.

——Sch. II, Art. 41—Co-lessees—Jurisdiction.

A suit by plaintiff for contribution of the money paid by plaintiff on defendant's behalf for taking a joint lease is not cognizable by Small Cause Court. 99 Ind. Cas. 518: A.I.R. 1927 Nag. 365.

——Sch. II, Art. 41—Joint tort-feasors—Jurisdiction.

A suit for contribution by one tort-feasor against his joint tort-feasor where the sum claimed is below Rs. 500, is a Small Cause suit and no second appeal lies. 62 Ind. Cas. 504 (Cal.).

——Sch. II, Art. 41—Payment of rent by mortgagor for the mortgagee—Contribution—Jurisdiction.

A mortgaged his holding to *B*, who agreed to pay portion of the rent to the landlord. *A* having paid the whole rent to the landlord to prevent the sale of the holding, sued *B* for contribution in the Court of Small Causes. The suit was held to be barred from its cognizance by Art. 41 as *A* and *B* were joint holders of the holding and the suit by *A* is to recover money due by another co-sharer. 57 Ind. Cas. 595 (Pat.).

——Sch. II, Art. 41—Contribution, suit for—Jurisdiction.

A suit by one of the heirs of a deceased Mahomedan for recovery from the other co-heirs of his share of debt due by the deceased and paid off by the plaintiff is cognizable by a Small Cause Court. 41 All. 51: 16 A.L.J. 787: 47 Ind. Cas. 842.

——Sch. II, Art. 41—Suit for contribution—Jurisdiction.

A suit for contribution is not exempted from the cognizance of a Court of Small Causes. 5 O.L.J. 109: 45 Ind. Cas. 236.

——Sch. II, Arts. 41 and 42—Contribution, suit for—Jurisdiction.

A suit by one co-mortgagor against the other co-mortgagors for contribution in respect of money paid by him to discharge a decree obtained on their joint mortgage is not cognizable by a Small Cause Court. 13 A.L.J. 694: 29 Ind. Cas. 247.

——Sch. II, Art. 41—Contribution, suit for—Jurisdiction.

A suit by some of several persons bound by a common liability, who have discharged joint obligation, to compel their co-sharers to make good their shares falls within Art. 41 of the Act. 20 C.L.J. 200: 19 C.W.N. 458: 27 Ind Cas. 56.

——Sch. II, Art. 41—Contribution, suit for—Jurisdiction.

A suit for contribution by a co-sharer against another co-sharer whose name appears as recorded tenant: though he has sold away his share in respect of money paid by the plaintiff towards a decree passed against the defendant as recorded tenant comes under Art. 41 as the defendant fills a representative capacity in such suit. 16 C.W.N. 975: 17 C.L.J. 179: 17 Ind. Cas. 90.

——Sch. II, Art 41—Contribution, suit for—Undissolved partnership—Jurisdiction.

A suit for contribution will lie on the small cause side even though the debt in respect of which the decree was obtained was one relating to a partnership trade carried on between plaintiff and defendant jointly unless the partnership is one undissolved and continuing. 11 M.L.T. 188: (1912) M.W.N. 384: 15 Ind. Cas. 218.

——Sch. II, Art. 41—Contribution, suit for—Jurisdiction.

Where an *ex parte* decree was obtained against the plaintiff for rent of certain lands of which he was the registered tenant but in which he had an interest at the time of suit and the plaintiff paid off the decree and sued for contribution the persons who had an interest in the land and the suit amount was less than 500 Rupees, *held* that the suit was not excluded by Art. 41 of the Act and that no second appeal lay. 14 Ind. Cas. 735 (Cal.).

7. "Manager".

——Sch. II, Art. 41—"Manager", meaning of

Where certain land is granted to a Hindu person and his nephew and such person alleging to have reclaimed the land at a certain cost, sues his nephew to recover the nephew's half share of the costs with interest, the suit cannot be said to be one "for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer" within the first portion of Art. 41.

Nor can the suit be regarded as a suit by a manager of joint property or a member of an undivided family in respect of a payment made by him on account of the property or family within the meaning of Art. 41. When the person has nowhere stated in his plaint that he was the manager of the property, the mere fact that he performed an act of management by entering into a contract for the reclamation of the land would not constitute him a manager within the meaning of Art. 41 as the word "manager" means a recognized manager not a manager *ad hoc* A.I.R. 1943 All. 21: 1942 A.L.J. 634: 1942 A.W.R. 350: 204 Ind. Cas. 610.

8. "Money due from a co-sharer".

——Sch. II, Art. 41—"Money due from a co-sharer".

B brought a suit in the Court of Revenue for recovery of arrears of rent against a larger number of persons. He obtained a decree for a certain sum. In the process of execution of that decree *B* sold certain zamindary shares belonging to the plaintiffs and other co-sharers. The sale was set aside in respect of the plaintiff's share on payment of that sum. The plaintiffs sued to recover that sum with interest from the co-sharers the majority of whom were party to the decree obtained by *B*.

Held, that it was a suit by sharer in joint property in respect of payment made by him of money due from a co-sharer and therefore its cognizance by a Small Cause Court was excluded under Art. 41.

110 Ind. Cas. 119: 3 Luck. 368: 5 O.W.N. 11: A.I.R. 1928 Oudh. 237.

———Sch. II, Art. 41—Joint purchasers — Joint pro-note payment by one—Suit not excepted.

The words "money due from a co-sharer" in Art. 41 mean money due from him as such. Where the money is due from the defendant by reason of his being one of the makers of a promissory note along with plaintiff the fact that the promissory note was itself executed by reason of a joint purchase by plaintiff and defendant does not make the amount one due from a co-sharer. 86 Ind. Cas. 587: A.I.R. 1925 Mad. 970.

——Sch. II, Art. 41—"Payment made.....of money due by a co-sharer."

Art. 41 only contemplates a suit for contribution in respect of a payment made by a sharer of money already *due* from a co-sharer and does not cover the case where the debt becomes due only by virtue of the payment. A decree was passed jointly against five persons. Three of them sued to set aside the decree as fraudulent and the decree was in consequence declared not binding on them. The decree-holder took out execution against the other two judgment-debtors They objected that they were liable only to pay their proportionate shares, but the objection was disallowed by the first Court and the appellate Court confirmed the order. *Held*:—That no second appeal lay in the case. (1906) 17 M.L.J. 376: 30 M. 212.

——Sch. II, Art. 42—Applicability — Suit not coming under S. 95, Transfer of Property Act.

One of the mortgagors paid up the entire amount of the decree for sale obtained on the mortgage. Subsequently he brought a suit for contribution against the co-mortgagee to the extent of his share in the property. The plaint of the suit was so worded as to bring it under S. 69, Contract Act, and not under S. 95, Transfer of Property Act.

Held, that the suit was not covered by Art. 42 as the suit was not under S. 95, Transfer of Property Act. 13 A.L.J. 694. Expl. 114 Ind. Cas. 47: 50 All. 428: 26 A.L.J. 164: A.I.R. 1928 All. 298.

——Sch. II, Art. 42—Effect.

When one of the joint mortgagors satisfied the mortgage debt and sued the co-mortgagor for recovery of money.

Held, that the suit was not cognizable by the Small Cause Court and consequently second appeal lies. 71 Ind. Cas. 393: A.I.R. 1923 All. 408.

——Sch. II, Art. 42—Joint mortgagor, who is—Purchaser redeeming mortgage.

A purchaser who redeems the mortgage is in the same position as if he were a joint mortgagor and the fact that a decree had been obtained on the mortgage is also immaterial because the decree on the mortgage does not extinguish the security though the security may be merged in the decree. 13 A.L.J. 694 and 21 C.L.J. 104, Foll. 109 Ind. Cas. 247: 55 Cal. 1193: A.I.R. 1928 Cal. 593.

——Sch. II, Art. 42—Joint mortgagor.

Meresigning mortgage deed as joint executant does not make one a joint-mortgagor where only one mortgaged his property and other mortgaged none. 85 Ind Cas. 498: 22 A.L.J. 855: 5 L.R.A. (Civ.) 673: A.I.R. 1924 All. 787.

——Sch. II, Art. 42—Suit by compnay for money due on shares—Jurisdiction.

A suit by a company which is not under liquidation for recovery of arrears of allotment money and call money due on shares allotted to the defendant is cognizable by a Court of Small Causes. A.I.R. 1933 Lah. 657: 34 P.L.R. 592.

——Sch. II, Art. 42—Compensation, suit for—Juristion.

A suit by the plaintiff to recover money from the defendant for a wrong committed by him and another in mortgaging plaintiff's property for their own purposes which mortgage the plaintiff had to pay off to secure his property is a suit for compensation and cognizable by the Small Cause Court. 13 A.L.J. 632: 29 Ind. Cas. 245.

——Sch. II, Art. 43-A — Recovery of property taken forcibly—Applicability.

A suit to recover value of certain sovereigns delivered by plaintiff to one of the defendant and alleged to have been illegally, forcibly and fraudulently wrested from the latter by another defendant with knowledge of plaintiff's title in them, and without any legal title or valid claim therero falls within Art. 43-A. 91 Ind. Cas. 659: A.I.R. 1926 Mad. 320.

——Sch. II, Art. 43-A — Criminal offence — Plaintiff accusing defendant of—Jurisdiction.

If plaintiff accuses the defendant or conduct amounting to a criminal misappropriation the jurisdiction of Small Cause Court to try the suit is barred by Art. 43-A. 55 Ind. Cas. 328 (Nag.).

——Sch. II, Art. 43-A—Recovery of property forcibly removed—Jurisdiction ousted.

Where the plaintiff sued the defendants for the recovery of certain property or its price on the allegation that the same was forcibly removed by the defendants from the cart in which it was being conveyed.

Held, the allegations amounted to a criminal offence and the suit was not triable by Small Cause Court. 109 Ind. Cas. 643: 24 N.L.R. 23: A.I.R. 1928 Nag. 288.

——Sch. II, Art. 43-A—Suit to recover property or its value—Alleged misappropriation.

In a suit for recovery of certain ornaments or their value it was not alleged that defendants had committed any criminal offence in respect of the ornaments but certain other persons were said to have misappropriated them and pledged them with the defendant. *Held*, that Arts. 35 (ii) and 43, were not applicable to the case. 18 All. L.J. 354: 58 Ind. Cas. 663.

——Sch. II, Art. 43-A — Wrongful withholding — No allegation of offence—Jurisdiction not ousted.

Where there is allegation of wrongful withholding but no allegation in the plaint that the suit amount was misappropriated by the defendant, or that any offence has been committed, nor is there any allegation that the defendant dishonestly kept the amount with himself, the cognizance of the suit in a Small Cause Court cannot be held to be barred. 86 Ind. Cas. 328: A.I.R. 1925 Mad. 942.

PROVISINOAL LEGISLATURE, power of, to amend or repeal an Act, passed by the Supreme Council—Indian Councils Act, Ss. 5, 6—"Province".

The reference to "Province" is merely for the purpose of defining the limits of legislative operation and in no way imposes the condition that all legislation should reflect the whole of that area. (1903) 27 B. 424: 5 Bom. L.R. 431.

PROVACATION. *See* PENAL CODE, SS. 299 TO 304.

PUBLICATION. *See* (1) PENAL CODE, SS. 499 AND 500.

(2) TORT—DEEFAMATION.

(3) DEFENCE OF INDIA RULES, R. 119.

PUBLIC AUCTION. *See* CIVIL P. C. O. 21, R. 66.

PUBLIC AUTHORITY.

See (1) LOCAL BODIES.

(2) LOCAL MUNICIPAL ACTS.

(3) CORPORATION.

(4) CROWN.

(5) SECRETARY OF STATE.

PUBLIC BODY.

See (1) COMMUNITY.

(2) COMPANY.

(3) CORPORATION.

(4) LOCAL BODIES.

(5) LOCAL MUNICIPAL ACTS.

PUBLIC CHARITY.

See (1) C. P. CODE, S. 92.

(2) RELIGIOUS ENDOWMENT.

(3) TRUST AND TRUST ACT.

(4) RELIGIOUS AND CHARITABLE ENDOWMENT.

PUBLIC COMPANY.

See (1) COMPANIES ACT.

(2) COMPANY.

(3) CORPORATION.

PUBLIC CONVEYANCES ACT (6 OF 1863), Ss. 1 and 7—Public conveyance—Hind drawn lorry.

A public conveyance need not necessarily be one drawn by animals, and a hand drawn lorry plied for hire is a public conveyance within the meaning of the Act. 37 Bom. 374: 15 Bom. L.R. 66: 14 Cr. L. J. 78: 18 Ind. Cas. 414.

——S. 18—License of conveyance—Omission to produce list of fares on demand by Police Officer.

S. 18 is meant for the benefit of the hirer or the passenger, and when the list of fares is not produced on demand by the hirer or the passenger the penalty provided in the section can be imposed; but it cannot be imposed on the licensee for failure to produce the list of fares when required to do so by a Police officer at the carriage stand. 14 Bom. L.R. 875: 13 Cr. L.J. 787: 17 Ind. Cas. 531.

PUBLIC DEMANDS RECOVERY

See (i) BENGAL PUBLIC DEMANDS RECOVERY ACT (III OF 1913).

(*ii*) BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (IV OF 1914).

(*iii*) MADRAS REVENUE RECOVERY ACT (VII OF 1864).

PUBLIC DEMANDS RECOVERY ACT (7 OF 1868), S. 8—Applicability—Notice less than 30 days.

S. 8 does not apply to a case where notices under S. 6 of the Revenue Sale Law are fixed less than thirty days before the sale. 2 Ind. Cas. 280 (Cal.).

PUBLIC DEMANDS RECOVERY ACT (1 OF 1895) —Sale for arrears of road cess—Certificate issued to person who has no interest in the property—Validity of sale.

A sale of property held under the Act by issuing certificates, for arrears of road cess against a person on the books of the Collector when the person has no interest in the property does not affect the real owner of the property. 41 Ind. Cas. 252 (Pat.).

——S. 7—Certificate.

A certificate cannot be issued for a claim for damages as it does not fall under S. 7. A tenant cannot get refund of money recovered as damages for use and occupation for certain non-agricultural lands when he had notice of the increase in demand by the Settlement Officer. 22 Ind. Cas. 626 (Cal.).

——S. 7—Rent, certificate, procedure.

If it is not settled either by agreement or by Court no rent can be levied for occupation of Government land by the certificate procedure. 10 Ind.Cas. 335 (Cal.).

——S. 9 (3)—Object of granting certificate.

The obvious intention under S. 9 (3) is that the Officer shall use his discretion as to the issue of a certificate and decide whether the case is a proper one and whether the money is due or not. A certificate issued under Cl. (1) though not duly signed or verified is not valid in law. 19 C.W.N. 1159: 31 Ind. Cas. 664.

PUBLIC DEMANDS RECOVERY ACT (I OF 1905), S. 10—Sale—Certificate improperly issued.

Sale under a certificate, which ought not to have been issued is void and even a *bona fide* purchaser for value gets no title under it. 11 C.L.J. 266: 14 C.W.N. 607: 5 Ind. Cas. 337.

——S. 10—Sale under—Purchaser's rights.

A sale under the Act passes to the purchaser merely the right title and interest of the persons named as judgment-debtors in the certificate. So where the interest of a person in a certain property was purchased by another who did not register his name in the Collectorate and subsequently the properties were sold under the Act, no title passes to the purchaser at the certificate sale as the persons named as judgment-debtors in the certificate has no interest in the property on the date of sale. 13 C.W.N. 750: 10 C.L.J. 201: 1 Ind. Cas. 197.

——Ss. 10, 19 (2) and 21—Sale under Act — Right of purchaser—Non-service of notice—Effect.

A purchaser at a sale uuder the Act acquires the rights and interests of the judgment-debtors mentioned in the Collector's certificate. Non-service of notice upon the judgment-debtors invalidates the sale and the original owners can recover the property within 12 years from that date if at all dispossessed. Return of the serving officer stating that notices have been served producing receipts of the judgment-debtors is *prima facie* proof of due service. 18 C.L.J. 628: 18 C.W.N. 766: 22 Ind. Cas. 95.

PUBLIC DOCUMENT. *See* EVIDENCE ACT, SS. 65 AND 74.

PUBLIC GAMBLING ACT (III OF 1867). *See* also BENGAL PUBLIC GAMBLING ACT.

——(As amended in 1929)—Applicability and scope.

By Notification No. 26769-G. B., dated 30th September/ 2nd October, 1933, the Governor-General in Council extended all the provisions of the Public Gambling Act (III of 1867) as amended by the Public Gambling Act, Punjab amendment, 1929, to the Cantonment of Ambala. By another Notification No. 6556-S, dated 25th Sepetember, 1934/ Military, the Governor-General in Council excluded, *inter alia*, from the limits of the Ambala Cantonment, Sadar Bazar Area with effect from 1st October, 1934—the area in which the common gaming house was situated and where the accused was arrested on 6th July, 1935, while carrying on the act of gambling. The question to be decided was whether by the exclusion of Sadar Bazar from the limits of Ambala Cantonment, the earlier notification still applied to Sadar Bazar or not:

Held, that the clear intention of the earlier notification was that, it would apply to the limits of Ambala Cantonment which were in existence at the time of commission of the offence and not to the limits existing at the date on which the earlier Notification was published. (1936) 38 P.L.R. 432.

——Certainty of profits—U.P. Act (1920)—Mere expectation of profit sufficient.

In order to bring the case under the Act it is not necessary to prove that profit is certain to result. A mere expectation of profit would suffice. 101 Ind. Cas. 474: 49 All. 562: 25 A.L.J. 346: 8 L.R.A. (Cr.) 75: 28 Cr. L.J. 442: 7 A.I.Cr.R. 487: A.I.R. 1927 All. 480.

——First offender—Conviction under—S. 562, Cr. P. Code, does not apply.

S. 18 of Gambling Act having been repealed, an order under S. 562, Cr. P. Code cannot be upheld, as that section has no application to a conviction under Gambling Act. 71 Ind. Cas. 62: 25 O.C. 111: 9 O.L.J. 667: 24 Cr. L.J. 14: A.I.R. 1922 Oudh. 224.

——Gambling and betting—Distinction between.

In betting, it should be an operation of nature that is brought into play and there should be no contest.

Per *Stephen. J.*—The difference between gaming and betting depends on the nature of the events on which the bet is made. If the event is brought about solely for the purpose of being betted about, betting on it is gaming, otherwise not. The popular and not the scientific or the historical meaning of the term is to be considered. 8 C.W.N. 458: 31 C. 542.

——Gambling instruments—Coins—Cowries.

Coins and cowries are not necessarily implements of gambling but they become 'instruments of gaming' within the meaning of the Gambling Act (II B.C. of 1867) if they are found to be used for that purpose. (1901) 5 C.W.N. 503.

——Rights of accused—Magistrate issuing warrant—Accused may examine as witness—Magistrate not to try.

An accused under the Act has the right to examine the Magistrate issuing the warrant as a witness to enquire from him what was the information received by him and how the warrant was filled up and therefore he is materially prejudiced by the trial of the case by the very Magistrate who issued the warrant. 73 Ind. Cas. 521: 5 L.L.J. 429: 24 Cr. L.J. 633: A.I.R. 1924 Lah. 247.

——'Ring game', conduct of.

The conduct of a ring game is not an offence under the Gambling Act. 6 C.L.J. 708, Rel. on. 40 Cal. 702: 17 C W.N. 883: 14 Cr. L.J. 452: 20 Ind. Cas. 612.

——Ss. 1 (ii) and 3—Scope—Single user of house for gaming purposes—If sufficient.

The definition of "Common gaming house" in S. 1 (*ii*) of the Public Gambling Act does not place any words of limitation on the user, and a single user of a house for gaming purposes is within its purview. It is, therefore, not necessary to prove habitual user for a conviction under S 3 of the Act. I.L R. (1948) Nag 838: 1949 N.L J. 209: A.I.R. 1949 Nag. 58: 50 Cr. L.J. 174.

——Ss. 1 and 4—Place in front of small panstall in which customers usually stand is common gaming house if so used.

Where a pan stall is small, the area in front of it in which customers usually stand should be included in the definition of "common gaming house" when the place is so used. A.I.R 1941 Nag. 16: 1940 N.L.J. 297: 42 Cr L.J. 32: 190. Ind. Cas. 764.

——Ss. 1 and 3 (as amended by C.P. Act III of 1927) —Common gaming house, meaning of—Evidence that gambling with cowries was going on in house—Conviction.

The definition of "common gaming house" in S. 1 of the Public Gambling Act as amended by C.P Act III of 1927 falls under two heads according to the nature of the gaming. The first head includes gaming on the market price of cotton and other commodities, stocks or shares and on the occurrence or non-occurrence of rain, etc. In these cases, any place in which such gaming takes place or where instruments of gaming are kept or used is termed a 'common gaming honse'. But in the case of any other form of gaming the definition requires that the place should be one in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house or place.

Where there is evidence that cowries and money were seized and that gambling with cowries was actually witnessed by the Police before they broke in and the cowries were obviously being used as instruments of gaming and the game which was being played was called "Suraiya", the convictions under S. 3 must stand. A.I.R. 1936 Nag. 138: 37 Cr. L.J. 586: 162 Ind. Cas. 268.

——S. 1—Common gaming house—Government Office used for gambling.

A Government Office cannot escape the definition of a common gaming house when the persons gambling there and receiving profit out of the gambling used the place for such purpose. 108 Ind. Cas. 568: 26 A.L.J. 400: 9 A.I.Cr.R. 270: 9 L.R.A. (Cr.) 38: 29 Cr. L.J. 448: A.I.R. 1928 All. 215.

——S. 1—"Gaming"—What is.

Under S. 1, 'gaming' includes wagering or betting, and 'common gaming house' includes in the case of gaming on occurrence of rain or other natural event, any enclosure, space, etc., in which such gaming takes place. It is not possible to interpret gaming on the occurrence or non-occurrence of rain or other natural event as including betting on the number of cotton carts that would arrive the following day in the compound of a cotton market. 1939 N.L.J. 401.

——S. 1—'Instrument of gaming' meaning of—U.P. Public Gambling Act (I of 1925), S. 2 (1)—Evidence Act, S. 114.

Under the Public Gambling Act, anything which assists gaming or which is used for the furtherance of gaming would be instruments of gaming and, it is not possible to give an exhaustive list of such articles. It will be necessary in a given case to consider the article in question with reference to the game that is played. Where, on raiding a house, besides recovering certain slips of paper which were found to be instruments of gaming, two witnesses deposed to the effect that they staked money and the stakes had been accepted by the accused, it can be concluded that the instruments of gaming were kept or used for such purpose. A.I.R. 1933 All. 554: 1933 A.L.J. 1254; 34 Cr. L.J. 1244: 146 Ind. Cas. 293.

——S. 1—Instruments of gaming—Books of record—Examples.

Books used for the purpose of registering or recording any gaming transaction would fall within the definition of "instruments of gaming". 6 Bom. L.R. 249: 29 Bom. 264 and 40 Bom. 263, Rel. on. A register or record of transactions in American Futures was held to be an instrument of gaming. So also a book which contained register or Kacha Khandi transaction and Teji Mandi transaction. 24 Bom. 227, Rel. on. 116 Ind. Cas. 251: 53 Bom 367: 31 Bom. L.R. 158: 30 Cr. L.J. 595: 12 A.I.Cr.R. 466: A.I.R. 1929 Bom. 157.

——S. 1—Instruments of gaming—Satta papers—Advertisements and accounts of.

When the shop owned by the accused was raided, satta papers were found, and when the house was raided, advertisements of the satta gambling were found and accounts of the satta gambling.

Held, that such papers were instruments of gaming. A.I.R. 1924 All. 338, Foll. 101 Ind Cas. 474: 49 All. 562: 25 A.L.J. 346: 8 L.R.A. Cr. 75: 28 Cr. L.J. 442: 7 A.I Cr R. 487: A.I.R. 1927 All. 480.

——S. 1—U P. Act of 1917—Cauris—Instalments of gaming.

Cauris will fall within the definition of instruments of gaming. 90 Ind. Cas. 713: 2 O W.N. 638: 12 O.L.J. 646: 26 Cr. L J. 1609: A.I.R. 1925 Oudh 674.

——S. 1—Instalments of gaming—Code telegrams to settle differences—If amount to—U.P. Act of 1917.

Telegrams and documents which enabled gamblers to settle differences but could not be deciphered are not implements of gaming within the meaning of the Act such as, if found in a house, would enable a Court to presume that the house was a common gaming house. 76 Ind. Cas. 28: 25 Cr. L.J. 92: 4 L.R.A. (Cr.) 97: 21 A.L.J. 318: A.I R. 1923 All. 386.

——S. 1—Interpretation—"For the profit or gain of" —"Instruments of gaming"—"Common gaming house" —Explained

The words "for the profit or gain of" used in the section cannot be read as meaning "for the purpose of carrying on the gaming"; "instruments of gaming" include articles used as a means or appurtenance of, or for the purpose of carrying on, or facilitating gaming. The words "common gaming house" cannot be interpreted to mean a house in which articles used as a means or appurtenance of, or for the purpose of carrying on, or facilitating gaming are kept or used for the purposes of carrying on or facilitating a gaming. 65 Ind. Cas. 852: 20 A.L.J. 218: 23 Cr. L.J. 196: A.I.R. 1922 All. 61.

——Ss. 1 and 3—'Place' meaning of.

A bullock-run surrounded by low wall of loose bricks is a place within the meaning of the Act. 38 All. 47: 13 A.L.J. 1070: 16 Cr. L.J. 826: 31 Ind. Cas. 1002.

——S. 2—Extension to territories — Gambling on Benares side of mid-stream no offence.

By a Government Notification the Gambling Act was extended to the north bank of the Ganges. The gambling took place in a boat which was on the Benares side of the mid-stream of the Ganges.

Held, that no offence was committed because the gambling took place outside the area to which the Act applies. 88 Ind. Cas. 5: 23 A.L.J. 457: 26 Cr. L.J. 1061: 6 L.R.A. (Cr.) 144: A.I.R. 1925 All. 518.

——S. 3.

Synopsis.

1. Gambling in Diwali.
2. Grounds and legality of conviction.
3. Joint trial and joinder of charges.
4. Meanings and interpretation of.
5. Offence under.
6. Scope.
7. Sentence.
8. Miscellaneous.

1. Gambling in Diwali.

——S. 3—Gambling in Dewali.

Gambling in Dewali should not be considered to be an offence; but the law will not countenance gambling even at Dewali if it is in contravention of the Gambling Act. Where the only evidence that anything was done in contravention of the Act was that the owner of the house had in front of him a small pot containing a few annas and there was no reason to suppose that the sum represented his profits or that it was what is known as 'nal' and the sums staked were quite trifling:

Held, that it was only a case of Dewali Gambling in a private house and no offence was committed. 7 O.W.N. 757: 1930 Cr. C. 943: A.I.R. 1930 Oudh 403.

——S. 3—Dewali gambling—Raid on—Undersirable.

To issue warrant to raid houses where gambling goes on at the time of Dewali is highly undesirable as the police are merely encouraged to run in numbers of perfectly innocent persons in order to get a reward. A.I.R. 1930 Oudh 403: 7 O.W.N. 757: 128 Ind. Cas. 65.

——S. 3—Gambling in Diwali.

The presumption raised by the Act is not as strong when the gambling takes place openly on the Dewali occasion, as when it takes place at other times in a private house. 71 Ind. Cas. 62: 25 O.C. 111: 9 O. L J. 667: 24 Cr. L.J. 14: A.I.R. 1922 Oudh 224.

——Ss. 3 and 4—Common gaming house—Gambling in Diwali.

A person simply allowing the use of his house to

gamblers, during a Dipavali festival without any idea of *demanding* rent etc. cannot be said to keep a common gambling house within Ss. 3 & 4 of Public Gambling Act. 20 Cr.L.J. 283: 1 U P.L.R. (H C.) 22: 50 Ind. Cas. 171 (All).

2. Grounds and legality of conviction.

——S. 3—Grounds for conviction—Accused must be owner, occupier or having use of place.

For the purpose of conviction it is not suffcient to say that an accused used a house for the purpose of gaming. It should be proved that the accused is the owner or occupier or a person having the use of the place alleged to be kept as a gaming house 116 Ind Cas. 57:6 O W.N 46· 30 Cr.L J. 557: 12 A.I.Cr.R. 437: A.I R. 1929 Oudh 151.

——Ss. 3, 4—Offences distinct—Conviction separately under both sections—Not illegal.

The two offences under Ss 3 and 4 may be interdependent but they are distinct offences and one cannot be said to overlap the other. It is not illegal to convict an accused under the two sections separately. 120 Ind. Cas. 266: 31 Cr L.J. 35: 19˙0 A.L.J. 229: 13 A I.Cr R. 138: 11 L.R.A (Cr.) 21: 1929 Cr.C. 665: A.I.R. 1929 All. 937.

——S. 3—Conviction not vitiated if based on legal evidence.

A conviction under S. 3 based upon legal evidence is not vitiated merely because of the defects and irregularities in the warrant. 35 All. 1; 28 All. 210 and A.I.R. 1924 All. 214, Foll. A I.R. 1924 Lah. 247, Expl. 104 Ind. Cas. 441: 28 Cr. L.J. 825: A.I.R. 1927 Lah. 699.

——S. 3—Taking commission irrespective of result discount from winners—If commission.

It must be established that owner or occupier takes a fixed commission which is irrespective of the result of the gaming, or at the outside, that he manipulates the condition in such manner that he cannot possibly lose. Although the odds 50 to 1 are scarcely fair they are not such as to make the owner's loss impossible Discount from winners is not commission.

Merely finding implements of gaming in the house does not justify conviction. 20 A.L.J. 218, Foll. 76 Ind. Cas. 969: 21 A.L.J. 36: 46 All. 268: 25 Cr. L.J. 297: A.I.R. 1923 All 192.

——Ss. 3 and 4—Conviction under — Money found on persons of accused, whether can be confiscated.

The law does not contemplate the confiscation of money found on the persons of the accused, convicted under Ss. 3 & 4 of the Act. 41 All. 366: 17 A. L.J. 368: 1 U.P.L.R. (H.C.) 161: 21 Cr. L.J. 442: 54 Ind. Cas. 250.

——Ss. 3 and 4—Fine—Distribution of among Police.

Conviction under Ss. 3 and 4 for gambling in a temporarily constructed shelter is irregular. An irregular conviction by a Magistrate under the Act Ss. 3 & 4 ought to be set aside in revision. A Magistrate has no jurisdiction to distribute the fine levied among the witnesses and the Police. 20 Cr. L.J. 303: 50 Ind. Cas. 351 (All.).

3. Joint trial and joinder of charges.

——S. 3—Offences under both sections — Interdependent and complementary—Joint trial—Valid.

No cast iron rule of law can be laid down on the question as to whether the keeper of a gambling den, if he frequents the said den and gambles there, could not be said to do so in the course of the same transaction within the meaning of S. 239, Cr. P. Code. The words "same transaction" are not defined in the Code. The offences under Ss. 3 and 4, Public Gambling Act, are interdependent and "are the complements of one another." A Court, therefore, is justified in trying two accused persons under Ss. 3 and 4 in the course of the same trial. 5 P.W.R. 1910 and 35 P.R. 1914 (Cr.), not Foll. 120 Ind. Cas. 266: 1930 A.L.J. 229: 31 Cr. L.J. 35: 13 A. I.Cr.R. 138: 11 L.R.A. (Cr.) 21: 1929 Cr.C. 665: A.I.R. 1929 All. 937.

——S. 3—Joint trial—Not illegal.

The trial of a person under S. 3, along with a number of other persons found in the gaming house under S. 4 is not illegal. 6 P.R. 1919 (Cr.) and A.I.R. 1922 Lah. 458, Foll. 104 Ind. Cas. 441: 28 Cr. L.J. 825: A.I.R. 1927 Lah. 699.

——S. 3—Offences in the same transaction—Joint trial therefore justified.

It is always necessary to justify a *joint trial* and to point out the provisions under which it can be held. The separate trial is the rule, the joint trial is the exception. A joint trial is justified only if the persons tried together were accused of different offences committed in the "same transaction".

The offence of keeping the gaming house and the offence of using it, both appear to be offences committed in the same transaction. 71 Ind. Cas. 507: 20 A.L.J. 967: 24 Cr.L.J. 156: A.I.R. 1923 All. 88.

——S. 3—Of keeper and person found—Legal.

The joint trial of the keeper of a common gaming house and of other persons being found in such a house is not illegal. 68 Ind. Cas. 846: 3 Lah. 359: 23 Cr.L.J. 621: A.I.R. 1922 Lah. 468.

——Ss. 3 and 4—Joint trial—Punishment—Nature of.

The keeper of a gaming house and the players therein may be jointly tried as persons accused of different offences committed in the same transaction. The wording of Ss. 3 & 4, where, contrary to rule, the punishment of fine proceeds the alternative of imprisonment, suggests that primarily fine should be used as the mode of puishment and imprisonment awarded in aggravated cases only. An offence under S. 3 is more serious than one under S. 4. 9 N. L.R. 68: 14 Cr.L.J. 293:19 Ind. Cas. 949.

——Ss. 3 and 4—Mis-joinder of charges.

A person charged under S. 3 should not be tried with persons charged under S. 4. 5 P.W.R. (Cr.) 1910: 11 Cr.L.J. 211: 5 Ind. Cas. 720.

4. Meanings and interpretation.

——S. 3—"Dara" gambling, what is—Failure to prove commodity in respect of which gambling was going on, if fatal to prosecution.

"*Dara*" gambling is a well-known, and specified form of "*Satta*" gambling. "*Dara*" gambling has no connection whatever with the price of any commo-

dity. The failure on the part of the prosecution to prove by definite evidence, the commodity in respect of which the gambling was going on is not a fatal defect for sustaining a conviction undes S. 3. A. I.R. 1941 All. 330: 1941 A.L.J. 421: 1941 A.W. R. 220: 1941 O.W.N. 794: 42 Cr.L.J. 864: I.L. R. (1941) All. 576:196 Ind. Cas. 434.

——Ss. 3, 4—Betting in master's shop by servant—Master beyond range of shop at time of betting—Master must be given benefit of doubt—Pan stall very small—Area where customers usually stand if "Common gaming house."

Although it is quite possible that the master knew all about the betting which was being conducted by his servant while managing his master's *pan* stall, still the other possibility is there, that the servant was doing so without his master's knowledge, and where the prosecution has not rebutted that possibility and the master at the time of the betting was beyond the range of the *pan* stall and its immediate surroundings which could be designated a common gaming house and there is also nothing definite to prove his knowledge which is an essential element of S. 3, he must be given the benefit of the doubt and acquitted.

When the *pan* stall is a small structure and customers never actually enter it as there is no room for them, but they stand in front of it, the area in which customers usually stand should be included in the definition of "common gaming house" when the place is so used. A.I.R. 1941 Nag. 16: 1940 N.L.J. 297: 42 Cr.L.J. 32: 190 Ind. Cas. 764.

——S. 3 (as amended by C.P. Act III of 1927)—'Place', whether can be a public Road.

Under S. 3 as amended by the C.P. Act. No. III of 1927, an attempt has been made to bring that section into conformity with the definition of "common gaming house" in S. 1.

The word 'place' in S. 3 of the Public Gambling Act cannot be so construed as to embrace the whole of a public thoroughfare.

'A place' must be a definite area so marked out that it can be found and recognized. A public street is not such a place. A.I.R. 1937 Nag. 102: 38 Cr.L.J. 694:169 Ind. Cas. 36.

..—Ss. 3, 1 (as amended by C.P. Act III of 1927.

'Common gaming house', meaning explained—Evidence that gambling with *cowries* was going on in house—Conviction under S. 3 is proper. A.I.R. 1936 Nag. 138: 37 Cr.L.J. 586: 162 Ind. Cas. 268.

——Ss. 3, 4 (as amended by C.P. Act III of 1927)—'Common gaming house', if includes a public road.

The definition of 'common gaming house' in the Act as amended by the C.P. Amending Act III of 1927, is wide enough to include a public road. A. I.R. 1936 Nag. 78: 37 Cr.L.J. 588: I.L.R. (1936) Nag. 89: 162 Ind. Cas. 332.

——Ss. 3, 4—'Ring game'—S. 95, Penal Code.

In an enclosure erected for a variety entertainment, one of the items was the ring game. This was a game where the public may, if they so desire, try to throw brass rings, which they buy from the management at four to the anna, over small coins on a board. If they succeed in throwing a ring over a coin they keep the coin. The coins ranged from one anna to a rupee:

Held, that this enclosure could not be described as a "common gaming house", nor the table as an "instrument of gaming". Even if technically it could be so described, this was clearly a case of *de minimis non-cural lex*, a principle of law well recognied by Courts in India and enunciated by S. 95, Penal Code:

Held, also that this type of game, when played for such small prizes, was not the mischief aimed at by the Public Gambling Act. A.I.R. 1935 Lah. 225: 36 Cr.L.J. 1258: 158 Ind. Cas. 65.

——S. 3—Game of skill or chance—Dart game and roll-up or table game

In the dart game conducted by the accused there was a target divided into different coloured half inch squares each numbered from 1 to 10. The squares in the horizontal rows were numbered 1 to 10 in sequence, but the verti al rows did not contain the numbers arranged in their sequence, the numbers being scattered about the board haphazard. The player was given 5 darts, and if he put one of these darts into one of the squares bearing the number on which he had staked, he got twice his stake back. The darts which were of varying weight and length were thrown from a distance of about 12 feet in a bad light, and the numbers were not distinguishable except by persons with keen eyesight:

Held, that the dart game was a game of chance and was not intended to be anything else.

In the roll-up or table game, the player roiled 2 resilient rubber balls up to the far end of the table where there were 13 shallow cups numbered 1 to 13. The sum of the numbers of the 2 cups in which the balls eventually settled was the player's score and it was open to him to bet that he would score 6 or under or 7 or 8 and over. If he successfully staked on 6 and under of on 8 and over, he presumably got twice his stake back, and if he successfully staked on 7, he got a higher reward:

Held, that the element of chance in the roll-up or table game was greater than in the dart game.

It is impossible to lay down any hard and fast rule for distinguishing between games of chance and games of mere skill. A I.R. 1934 Nag. 225: 36 Cr.L.J. 60: 31 N.L.R. 24: 152 Ind. Cas. 202.

5. Offence under.

——S. 3 (as amended in C.P)—Applicablity—"Common gaming house"—Offence of keeping — Essentials of—Single user—Sufficiency—Ss. 1 (ii) and 4.

Before a man can be convicted under S. 3 of the Public Gambling Act, of keeping "common gaming house", there must be proof that the money collected has *nal* was intended for his use or profit. From the mere fact that a man collects money which may legitimately be inferred to be *nal* money, it does not follow that he does so for his own use. But the fact that *nal* money was being collected and that the person was playing or gaming with cards would be enough to make the place. "Common gaming house" under S. 1 (*ii*) and that would bring the case under S. 4 of the Act.

It is not necessary that there should be proof

of a "habitual" user of the place as a gaming place. A single user would be sufficient under S. 3. I.L.R. (1948) Nag. 838 1949 N.L.J. 209: A.I.R. 1949 Nag. 58: 50 Cr. L.J. 174.

——S. 3—Offence under, essentials—Accused not proved to be habitual frequenters of the particular site.

In the case of a public place used as a gaming house, S. 3 would apply to a man who habitually used that spot, has his regular seat or stand there, but not to a casual gambler whether he handed over or accepted the money staked. Where there is nothing to show that the implications of S. 3 have been clearly put to the accused, nor is there anything to show that they are proved to have been habitual frequenters of this particular spot, a conviction under S. 3 is not proper. A.I.R. 1936 Nag. 78: 37 Cr. L.J. 588: I.L.R. (1936) Nag. 89: 162 Ind Cas. 332.

——S. 3—Offence under — Chance of loss extremely rare—Offence complete.

Where from the method of business carried on, the chance of loss to a booth-keeper is extremely rare and almost nil, the offence of keeping common gambling house is complete. A.I.R. 1924 All 338, Foll. 86 Ind. Cas. 808: 23 A.L.J. 185: 26 Cr. L.J. 872: 47 All. 405: A.I.R. 1925 All. 309.

——S. 3—Offence under—Manipulation to avert loss—Offence—Proof by prosecution.

Where by the use of balls of paper the accused so manipulated the conditions of the game that he could not possibly lose, *Held*, that the offence of keeping a public gaming house was committed. The words "used for the benefit or gain of the person owning the house" require strict proof by the prosecution who must show that the owner or occupier takes a fixed commission irrespective of the result or so manipulates the conditions that he cannot possibly lose. 81 Ind. Cas. 438: 22 A.L.J. 249: 5 L.R.A. (Cr.) 33: 46 All. 447: 25 Cr. L.J. 902: A.I.R. 1924 All. 338 (F.B.).

——S. 3—Offence under.

Merely finding implements of gaming in the house does not justify conviction. 20 A.L.J. 218, Foll. 76 Ind Cas 969: 21 A.L.J. 36: 45 All. 258: 25 Cr. L.J. 297: A.I.R. 1923 All. 192.

——S. 3—Sums set apart for those ministering to comforts—Not advantage to keeper.

The mere fact that small sums are set aside for remunerating those who minister to the comfort of the persons assembled, does not show that such payments represent any advantage whatsoever to the person occupying or keeping the premises. 62 Ind. Cas. 322: 22 Cr. L.J. 498 (Nag.).

——Ss. 3, 4 and 6—Offence, necessary elements of—Levying of Commission.

Where certain persons, about 42 in number, were found in the house of a respectable Hindu gentleman on the day after the Divali festival indulging in a common friendly amusement and the idea of making a profit by levying a commission was not present to the mind of the owner of the house. *Held*, that the necessary elements constituting an offence under S. 3 and were not made out. 20 O.C. 4: 4 O.L.J. 88: 18 Cr. L.J. 494: 39 Ind. Cas. 334.

——Ss. 3 and 4 — Offence under—Keeping a common gambling house—Facts necessary to constitute offence.

To sustain conviction for keeping a common gambling house the prosecution must prove not only that he owned the house, or was the occupier of it and that the instruments of gambling were kept or used in it, but that they were kept or used for his profit or gain. Where a house is not proved to be a common gaming house the presence of other persons therein will not raise a presumption, against them and even if it were one, no presumption will arise against such persons unless it can be shown that gambling was going on at the time when they were present. 16 A.L.J, 760: 19 Cr. L.J. 958: 47 Ind. Cas. 810.

6. Scope.

——Ss. 3, 4—Scope.

The offences under sections 3 and 4 are different offences. The offence under section 3 is that the owner on occupier opens or keeps the house as a common gaming house. He may do this without himself taking part in gaming there under S 4. 81 Ind. Cas 186 11 O.L.J. 347: 26 Cr. L.J. 698: A.I.R. 1924 Oudh 403.

7. Sentence.

——S. 3—Sentence—Conviction under both sections—Cumulative sentence improper.

It is not proper to convict the accused person under the two sections and pass a cumulative sentence on one count only. 120 Ind. Cas. 266: 31 Cr. L.J 35: 1930 A.L.J. 229: 13 A I. Cr. R. 138: 11 L.R.A. (Cr.) 21: 1929 Cr. C. 665: A.I.R. 1929 All. 937.

8. Miscellaneous.

——Ss. 3, 4—Miscellaneous.

A search under the Gambling Act is not covered by the provisions of S. 103, Criminal P.C A.I R. 1934 Oudh 90; 35 Cr L.J. 397: 11 O.W.N. 62: 9 Luck. 355: 147 Ind. Cas. 317.

——S. 4—Essentials for conviction—Arrest in gambling house not necessary—Proof of persons sufficient.

In order to sustain a conviction under S. 4 it is not necessary that the person produced against should have been actually arrested in the gambling house in question but it is incumbent on the prosecution to prove that he was actually seen in the house The mere fact that the person proceeded against was seen going from the direction of the gambling house to his own house is insufficient. 31 P.L.R. 184: A.I.R. 1930 Lah. 314.

——Ss. 4 and 6 — Essence of the offence of gaming or gambling—Gambling on the festive occasions—If an offence, in the absence of proof of gaming for profits or gain.

The essence of the offence of gaming or gambling under S. 4 of the Public Gambling Act is gambling for profit. If there was no profit being made by any one either owning the house or participating in the game, the act will not fall within the mischief of S. 4 Hence where on festive occasions like Deevali or Deothan Ekadashi, people honestly believe that gambling is

permissible, they would be presumed to be there not for the purpose of making profit themselves or allowing others to do so but only gambling for the sake of gambling. If the prosecution wants to prove hat there was gain, it is for them to establish the affirmation and not for the accused to prove the negative. 1946 A.L W. 365.

——S. 4—Ingredients of offence—Friendly games of cards in private house on Diwali night—Offence.

It is a mistake to assume that gambling *per se* is an offence under the Gambling Act. It is only gambling in a common gaming house, as defined in the Act, that is made an offence under S. 4 of the Act. Where several persons merely met together on a Divali night in the house of one of them for a friendly game of cards there, that would not constitute as offence under the Act. 4 A.I. Cr. D. 189.

——S. 4—Satta gambling on public road—Offence.

Where two persons accepted money for *satta* gambling and the gambling was taking place on a public road and they are found present there for the purpose of gaming, they are guilty of an offence under S. 4. A.I.R. 1936 Nag. 78: 37 Cr. L.J. 588: I.L.R. (1936) Nag. 89: 162 Ind. Cas. 332.

——Ss. 4 and 8—Gaming house, being found in—Forfeiture of money found in the house.

On a conviction for being found in a gaming house under S. 4 of the Gambling Act an order for forfeiture of the money seized in the house is legal under S 8, 41 All. 272: 17 A.L.J. 64: 20 Cr. L.J. 133: 49 Ind. Cas. 165.

——S. 4—Interpretation—"Found"—Meaning of

"Found" in section 4 does not necessarily mean "found in the course of a lawful search by the police" or "arrested in the course of such search." 62 Ind. Cas. 332: 17 N.L.R. 59: 22 Cr. L.J. 508: A.I.R. 1921 Nag. 118.

——S. 4—Presumption — Cauris found on search—Presumption as to place and persons found—How rebutted.

Where at the time the accused's house was searched under the provisions of S. 5 of the Public Gambling Act, cauris were found therein.

Held, that there is a presumption that the house was used as a common gaming house and further that the persons found therein were there present for the purpose of gambling and that within the presumption is included the ingredient that the accused kept or used the house for profit or gain, and that, that presumption would be rebutted if the object of the persons was merely to indulge in a common friendly amusement, with a view to pass time, the idea of making any gain being entirely foreign to the mind of the entire party. 20 O.C. 4, Foll. 90 Ind. Cas. 713: 2 O.W N. 638: 12 O.L.J. 646: 26 Cr. L.J. 1609: A.I.R. 1925 Oudh. 674.

——S. 4—Scope.

The only crime under the Public Gambling Act is being found in the place where gambling is going on, and under the Act it is no offence to gamble in a public place as long as you are not found doing it. Persons not found in the place where gambling was going on cannot be convicted under S. 4 of the Act. A.I.R. 1938 Lah. 631: 39 Cr. L.J. 856: 40 P.L.R. 916: 177 Ind. Cas. 298.

——Ss. 4, 3—Search law applicable.

Section 103, Criminal P.C., does not apply to searches made under the Public Gambling Act. This question has a bearing on the character of the witnesses who appear for the prosecution in cases under the Act. They need not be residents of the locality and they need not even be respectable. Such witnesses are not accomplices and their evidence does not require corroboration, though it should be submitted to careful scrutiny. If the evidence as such is acceptable, it should not be disregarded, A I.R. 1937 Nag. 251: 38 Cr. L.J. 702: 169 Ind. Cas. 42.

——S. 5.

Synopsis.

1. **Credible information.**
2. **Presumption.**
3. **Procedure.**
4. **Search warrant.**
5. **Search without warrant.**
6. **Seizure of money found on person.**

1. Credible information.

——S. 5—Duty of Magistrate in issuing search warrant.

It is not necessary that the warrant issued by a magistrate to search the house should be filled up by him or his clerk. All that the Magistrate has to do is to satisfy himself that there is credible information that the house is being used as a common gambling house A I.R. 1945 Nag. 216: 1945 N.L.J. 237: I.L.R. (1945) Nag. 649: 47 Cr. L.J. 148: 221 Ind. Cas. 292.

——S. 5—Warrant—Validity—Magistrate, if bound to make inquiries.

The mere fact that the warrant under Public Gambling Act does not specify the boundaries of the house to be searched, does not make the warrant invalid, if the house is described by the name of the occupier or the owner.

The Act does not require an enquiry. All it requires is that the Magistrate should have credible information. He makes an inquiry if he thinks it to be necessary but he is not bound to do so. A.I.R. 1938 All. 252: 1938 A.L.J. 222: 1938 A.W.R. 147: 39 Cr. L.J. 548: I.L.R. (1938) All. 422: 175 Ind. Cas. 233.

——Ss. 5, 6—Warrant under, whether must state that it is issued on credible information.

Section 5 merely requires that the warrant should be issued after the receipt of credible information. The fact that the warrant issued does not state that it was issued after the receipt of credible information does make the warrant invalid. As the Magistrate issues the warrant, he presumably thinks that the information is credible, though it would be better if the form of warrant reproduces the wording of the section. A.I.R. 1938 Nag. 63: 39 Cr. L.J 55: I.L.R. (1939) Nag. 556. 171 Ind. Cas. 1007.

——S. 5—"Credible information"—Meaning of—Sworn information unnecessary.

Credible information includes any information which in the judgment of the officer to whom it

is given, appears entitled to credit in the particular instance and which he believes and it need not be sworn information. 7 P.R. 1882 Cr. (F.B.), Foll. 116 Ind. Cas. 455: 30 Cr. L.J. 625: 1929 Cr. C. 312: 13 A.I. Cr. R. 58: A.I.R. 1929 Lah. 720.

——**S. 5—Credible information — Superintendent of Police certifying he had reason to believe—Warrant valid.**

Where the Superintendent of Police issued the warrant and he signed it certifying that he "had reason to believe, etc.; the only interpre ation to be placed on the warrant is that the Superintendent of Police had reason to believe and therefore he acted upon credible information within S. 5. 96 Ind. Cas. 654: 7 Lah. 310: 27 P.L.R. 466: 27 Cr. L.J. 990: 7 A.I. Cr.R. 14: A.I.R. 1926 Lah. 459.

——**S. 5—Credible information as to actual gambling, how game is played and how toll is levied—Necessary for search.**

To apply S. 6 of the Public Gambling Act, the premises must be entered or searched under the provisions of S. 5 of that Act. The credible information, which the Police Officer must obtain before he can enter a place must show that the gambling is being carried on for the profit of the owner or occupier, and there ought to be evidence to describe either how the game itself was played, or how a toll, if any, was levied. A Police Officer is not at liberty to raid premises merely because a number of persons are collected to gamble there, and a conviction based on such information cannot be sustained. 62 Ind. Cas. 322: 22 Cr. L.J. 498 (Nag.).

——**S. 5—Credible information.**

When a warrant issued under the section is duly signed and shows on the face of it that it was issued on credible information it should be presumed that the Magistrate signing the warrant had such information.

A police report is *prima facie* credible information. 9 N.L.R. 68: 14 Cr. L.J. 293: 19 Ind. Cas. 949.

2. Presumption.

——**Ss. 5 and 6—Scope—Warrant under S. 5—Officer named endorsing it to another—Execution by latter—Presumption under S. 6—If can arise.**

A warrant issued under S. 5 of the Public Gambling Act is a special warrant and not a general warrant of search as under the Cr. P. Code. The officer named in the warrant is a delegate of the Court and he cannot therefore legally delegate his authority to another, and he cannot endorse the warrant to another to execute it. If the warrant is executed not by the officer mentioned in it, but by another to whom it is endorsed, the presump ion under S. 6, will not arise. 49 Cr. L.J. 150: A.I.R. 1948 Lah. 81.

——**Ss. 5 and 6—Issue of warrant—Regularity—Presumption—Evidence Act, S. 114.**

The issue of a warrant under S. 5 of the Gambling Act being a judicial act, there is the initial presumption under S. 114 of the Evidence Act that the Magistrate who issued the warrant did so complying with the terms of the section. That being the case, the presumption set out in S. 6 of the Gambling Act would appiy. 51 C.W.N. 284.

——**Ss. 5 and 6—Search warrant issued by authority specified in S. 5 on face of it regular—Presumption under S. 114, Illustration (e), Evidence Act, that authority acted on credible information can be drawn so as to attract S. 6—Presumption is rebuttable—Mere production of warrant if sufficient to prove credibility of information—Evidence of Police Sub-Inspector as to credibility of information if sufficient.**

Provided the warrant issued under S. 5, is on the face of it regular, the presumption, under S. 114, Illustration (e), Evidence Act, does arise; and the Court may presume that the officer issuing the warrant has acted on credible information and the presumption arising under S. 6 would arise if as a result of the ensuing search, the articles indicated in S. 6 are found. But the Court is not bound to raise the presumption under S. 114, Illustration (e), Evidence Act. The presumption is rebuttable and it is open to the Court in proper cases even when the warrant is in proper form to refuse to raise the presumption on good cause being shown. It is open to the Magistrate to hold, after hearing all the evidence, including such evidence as the accused may wish to lead that the mere issue or service of warrant in a particular case is not sufficient to give rise to the presumption that the house searched is a common gaming house merely because cards and other such instruments of gaming happen to be found therein. If it is shown that upon the whole information before the officer issuing the warrant, there was no reason to believe that the premises searched were used as a common gaming house, for the profit or gain of some person connected with them, as owner or otherwise, it would be difficult to uphold the validity of the warrant, as laying down foundation for the presumptions mentioned in S. 6.

If the Court chooses to draw a presumption under S. 114, Illustration (e), Evidence Act, regarding the credibility of the information on the basis of which the warrant under S. 5 was issued the mere production of a warrant might be sufficient to prove the credibility of the information and it is not incumbent upon the prosecution to place before the Court the nature of the information received. But if the prosecution depends in any particular case on the mere production of the warrant, it would do so at its own risk, because the Court may refuse to draw the presumption, in which case the probability is that the prosecution case would fail.

If the prosecution does not choose to depend on the mere production of the warrant to prove the credibility of the information on the basis of which the warrant was issued the best evidence to prove the credibility of the informatic n would be that of the offi er to whom the alleged credible information had be n given. In most cases the officer concerned would be the Sub-Inspector of Police and his evidence would be sufficient to meet the requirements of the law. A.I.R 1946 Lah. 26: I.L.R. (1945) Lah. 119: 223 Ind. Cas. 137 (F.B.).

——**Ss. 5, 6, 10, 11—Warrant under S. 5 and not stating that it was issued on credible information—Presumption under S. 6 could be raised.**

The warrant under S. 5 received: "Whereas infor-

mation has been laid before me that the house of R. is used as common gaming house...." and then followed the operative part of the warrant. It was contended that this was illegal as the warrant did not state that the Magistrate was acting on credible infomation:

Held, that it may be unfortunate that the form of the warrant did not entirely follow the words of the section but it must be presumed that Magistrates are aware of law and that no Magistrate would sign a warrant on information which he did not consider credible. The fact that the Magistrate signed the warrant was sufficient guarantee that he was satisfied that he was acting on credible information. There was, therefore, no illegality in the warrant, and the provisions of Ss. 10 and 11 could be invoked and the presumption under S 6 be legally made. A.I.R. 1937 Nag. 396: 39 Cr. L J. 85: I. L.R. (1939) Nag. 380: 172 Ind. Cas. 182.

——Ss. 5, 10—Presumption—Information that gambling was likely to take place in a house—Issue of warrant—Legality—Illegal warrant—Search witness, if can be examined under S. 10.

Where a warrant under the Act recites that information was received that gambling was 'likely to take place" in the house which was searched, not upon information that the house was being used as common gaming house, it is not in strict accordance with the provisions of S. 5. 10 S. must be read strictly and if the warrant is not issued strictly in accordance with the provisions of the Act, then a person found in house when it is searched may not be examined under S. 10.

The presumption that persons found on the premises when a house is searched where there for the purpose of gaming only arises when the search is legal. When the search has proceeded upon a warrant which is not in compliance with S. 5, no presumption arises against those found in the premises. A.I.R. 1934 All. 524 35 Cr.L.J. 873: 1934 A.L.J. 680: 3 A.W.R. 541: 148 Ind. Cas. 1128.

——Ss. 5, 6—Validity of search—Presumption.

The presumption under S. 6 arises only if the house or room is entered or searched under the provisions of S. 5.

Under S. 5, a Magistrate may himself enter or authorise specified Police Officers to enter. But if he does not authorize any Police Officer but professes to take action himself, it is his duty to conduct the search personally and if he does not do so, but sends a Police Officer to conduct the search, S 5 is not duly complied with and the presumption under S. 6 does not arise.

In cases like the present, where on the happening of certain events a legal presumption is to be raised against the accused, it is the duty of the prosecution to prove that such events happened strictly as required by law. A.I.R. 1933 Lah. 234: 34 Cr L J. 252: 34 P.L R. 518: 141 Ind. Cas. 659.

——S. 5—Presumption about search—Information credible—Presumption as to official acts.

If the warrant on the face of it shows that the issuing officer believed upon information which he considered credible that the house in question was being used as a common gaming house the presumption that the official acts were regularly performed applies and there is no authority in which it has been held that independent evidence of this fact must be produced at the trial. 81 Ind. Cas. 186: 11 O.L.J. 347: 25 Cr. L.J. 698: A.I.R. 1924 Oudh 403.

——Ss. 5 and 6—Presumption as to occupation—Issue of warrant.

If there is a fair presumption under S. 6 that the person is the occupier or has the use of a room within S. 3 as a common gaming house the issue of a warrant is not illegal. 21 Cr. L.J. 442: 56 Ind. Cas. 234 (All.).

——Ss 5 and 4—Search warrant illegal—Presumption.

A warrant issued for the search of any house which the Police officer might think proper to search, is illegal. The result of such illegal search is that no presumption whatsoever can be drawn in accordance with the Act as is allowed to be drawn in the case of a legal search. 35 All. 1: 10 A.L.J. 355: 13 Cr. L.J. 832: 17 Ind. Cas. 576.

——Ss. 5 and 6—Presumption.

An irregularity in a search warrant issued under S. 5 will not *per se* vitiate a conviction following the search if the conviction can be supported without invoking the presumptions under S. 6. But these presumptions only arise when a search has been duly made under S. 5. 6 N.L.R. 168: 12 Cr. L.J. 28: 8 Ind. Cas. 1127.

3. Procedure

——Ss. 5, 3, 4—Offence under Act—Investigation and trial of offences—Procedure.

The Public Act contains no provisions regulating the investigating, inquiry into, or trying of offences under that Act The ordinary provisions of the Criminal P. C.. will therefore, regulate the investigation and trial of such offences.

In order that an offence may be cognizable offence within the meaning of S. 4 (*f*), Criminal P.C., it is not necessary that every Police Officer should have the power to arrest without warrant. The fact that under S. 5, the District Superintendent of Police has such power, makes an offence under Ss. 3 and 4 of that Act a cognizable offence.

The Sub-Inspector of Police in Akola town, on the receipt of information that the accused Nagarmal habitually gambled on cotton futures by the road side, sent a man with marked coins to wager on a difference of figures and after the wager had been made, searched the accused, seized the coins, and arrested him The accused was then prosecuted on a *challan* presented by the City Police of Akola. The trial Court held that in the absence of any warrant under S. 5 of the Public Gambling Act, the proceedings were irregular an discharged the accused under S. 249, Criminal P. C.:

Held, that the procedure adopted by the City Police was correct. Even if the arrest were illegal, the Court still had jurisdiction under S. 190 Criminal P.C., to take cognizance of the offence, and the question whether the arrest was valid or not would not affect the question whether the accused was guilty or not. A.I.R. 1941 Nag. 338: 1941 N.L.J. 465: 43 Cr. L.J. 89; I.L.R. (1942) Nag. 426: 196 Ind. Cas. 869.

——S. 5—Procedure in search—S. 103, Cr. P. Code, does not apply.

Where a warrant has been issued for search under S. 5, Gambling Act, S. 103, Cr. P. Code, is not applicable. A.I.R. 1922 Lah. 458, Foll. 120 Ind. Cas. 266=31 Cr. L.J. 35=1930 A.L.J. 229=13 A.I.Cr.R. 138=11 L.R.A. (Cr.) 21=1929 Cr. C. 665=A.I.R. 1929 All. 937.

4. Search warrant.

——S. 5—Warrant under — Omission to address particular police officer—Word 'Common' absent before 'gaming house'—Effect on legality—Cr. P. Code, S. 537.

A search warrant under S. 5 of the Public Gambling Act need not be addressed to one or more particular police officers. The fact that the warrant is not addressed to any particular police officer does not make it an illegal warrant. Nor would the fact that the word "Common" is omitted before the words "gaming house" in such a warrant make it an illegal warrant. The defect if any, is curable by S. 537, Cr. P. Code. 1948 A.W.R. (H.C.) 142=A.I.R. 1948 A. 428=1948 O.A. (H.C.) 142=1948 A.L.J. 532=49 Cr. L.J. 710.

——S. 5—Search warrants—Endorsement.

Warrants issued under S. 5 of the Act may be endorsed in accordance with the provisions of S. 79, Criminal P. C. A.I.R. 1945 Nag. 216=1945 N.L.J. 237=I.L.R. (1945) Nag. 649=47 Cr. L. J. 148=221 Ind. Cas. 292.

——S. 5—Description in warrant adequate to identify place—Non-mentioning of boundaries is immaterial.

If the description in the warrant is otherwise adequate to identify the place without ambiguity, it is immaterial that the boundaries are not given. A. I. R. 1941 Nag. 16=1940 N.L.J. 297=42 Cr. L. J. 32=190 Ind. Cas. 764.

——S. 5—General warrant—Legality.

A search under the Gambling Act cannot be said to be vitiated on the ground that the search witnesses lived half a mile away from the accused's house. Nor can the fact that the investigating Sub-Inspector who had the necessary search warrant entered the accused's house after scaling the walls of a neighbouring house at dead of night, make the search illegal. A.I.R. 1934 Oudh 90=35 Cr. L.J. 397=11 O.W.N. 62=9 Luck. 355=147 Ind. Cas. 317.

——S. 5—General warrant—Legality.

To issue a warrant to raid houses where gambling goes on at the time of Dewali is highly undesirable as the police are merely encouraged to run in numbers of perfectly innocent persons in order to get a reward. 7 O.W.N. 757=1930 Cr. C. 943=A. I. R. 1930 Oudh 403.

——S. 5—Search warrant — Place not stated — Warrant illegal.

Where at the time when the Magistrate signed, the place used as public gaming house is not stated at all in the body of the warrant, the warrant is not for the search of any particular place and therefore is illegal. 73 Ind. Cas. 521=5 L.L.J. 429=24 Cr. L. J. 633=A.I.R. 1924 Lah. 247.

——S. 5—Search warrant.

A warrant that is not a legal warrant is no warrant for the purposes of Gambling Act. Omission to affix the seal of the Court on a search warrant issued under the Act is a mere irregularity curable by S. 537, Cr. P. Code. 23 P.R. (Cr.) 1910=85 P.L.R. 1910=11 Cr. L.J. 570=8 Ind. Cas. 137.

——S. 5—Search warrant issued to one Police Officer—Endorsement of, to another Officer—Legality.

Where a Magistrate issued a search warrant under S. 5 to a police officer, who endorsed it to another police officer of rank qualifying him to conduct searches under the section the search conducted by the latter officer was valid and operative. 42 All. 385=18 A.L.J. 383=58 Ind. Cas. 241.

——S. 5—Search warrant—Power to issue—Sub-divisional officer.

A search warrant issued under S. 5 of the Public Gambling Act, 1867, by a first class Magistrate is not invalid by reason of the fact that the house to be searched is situated outside the limits of the tahsils in respect of which such Magistrate has been appointed Sub-divisional officer. 34 All. 597=10 A.L.J. 169=13 Cr. L.J. 716=16 Ind. Cas. 524.

——S. 5—Warrant when issued—Information of future use—Warrant cannot issue.

A warrant cannot be issued unless the house is used as a common gaming house. It is not sufficient that information should be received that the house is going to be used in this way in the future. 19 A.L.J. 691=A.I.R. 1921 All. 410.

5. Search without warrant.

——Ss. 5, 10—Sub-Inspector entering house without warrant from Magistrate under S. 5 and bringing accused before Magistrate—Such accused cannot be examined as witnesses under S. 10. A. I. R. 1944 Nag. 328=1944 N.L.J. 383=46 Cr. L.J. 147=I.L.R. (1945) Nag. 430=216 Ind. Cas. 210.

——S. 5—Search without warrant — Assistant Superintendent of Police not authorised.

An Assistant Superintendent of Police is not authorised under S. 5 of the Public Gambling Act to search a place without a warrant. 86 Ind. Cas. 832=23 A.L.J. 137=26 Cr. L.J. 896=6 L.R.A. (Cr.) 64=A.I.R. 1925 All. 301.

6. Seizure of money found on person.

——Ss. 5, 8, 4—Money found in pocket of persons arrested or ring found on personal search cannot be forfeited.

Although the definition of "instruments of gaming" is very wide in S. 1, and although in S. 4, money is an instrument of gaming when it is used for purposes of gaming, nevertheless, in S. 5 and S. 8, money is distinguished from an instrument of gaming. The money seized under S. 5 and forfeited under S. 8, is money seized as found on the premises and connected with gaming by suspicion, not money found in the pockets of those taken into custody. Section 8 is controlled by S. 5 and as S. 5 does not authorise seizure of money from pockets of those who are taken into custody, the money seized in personal search cannot be forfeited, nor a ring seized in personal search. A.I.R. 1943 Nag. 286=1943 N.L.J. 430=I.L.R. (1943) Nag. 667=45 Cr. L.J. 94=210 Ind. Cas. 123.

——S. 5—Confiscation of money, if authorised by S. 5.

Section 5 conveys no authority for the seizure and confiscation of money found on the persons of people found in a common gaming house. The authority extends only to money found therein reasonably suspected to have been used or intended to be used for

the purposes of gaming. There can be no justification for assuming that any person who frequents a public gaming house has the intention of gaming with all the money he happens to have in his pocket at the time. A.I.R. 1937 Nag. 251=38 Cr. L.J. 702=169 Ind. Cas. 42.

——S. 5—Confiscation of money — Money found on person—Seizure illegal.

No part of the money found on the person of a man arrested in a gaming house can be seized as S. 5 authorizes the seizure of money and securities lying about the premises but of no other money. The reason why such money cannot be seized is that a person convicted for gambling is liable to pay fine and power to confiscate money which belongs to the person arrested is unnecessary. A.I.R. 1927 Lah. 338; 26 Bom. 641 and 44 Bom. 686, Rel. on. 121 Ind. Cas. 657=31 Cr. L.J. 277=12 N.L.J. 161=26 N.L.R. 151=A.I.R. 1930 Nag. 49.

——S. 5—Money and valuable on person—Confiscation improper.

It would be unsafe to direct confiscations of all moneys or valuables, such as gold watches and ornaments found on the person of a man arrested in a gaming house. 100 Ind. Cas. 716=8 Lah. 320=28 Cr. L.J. 332=7 A.I.Cr.R. 572=28 P.L.R. 521=A.I.R. 1927 Lah. 338.

——S. 5—Search limited to instruments of gaming found on person and not money.

The power given to police in the first part of S. 5 to seize instruments of gaming and money, etc., found in the house does not extend to the seizure of money recovered on the search of the persons found in the house. The search is limited to the recovery of instruments of gaming found on the person and, therefore, the police has no power to seize money found on the person of the accused. 96 Ind. Cas. 503=27 Cr. L.J. 951=7 A.I.Cr.R. 41=A.I.R. 1926 Lah. 290.

——S. 5—Money found on person—Not forfeited.

Money can be seized only when found in the common gaming house. Money found upon search of persons is not authorised to be seized and cannot be forfeited. 17 A.W.N. 368, Foll. 68 Ind. Cas. 832=23 Cr. L.J. 608=A.I.R. 1923 Nag. 66.

——S. 6—Burden of proof.

If a warrant issued by the Magistrate does not contain a description of the boundaries of the house to be searched, the warrant is rendered ineffective. The prosecution thus not being entitled to a presumption under S. 6, the burden of proof lies upon the prosecution. 1939 N.L.J. 357.

——S. 6—Burden of proof.

Before relying on the presumption under S. 6, the prosecution must establish that the place where the accused was found gambling really was the place named in the search warrant. A.I.R. 1937 Cal. 54=38 Cr. L.J. 784=169 Ind. Cas. 303 (D.B.).

——S. 6—Burden of proof.

The presumption provided for by S. 6 can arise only where search is made in strict compliance with the provisions of S. 5 and if the search is not proved to have been duly made, no such presumption can be made. In order to entitle the prosecution to invoke to its aid the presumption under S. 6, the prosecution must prove affirmatively that the search was in accordance with the provisions of S. 5 and where this fact is not proved, the conviction of the accused cannot be sustained merely on the strength of the presumption referred to in S. 6. A.I.R. 1936 All. 109=1935 A.W.R. 1314=37 Cr. L.J. 351=1936 A.L.J 419=160 Ind. Cas. 998.

——S. 6—Evidence — Direct evidence of taking commission not necessary.

It is not necessary for the police to give direct evidence that the gambling was being carried on for the profit of the keeper of the house. 75 Ind. Cas. 358=45 All. 671=24 Cr. L.J. 934=A.I.R. 1924 All. 186.

——S. 6—Gaming—Whether an offence—Search.

A search by a police officer below the rank of Sub-Inspector, under a warrant issued by a Magistrate is irregular and does not raise the presumptions under S. 6. A conviction based on such presumptions but unsupported by any other evidence should be set aside. A.W.N. (1884) 286; 4 C. 710; 4 C. 659; 5 B.H.C.R. Cr. 1, Foll. A.W.N. (1884) 291, Diss. Gaming is punishable only when carried on in a common gambling house or in a public place. Gambling is not an offence in itself. 6 N.L.R. 168=12 Cr. L.J. 28=8 Ind. Cas. 1127.

——S. 6—Illegal warrant.

Where a Magistrate issuing a warrant simply relies on the uncorroborated information received by the Sub-Inspector does not conduct any enquiry for the purpose of being satisfied that the house was used as a gaming house, the warrant is not legal and hence S. 6 of the Act cannot be invoked to raise a presumption against the accused. 1939 N.L.J. 357.

——S. 6—Illegal warrant—Presumption does not arise.

The presumption under S. 6 would not arise if it is found that the warrant was an illegal warrant. 1930 A.L.J. 1462=128 Ind. Cas. 393=A.I.R. 1930 All. 740.

——S. 6—No presumption arises.

If the search warrant is illegal no presumption under S. 6 arises that the house is a common gaming house or that the persons present in the house are there for the purpose of gaming. 106 Ind. Cas. 825=50 All. 412=26 A.L.J. 78=28 Cr. L.J. 1001=3 L.R.A. (Cr.) 145=8 A.I.Cr.R. 406=A.I.R. 1928 All. 20.

——S. 6—No presumption arises.

The effect of a search warrant being illegal is that no presumption such as arises under S. 6 can be made in favour of the prosecution. 104 Ind. Cas. 441=28 Cr. L.J. 825=A.I.R. 1927 Lah. 699.

——S. 6—Illegal search — Presumption does not arise.

Where it is found that the search was illegal, the presumption under S. 6 of the Gambling Act does not arise.

In such a case, the presence of the dice and the board and the pot by itself does not raise any presumption that the premises were being used as a common gaming house. 86 Ind. Cas. 832=23 A.L.J. 137=26 Cr. L.J. 896=6 L.R.A. (Cr.) 64=A.I.R. 1925 All. 301.

——S. 6—Warrant vague and indefinite as to place and person — Omission to address to a definite police officer—Warrant illegal—Presumption does not arise.

The Superintendent of Police received credible information that a common gaming house was maintained by Puttu Lal. He issued a warrant for the search of the house of Puttu Lal but omitted to get the boundaries of that house noted in the warrant or to enter to whom it was addressed. The caste of Puttu Lal was also misdescribed. The Sub-Inspector to whom the warrant in question was handed over waited for a suitable opportunity to make the search. He corrected the caste of Puttu Lal in the warrant with his own hand and went to the house of Puttu Lal and made a search.

Held, that the erroneous description of the caste in the original warrant may not be very material but the omission to address it to a definite police officer and to describe the house by its boundaries or number, renders the warrant vague and indefinite and it cannot be said that under that warrant the officer making the search was authorised to make it. The warrant in question cannot therefore be regarded as legal and the presumption authorised by S. 6 cannot be raised. 73 Ind. Cas. 518=21 A. L. J. 602=4 L.R.A. (Cr.) 138=24 Cr. L.J. 630=A.I.R. 1924 All. 128.

——Ss. 6 and 5 (as amended by Punjab Act 1 of 1929)—Evidence Act, S. 114 (e)—Warrant under S. 5—Presumption— Whether and when arises—Rebuttal—Refusal to draw presumption—Effect.

Provided the warrant issued under S. 5 is, on the face of it, regular, the presumption under S. 114 (e), Evidence Act, does arise and the Court may presume that the officer issuing the warrant has acted on credible information. It would follow that the presumption arising under S. 6 would if, as a result of the ensuing search, the articles indicated in S. 6 are found.

But this presumption is rebuttable and it is open to the Magistrate to hold, after hearing all the evidence, including such evidence as the accused may wish to lead, that the mere issue and service of a warrant in a particular case is not sufficient to give rise to the presumption that the house searched is common gaming house merely because cards and other such instruments of gaming happen to be found therein. It is always open to the accused to suggest that the credible information in any particular case is the false information of the informer actuated by spite and that in fact, the house was not being used for the profit or gain of the owner. Thus, it would follow that the presumption embodied in S. 6 would not arise from the mere issue and service of warrant under S. 5 and in the absence of a positive evidence to prove that the house searched was a common gaming house, the prosecution would fail.

If the Court chooses to draw a presumption under S. 114 (e), Evidence Act, regarding the credibility of the information, the mere issue of a warrant might be sufficient to prove the credibility of the information and it is not incumbent upon the prosecution to place before the Court the nature of the information received. If the prosecution depends in any particular case on the mere production of the warrant, it would do so at its own risk, because the Court may refuse to draw the presumption in which case the probability is that the prosecution case would fail.

If the prosecution does not choose to depend on the mere production of the warrant, the best evidence that they should lead to prove the credibility of the information would be the officer to whom the alleged credible information had been given. Since, in most cases, the officer concerned would be the Sub-Inspector of Police, his evidence would be sufficient to meet the requirements of the law. A.I.R. 1946 Lah. 26=47 Cr. L.J. 368=I.L.R. (1945) Lah. 119=223 Ind. Cas. 137 (F.B.).

——S. 6—Dara gambling — Slips of paper with numbers on them, whether instruments of gaming—Presumption.

In the case of "*dara*" gambling, the slips of paper with numbers upon them constitute instruments of gaming within the meaning of the Act and give rise to a presumption under S. 6 of the Act that the shop was used as a common gaming house. A.I.R. 1941 All. 330=I.L.R. (1941) All. 576=1941 A. L. J. 421=1941 A.W.R. 220=1941 O.W.N. 794=42 Cr. L.J. 864=196 Ind. Cas. 434.

——S. 6—Instruments of gaming—Presumption.

Held, that marked coins were clearly instruments of gaming, and therefore, under S. 6, this was evidence that the house was used as a common gaming house. A.I.R. 1938 Nag. 63=39 Cr. L.J. 55=I.L.R. (1939) Nag. 556=171 Ind. Cas. 1007.

——S. 6 — Persons found during game — Presumption.

When a gaming game is being played there is a strong presumption that the persons present are taking part in it; but when bets are being made at intervals, and legitimate business is being carried on throughout, the presumption is not a strong one, and if persons found there give a reasonable explanation of their presence, it should ordinarily be accepted. A.I.R. 1938 Nag. 63=39 Cr. L.J. 55=I.L.R. (1939) Nag. 556=171 Ind. Cas. 1007.

——S. 6—Search—Playing cards found — Denial of shop-keeper as to unlawful gaming —Whether sufficient.

Where, on a search under S. 6, packets of playing cards are found in a shop, the mere denial of the house owner is often sufficient and indeed the only available proof that unlawful gaming was not going on in such shop, unless other circumstances of the case indicate that, in fact, unlawful gaming was going on. Most persons have in their houses, a packet of playing cards which inevitably would be found on a search under S. 6. It is, therefore, always possible for a malicious person to give information to an authorized officer alleging that unlawful gambling is going on and thereupon the unfortunate houseowner is put to the trouble of proving that no unlawful gambling was going on. A.I.R. 1937 Rang. 469 =39 Cr. L.J. 134=172 Ind. Cas. 371.

——Ss. 6, 5—Residents of locality addicted to gambling—Presumption.

No presumption against the accused can be made by the mere fact that residents of a particular locality are addicted to gambling, and in a case where it is manifest that Police has, on previous occasions, made unsuccessful attempts to falsely implicate a man under the Gambling Act, the Court must, before recording an order of conviction, be satisfied that there was evidence of unimpeachable character to support the conviction. A.I.R. 1936 All. 109 =1935 A.W.R. 1314=37 Cr. L.J. 351=1936 A. L. J. 419=160 Ind. Cas. 998.

——S. 6—Scope—Presumption.

Under S. 6, the Court must draw a presumption from the finding of cards, etc., that the house was used as a common gaming house, and that presump-

tion will stand until it is rebutted. A.I.R. 1933 All. 574=34 Cr. L.J. 1232=146 Ind. Cas. 244.

——S. 6—Presumption under — Instruments of gaming and nal found.

Where a Magistrate raids a house and finds therein instruments of gaming and a Nal (a wooden box containing some money) the presumption is that the place was a common gambling house. 116 Ind. Cas. 455=30 Cr. L.J. 625=1929 Cr. C. 312=13 A.I.Cr.R. 58=A.I.R. 1929 Lah. 720.

——S. 6—Common gaming house—U. P. Public Gambling Act (1 of 1917), S. 3—Presumption.

On the search of a house persons were found therein engaged in gambling and instruments of gaming were also found. There was evidence that the owner made profit by allowing his house to be used as a place for gambling. *Held*, that it must be presumed under S. 6 as amended by the U. P. Public Gambling (Amendment) Act of 1917 that the house question was a common gaming house in absence of evidence to the contrary. 42 All. 470=18 A.L.J. 562=21 Cr. L.J. 438=2 U.P.L.R. (All.) 119=56 Ind. Cas. 230.

——S. 7—Common gaming house.

A private room containing all the paraphernalia of a club and rented by members of only one caste is not *prima facie* a common gaming house within the meaning of the Act. A.I.R. 1935 Sind 52=36 Cr. L. J. 865=155 Ind. Cas. 971.

——S. 7—Gambling in one room.

If two persons are gambling in a room, forming part of a common gaming house they must be convicted for gambling. 7 M.L.T. 189=11 Cr. L.J. 334=5 Ind. Cas. 934.

——S. 8—Confiscation of money found on the person of those convicted under Ss. 3 and 4—Legality.

S. 8 of the Public Gambling Act does not authorise the forfeiture of moneys found on the person of those convicted under Ss. 3 and 4 of the Act. 19 A.L.J. 765; 26 Bom. 641; 8 Lah. 320 and 62 Cal. 1093, rel. on. I.L.R. (1950) A. 1299=1950 A. L. J. 58=1950 A.W.R 141=A.I.R. 1950 A. 199=51 Cr. L.J. 640.

——S. 8—Confiscation of money—Money found on the person—Not forfeited.

In the ordinary case of money found in the possession of a person who is discovered in a gaming house such money is not capable of being forfeited. Everything found on the premises or on the persons there which is surely tainted with the gaming mark, that is to say. "Reasonably suspected to have been used or intended to be used for the purpose of gaming" is liable to forfeiture and may or may not be returned under the discretion of the Magistrate under the provisions of S. 8 but not otherwise. 28 A. 274 and 41 A. 366, Foll. 77 Ind. Cas. 177=4 P.L. T. 622=1923 P.H.C.C. 220=1 Pat. L.R. (Cr.) 229=25 Cr. L.J. 321=A.I.R. 1924 Pat. 42.

——S. 8—Money found on persons of gamblers cannot be seized—Money found on table or floor valid but not on persons.

S. 8 justifies the seizing and forfeiting of money found on the table or on the floor or other places in the house, but not on the persons of the men arrested therein. 63 Ind. Cas. 408=19 A.L.J. 765=22 Cr. L.J. 648=A.I.R. 1921 All. 241.

——S. 8—Instruments of gaming.

Under S. 8, it is only the instruments of gaming that can be properly dealt with. Petromax lamps are not articles that can be rightly comprised in the expression, instruments of gaming. 1939 N.L.J. 357.

——S. 10—Absence of warrant—Effect.

Ss. 10, 5—Entry of Sub-Inspector not by warrant under S. 5—Persons found and brought as accused before Magistrate by him cannot be examined as witnesses. A.I.R. 1944 Nag. 328=46 Cr.L.J. 147 =I.L.R. (1945) Nag. 430=1944 N.L.J. 383 =216 Ind. Cas. 210.

——S. 10—Application.

The prosecution can proceed only against some only of the persons found gaming or present in a common gambling house and can call others not prosecuted as witnesses. S. 10 does not apply to such persons. It applies to persons converted by the Magistrate unto witnesses, out of the persons brought before him for trial. 9 N.L.R. 68 =14 Cr.L.J. 293=19 Ind. Cas. 949.

——Ss. 10, 11—Conviction of approver.

There is no prohibition in S. 10 against the conviction of an approver who does not depose truthfully. Under S. 11, the Magistrate may, if he so chooses, indemnify an approving accused, if such accused as witness, in the Magistrate's opinion, has, to the best of his knowledge, made a true statement; it follows that if the Magistrate considers that the witness has not made a truthful statement to the best of his ability, he is not to be indemnified. He is an accused person, and punishment necessarily follows.

The scheme of the Public Gambling Act appears to be that a person may be taken from the dock and placed in the witness-box and returned to the dock and punished if he fails to satisfy the Court that he is entitled to an indemnity. The procedure is not governed by the Cr. P. Code. A.I.R. 1937 Nag. 396=I.L.R. (1939) Nag. 380 =39 Cr.L.J. 85=172 Ind. Cas. 182.

——Ss. 10, 11—Uncorroborated evidence of accomplice—Conviction.

The whole procedure of the Public Gambling Act is a special one and overrides the general law as to the procedure connected with pardons laid down in the Cr. P. Code. It is open to a Magistrate in pursuance of the provisions of Ss. 10 and 11 to grant a pardon to a co-accused and use his evidence against the accused.

The evidence of an accomplice who accepts the pardon tendered to him by the trying Magistrate under S. 10 in order to save his own skin must be viewed with great care and caution and it is not safe to act on his evidence unless corroborated in material particulars. A.I.R. 1934 Oudh 90=35 Cr.L.J. 397=11 O.W.N. 62=9 Luck. 355=147 Ind. Cas. 317.

——S. 10—Illegal arrest—Person illegally arrested cannot be examined.

A person arrested during the raid could be rightly examined on oath only in case the premises were entered into under provisions of the Act. Where they were entered into contrary to the provisions of the Act the Magistrate is not authorised to call upon one of the persons arrested to take oath and give evidence in the case. 86 Ind. Cas. 832=23 A.L.J. 137=26 Cr.L.J. 896=6 L.R.A. (Cr.) 64=A.I.R. 1925 All. 301.

——S. 10—Irregular search—Effect.

Where a search is not made in accordance with the provisions of S. 10, the Magistrate cannot examine as witness one of the persons arrested. 1939 N.L.J. 357.

——S. 11—Approver—Acquittal.

S. 11 allows an approver to be acquitted only if a disclosure made is to be true and faithful. 20 O.C. 4=4 O.L.J. 88=18 Cr.L.J. 494=39 Ind. Cas. 334.

——S. 12—Ring game.

Ring game is not a game of mere skill. 34 All. 96, Foll. 110 Ind. Cas. 674=10 A.I.Cr.R. 199 =9 L.R.A. (Cr.) 117=29 Cr.L.J. 738.

——S. 13.

Synopsis.

1. Applicability.
2. Confiscation of money.
3. Offence under.
4. Public place.
5. Punishment.
6. Miscellaneous.

1. Applicability.

——S. 13—Applicability.

Betting on a number of carts that would enter a cotton market compound on a particular day does not amount to an offence. The act is not covered by S. 13. 1939 N.L.J. 401.

——S. 13—Applicability — Wagering contract — Sale of goods—Act does not apply.

S. 13 of U. P. Act, 1867, as amended by Act I of 1917 does not apply to a case of wagering contract in respect of sale of goods. 102 Ind. Cas. 605=49 All. 926=25 A.L.J. 693=A.I.R. 1927 All. 823.

2. Confiscation of money.

——S. 13—Confiscation of money.

Money is used in gaming is not an instrument of gaming — Under S. 13, money seized by Police and found on the persons gambling cannot be forfeited. 1939 N.L.J. 403.

——Ss. 13 and 8—Distinction between — Confiscation of money.

Section 13 justifies only confiscation of instruments of gaming; money is not an instrument of gaming and therefore its confiscation under S. 13 is not justified. S. 8 of the Act says clearly that all money found in a gaming house may be confiscated and there is no question whether money is an instrument of gaming or not. A.I.R. 1938 All. 252=1938 A.L.J. 222=1938 A.W.R. 147= 39 Cr.L.J. 548=I.L.R. (1938) All. 422=175 Ind. Cas. 233.

——S. 13—Confiscation of money.

S. 13 does not justify the seizure of money. Money is not an instrument of gaming within the meaning of that section. In so far as the Act is concerned, the Magistrate has no authority to confiscate this money. But he has this authority under the provisions of S. 517, Cr. P. Code, where it has been produced before the Court. A. I.R. 1938 All. 209=1938 A.L.J. 102=39 Cr.L. J. 441=1938 A.W.R. 118=I.L.R. (1938) All. 348=174 Ind. Cas. 556.

——S. 13—Confiscation of money found on person.

By no stretch of imagination can money found on the person of the accused be regarded as among the instruments of gambling under S. 13 and cannot, therefore be confiscated. A.I.R. 1938 All. 11=1937 A.L.J. 973 (1)=39 Cr.L.J. 227=1937 A.W.R. 960 (1)=172 Ind. Cas. 793.

——S. 13—Confiscation of money — Money in accused's possession.

No order for confiscating the money in the possession of the accused can be made under S. 13. 24 O.C. 264=A.I.R. 1921 Oudh 175.

——S. 13—Confiscation of money in accused's possession—If legal.

Only the instruments of gaming can be confiscated under S. 13 of the Act. 40 All. 617=19 Cr.L.J. 700=16 A.L.J. 428=46 Ind. Cas. 156.

3. Offence under.

——S. 13—Applicability — Dart game—Offence.

Before the prosecution can succeed in proving a case under S. 13, they must bring home clearly to the accused persons that they were responsible for carrying on the game and, therefore, were gambling at the time when the offence is alleged to have been committed.

Where the evidence as to dart game being played was vague but in addition there was also a side betting upon the result of throwing darts by the use of a second board coupled with other elements in the game arising from the employment of the second board and the table upon which the tickets were placed:

Held, that the fact that the dart game itself cannot be said to be a gambling game does not, in any substantial way, affect the question whether what the accused were alleged to have been doing amounted to gambling or not. A.I.R. 1936 Cal. 184=62 Cal. 865=37 Cr.L.J. 530 (2)=162 Ind. Cas. 129.

——S. 13—Offence under.

Articles for sale of value of two pice to one rupee — Number of tickets equal to number of articles — Tickets sold for one anna each—Sale does not constitute gambling. A.I.R. 1933 All. 482=1933 A.L.J. 925=34 Cr.L.J. 1128=146 Ind. Cas. 76.

——S. 13—Offence under — Playing game of skill in public places no offence.

The result of amendment of the U. P. Act of 1917 is that the playing of a game of mere skill in a public place is gaming, but it is not such gaming as falls within the ambit of the Public Gambling Act. The suggestion that the expression "any game of mere skill" means a game in respect of which there is no wagering or betting is untenable. 91 Ind. Cas. 40=48 All. 220=24 A.L.J. 150= 6 L.R.A. (Cr.) 205=27 Cr.L.J. 8=A.I.R. 1926 All. 187.

——S. 13—Game of throwing ring over a pin—If offence under.

A game of throwing a ring over a pin is not a

game of skill and the element of chance in it is very strong. It is punishable under S. 13. 34 All. 96=8 A.L.J. 1262=18 Cr.L.J. 612=12 Ind. Cas. 988.

4. Public place.

——S. 13—Public place.

The fact that the gaming was going on a place which was exposed to public view and not shut out does not make the place a public place. A. I.R. 1944 Nag. 328=1944 N.L.J. 383=46 Cr. L.J. 147=I.L.R. (1945) Nag. 430=216 Ind. Cas. 210.

——S. 13—Public place—Bank of tank belonging to temple.

The bank of a tank forming part of a temple property, to which the public are allowed to have access and where the people actually sit to task in the sun is a public place within the meaning of S. 13. A.I.R. 1942 Lah. 36=43 P.L.R. 725= 43 Cr.L.J. 446=198 Ind. Cas. 894.

——S. 13—Public place—Test.

The question whether any place is a public place within the meaning of S. 13 depends upon the character of the place itself and the use actually made of it. A public place is a place where the public go, no matter whether they have a right to go or not. A.I.R. 1942 Lah. 36=43 P.L.R. 725=43 Cr.L.J. 446=198 Ind. Cas. 894.

——S. 13—Public place—Unenclosed grove, few paces away from public pathway—No interference with access of public—Accused found gambling in such place — Accused having no connection with grove—Grove, held public place. A.I.R. 1938 All. 209=1938 A.L.J. 102=I.L.R. (1938) All. 348=39 Cr.L.J. 441=1938 A.W.R. 118=174 Ind. Cas. 556.

——S. 13—Public place, what is.

A place which is private property may be a public place within the meaning of S. 13, and the question whether it is a public place depends on the character of the place itself and the use actually made of it. The gist of the evil aimed at is such publicity of action that the ordinary passer by cannot well avoid seeing it and being enticed, if his inclinations be that way, to join in or follow the bad example openly placed in his way.

The spot in the nala where the alleged gambling was going on was admittedly about a mile away from the abadi of the village; there was no path recorded in the Settlement Misal although there was a marked path through the nala. The alleged gamblers were playing hiding themselves:

Held, that the place was not a public place within the meaning of S. 13 and that the path was not a public way. (1936) 162 Ind. Cas. 886=18 N. L.J. 336=37 Cr.L.J. 712.

——S. 13—Public place.

In order to be a public place or a public thoroughfare within the meaning of S. 13, the place or the thoroughfare must either be open to the public or actually used by the public and the mere publicity of the gambling place or its visibility from a puble place or a public thoroughfare is not sufficient. A.I.R. 1934 All. 17=35 Cr.L.J. 564 =1934 A.L.J. 360=147 Ind. Cas. 1028 (2).

——S. 13—Public place—Meaning of.

A public place is one which is in full view of the public and one to which the public has access. 7 O. W. N. 621=1930 Cr.C. 905=A.I.R. 1930 Oudh 394.

——S. 13—Place either open to or used by the public — Private place open to public view—Not public place.

The word 'place' is used in S. 13 in conjunction with street and thoroughfare and could not have been intended to apply to a private place which might be open to a public view. Of course a particular place though private may become a public place on a particular occasion, for instance, when the members of the public are really present there. But unless such is the case, a private place cannot be called a public place merely because if some member of the public were to pass close by he might have an opportunity of seeing what was going on there. It must be a place either open to the public, of actually used by the public, the mere publicity of the situation not being sufficient. 103 Ind. Cas. 202=49 All. 913=25 A.L.J. 578= 8 L.R.A. (Cr.) 116=28 Cr.L.J. 666=8 A. I. Cr.R. 159=A.I.R. 1927 All. 560.

——S. 13—Legal right to resort by the public—Not necessary—Place in view of and accessible to public—Owned by public body—Public place.

In order to bring a particular spot within S. 13, it is not necessary that the public should have a legal right to go to it. All that is necessary is that the public actually go there, whether as of right or on sufferance of the proprietors.

A place which is in full view of the public as they pass to and fro, is also freely accessible for all classes of the public and belongs to public body, which has never enclosed it, is a public place within S. 13. 104 Ind. Cas. 230=28 P.L.R. 577= 28 Cr.L.J. 790=A.I.R. 1927 Lah. 672.

——S. 13—Public place where public go — Serai used as a stand for hackney carriages and restored to by public is a public place.

A place which is in any way dedicated to the use of the public is of course a public place, but where it is owned privately and no such dedication has taken place, the question whether it is a public place depends on the character of the place itself and the use actually made of it. A public place is a place where the public go, no matter whether they have a right to go or not. A serai taken by the Municipality on rent and used as a stand for hackney carriages, and which is resorted to by the public, is a public place within the section. 89 Ind. Cas. 975=26 Cr.L.J. 1455=A.I. R. 1926 Lah. 149.

——S. 13—Public must have lawful access to.

If the provisions of S. 13 of the Public Gambling Act must be satisfied as to a place being a public place, the place must be opened to the public, i.e., the public must have lawful access, by right, permission, usage or otherwise. 81 Ind. Cas. 897=25 Cr.L.J. 1073=A.I.R. 1925 Nag. 123.

——S. 13—No dedication to public—If public place—Nature—Use of place—Test.

When there is a dedication of a place in any way to the use of the public, doubtless it will become a public place, but where it is under private

ownership and there has been no such dedication the question whether or not it is a public place depends on the character of the place and the use to which it is actually put. 81 Ind. Cas. 897= 25 Cr.L.J. 1073=A.I.R. 1925 Nag. 123.

——S. 13—Free access to public — Use to which place is put—Deciding factors.

The words 'in a public place' in S. 13 as amended are capable equally of including in their ordinary reasonable and proper meaning "a place the title to which is vested in the public" "and a place to which however owned the public is allowed in effect unrestricted access." It is not the question of title to the place nor the nature of its metes and bounds which are the decisive factors but the use to which the place is put. A.I.R. 1922 All. 542, Rel. on. 82 Ind. Cas. 426=46 All. 787=22 A.L.J. 741=5 L.R.A. (Cr.) 149= 25 Cr.L.J. 1308=A.I.R. 1924 All. 768.

——S. 13—Public place—Blind alley removed from highway.

A blind alley approached by a circuitous lane and removed at a considerable distance from a highway is not a "public" place within the meaning of S. 13 of the Public Gambling Act. 68 Ind. Cas. 848=23 Cr.L.J. 624=A.I.R. 1923 Lah. 278.

——S. 13—Private grove — Access not interfered with—Is a public place.

When the public have access to a place without their access being refused or interfered with, that place is a public place whether the public have a right to go there or not. The accused were found gambling in a grove which was a private property but was used by the public on the occasion of fairs without interference and the visitors on such occasions penetrated all parts of the grove.

Held, the accused were gambling in a public place. 65 Ind. Cas. 419=44 All. 265=20 A.L.J. 80=23 Cr.L.J. 67=A.I.R. 1922 All. 542.

——S. 13—Open to or used by public—Publicity or public ownership immaterial.

A public place must be a place which is either open to the public or is used by the public. The publicity of its situation is not a necessary element of the offence any more than public ownership. 68 Ind. Cas. 613=9 O.L.J. 288=23 Cr.L.J. 581 =26 O.C. 41=A.I.R. 1922 Oudh 275.

——S. 13—Footpath used by public.

A footpath through a private grove used by the public as of right is a public place. 68 Ind. Cas. 611=25 O.C. 114=23 Cr.L.J. 579=A.I.R. 1922 Oudh 196.

——S. 13—Bank of a canal not a public place.

The Bank of a canal is not a public place as it is not a place dedicated to the use of the public. If a road on the canal bank is used as a public thoroughfare the circumstances may be different, but the embankment of the canal itself is obviously not a thoroughfare. 3 L.L.J. 53=A.I.R. 1921 Lah. 141.

——S. 13—Public place.

The premises of a Railway sation, i.e. that part of the compound to which the public have no right to go is not a public place within S. 13. 57 Ind. Cas. 931 (Lah.).

——S. 13—Public place.

Gambling at a place near a public street and exposed to public view but which was not part of a public street is not an offence under S. 13. 21 Cr.L.J. 512=56 Ind. Cas. 672=104 P.L.R. 1920.

——S. 13—Public place, meaning of—Instrument of "gaming" — Beating and Gaming — Distinction.

The word "public place" in S. 13 signifies a place to which the public resort as a matter of fact whether as of right or with the permission of the private owner.—There is a well established difference between betting and gaming for the purposes of the Criminal Law and in the absence of special enactments the courts have always refused to punish betting as an instance of gaming. To obtain a conviction under S. 13 the accused must have been found playing for money or other valuable thing with some of instrument of gaming used in playing any game, not being a game of mere skill. Recording bests about an uncertain event beyond the control of the betters or recorders is not an offence under S. 13 and a book recording bets is not an instrument of gaming. A lottery or sweep ticket is not an instrument of 'gaming' within the meaning of S. 13.—Mere betting without gaming is no offence in the Central Provinces and Berar. 14 N.L.R. 137=19 Cr.L.J. 917= 47 Ind. Cas. 433.

——S. 13—"Public place" interpretation of.

The expression "public place" in S. 13 of the Act must be interpreted in the same way as "public street" "public throughfare" with which it is joined. The gist of the offence under S. 13 is such publicity of action that the ordinary passer-by cannot avoid seeing it and get enticed in consequence. A private property, though not dedicated to the public use, may yet become public according to its locality and the actual use it is put to. 9 N.L.R. 164=14 Cr.L.J. 670=21 Ind. Cas. 910.

5. Punishment.

——S. 13—Punishment—Both fine and imprisonment—Illegal.

A person who offends against S. 13 can be punished either with imprisonment or with fine, but not with both. Double punishment of fine and imprisonment cannot be legally imposed. 25 P. R. 1880 (Cr.), Foll. 104 Ind. Cas. 230=28 P. L.R. 577=28 Cr.L.J. 790=A.I.R. 1927 Lah. 672.

6. Miscellaneous.

——S. 13—Miscellaneous.

Police constables informed by some constables that gambling was going on—The constable being a Police Officer, was entitled to apprehend the gamblers without warrant and any body who

deterred him from discharging his duty which was to arrest the gamblers was liable under S. 353, I. P. Code. A.I.R. 1935 All. 516=36 Cr. L.J. 558=1935 A.W.R. 469=154 Ind. Cas. 740.

——S. 13—'Limits aforesaid".

'Limits aforesaid' refer to the whole of the territories under the Administration of a Lieutenant-Governor. Hence gambling in a kachcha public road outside municipal limits is an offence. 12 Cr. L.J. 107=9 Ind. Cas. 630.

——S. 13-A—Effect of amendment by U.P. Act. See under PUBLIC GAMBLING ACT, S. 13.

——S. 14—Magistrate issuing warrant trying case —Accused is materially prejudiced. (Conviction was quashed). A.I.R. 1934 All. 987=38 Cr.L. J. 293=4 A.W.R. 345=153 Ind. Cas. 146 (1)

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